

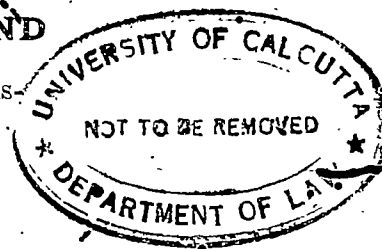
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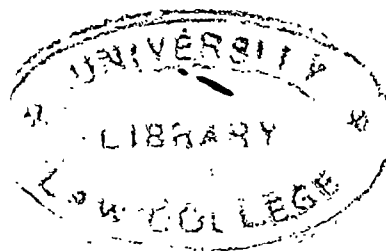
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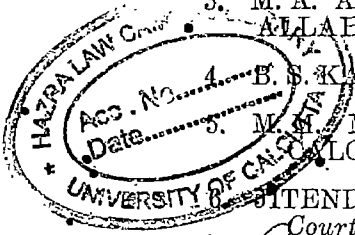
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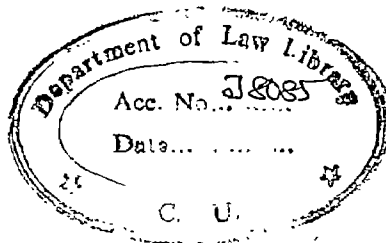
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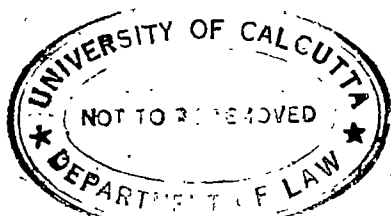
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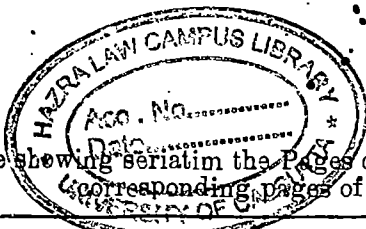
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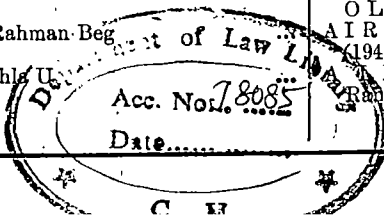




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326	Mohanlal Bababhai v. Emperor	...	A I R 1941 Bom. 149; 43 Bom. L R 163; 42 Cr. L J 556; 13 R B 365.
328	Kasikananda Gnanacharya Swamigal v. Saravananperumal Pillai	...	A I R 1941 Mad. 319; 53 L W 164; 1941 M W N 125; (1941) 1 M L J 257; I L R (1941) Mad. 317; 13 R M 753 F B.
330	Mahommed Yaqub v. Imperial Bank of India	...	A I R 1941 Cal. 110; I L R (1940) 2 Cal. 578; 13 R C 498.
332	Sankappa Shetty, <i>In re</i>	...	A I R 1941 Mad. 326; (1940) M W N 963; 52 L W 689; 42 Cr. L J 558; 13 R M 756.
344	Ramgopal Srinivas v. Net Ram	...	A I R 1941 All. 178; (1941) A L J 107; 1941 O W N 106; 1941 R D 75; I L R (1941) All. 311; 13 R A 499.
345	Emperor v. Champaklal Chunilal Banker	...	A I R 1941 Bom. 156; 43 Bom. L R 110; 42 Cr. L J 571; 13 R B 370.
347	Ramman Lal v. Ragunath Shanker	...	A I R 1941 All. 56; (1941) A L J 55; 1941 O W N 388; 1941 R D 180; I L R (1941) All. 17; 13 R A 495.
351	Shia Youngmen's Association v. Fateh Ali Shah	...	A I R 1941 Lah. 145; 43 P L R 208; I L R (1941) Lah. 395; 13 R L 532 F B.
354	Bajinath v. Ram Narain	...	A I R 1941 Oudh 367; 1941 O W N 678; 1941 O L R 448; 13 R O 587.
357	Hindu Women's Rights to Property Act, 1937, <i>In the matter of</i>	...	A I R 1941 F C 72; 7 B R 788; 22 P L T 469; 1941 O L R 477; 45 O W N F O 81; 73 O L J 415; 1941 M W N 556; 54 L W 22; (1941) 2 M L J 12; 1941 O W N 680; 1941 Kar. F C 148 Sup.; 13 R F C 70 F C.

363.	Bhagwan Dass v. Tajunnisa Bibi	1941 O. W. N. 681; 1941 O. L. R. 452; 1941 R D 562; 13 R O 585.
365	Mashahur v. Subhan Din	A I R 1941 Pesh. 36; 13 R Pesh. 79; 13 R O 585.
367	Hemendra Nath Roy Chowdhury v. Purna Charan Hauli	A I R 1940 Cal. 549; I L R (1941) 1 Cal. 132; 44 Q W N 1015; 13 R O 493.
369	Sarwan Chaudhury v. Chanarpat Thakur	A I R 1941 Pat. 484; 7 B R 752 (2); 22 P L T 984; 13 R P 710.
370	The King v. Maung Po Thaing	A I R 1941 Rang. 114; 1941 Rang. 82; 42 Cr. L J 573; 13 R Rang. 306.
372	Durga Singh v. Sugambar Singh	A I R 1941 Pat. 481; 7 B R 753; 22 P L T 523; 13 R B 708.
374	Jatindra Mohan Banerjee v. Corporation of Calcutta	A I R 1941 Cal. 13; 13 R O 501.
378	Rai Bageshwari Prasad v. Tulsi Garain	A I R 1941 Pat. 463; 22 P L T 453; 7 B R 755; 13 R P 709.
380	Mulchand Tagiomal v. Shandas Jethanand	A I R 1941 Sind 73; 13 R S 271.
385	Bhimraj Debi Baksh Firm v. Gaya Prasad Sahu	A I R 1941 Pat. 532; 7 B R 757; 13 R P 711.
387	Hari Saran Das v. Dhani Ram	A I R 1941 Oudh 273; 1941 O W N 656; 1941 O L R 455; 1941 R D 354; 16 Luck. 443; 13 R O 59 F B.
390	Ganpatrao v. Shamrao	A I R 1941 Nag. 138; 1941 N. L. J. 105; I L R (1941) Nag. 194; 13 R N 367.
392	Jamuna Singh v. Sheonandan Singh	A I R 1941 Pat. 486; 7 B R 758; 22 P L T 529; 13 R P 713.
394	Harun Rashid v. Kaniz Fatima	A I R 1941 Oudh 468; 1941 O W N 623; 1941 O L R 459; 1941 R D 472; 16 Luck. 626; 13 R O 593.
399	Moinuddin v. Sheogobind Sahu	A I R 1941 Pat. 505; 23 P L T 62; 7 B R 761; 42 Cr. L J 576; 14 R P 4.
401	Nithoo Thimmianna Bhat v. Aithappa Adyanthaya	A I R 1940 Mad. 908; 52 L W 221; (1940) 2 M L J 251; (1940) M W N 777; 13 R M 770.
403	Jharia Mines Board v. Kartar Ad-Dharmi	A I R 1941 Pat. 482; 7 B R 760; 42 Cr. L J 578; 14 R P 9.
404	Cheda Lal Jain v. Officer Commanding Station Meerut Cantonment	A I R 1941 All. 207; (1941) A L J 267; 1941 O W N 453; I L R (1941) All. 356; 13 R A 500.
405	Kirat Singh v. Ram Saran	A I R 1941 Oudh 380; 1941 O W N 687; 1941 O L R 463; 1941 R D 369; 13 R O 600.
408	Vendcor Thazhath Prayan v. Venthayil Tarwad	A I R 1940 Mad. 794; (1940) 2 M L J 273; (1940) M W N 884; 52 L W 289; I L R (1910) Mad. 864; 13 R M 763.
410	Hajira Khatoon v. Mustafa Husain	A I R 1941 Oudh 474; 1941 O W N 780; 1941 O L R 467; 13 R O 597.
413	Megh Raj v. Allah Rakhia	A I R 1941 Lah. 177; 43 P L R 22; 13 R L 536 F B.
417	Mehdi Husain v. Mohammad Jawad	A I R 1941 Oudh 479; 1941 O W N 760; 1941 O L R 469; 16 Luck. 789; 13 R O 605.
423	Kedarnath. Sen; <i>In re</i>	A I R 1941 Cal. 112; 13 R C 505.
425	Surjan Singh v. Mashal Singh	A I R 1941 Oudh 447; 1941 O W N 789; 1941 O L R 475; 1941 R D 443; 13 R O 603.
427	Ram Piari v. Daya Shanker	A I R 1941 All. 193; (1941) A L J 232; 1941 O W N 452; 1941 R D 234; I L R (1941) All. 367; 13 R A 501.
428	Jagdish Chandra Deo Dhabal Deb v. Biseswar Lal Agarwalla	A I R 1941 Pat. 536; 7 B R 767; 13 R P 715.
431	Ramabai Shriniwas Nadgir v. Government of Bombay	A I R 1941 Bom. 114; 43 Bom. L R 282; 13 R B 371.
433	Hari Kant Jha v. Nathu Chondhury	A I R 1941 Pat. 501; 7 B R 774; 13 R P 718.
434	Bonda Subba Rao v. Kandregula Narasiah	A I R 1940 Mad. 495; I L R (1940) Mad. 624; 51 L W 179; (1940) 1 M L J 220; (1940) M W N 152; 13 R M 773.
435	Nehal Khan v. Felu Dome	A I R 1941 Pat. 490; 7 B R 770; 13 R P 721.
437	Deputy Commissioner, Partapgarh v. Shahzad Koer	A I R 1941 Oudh 374; 1941 O W N 638; 1940 O L R 484; 1941 R D 352; 16 Luck. 573; 13 R O 611.
934	U. Tun Yin v. U. Ba Han	A I R 1941 Rang. 133; 13 R Rang. 309.

441	Rampratap Marwari v. Lachman Mistry	...	A I R 1941 Pat. 485; 7 B R 772; 13 R P 719.
443	Vaidyaratnam P. S. Varier, Kottakkal, South Malabar v. Commissioner of Income-tax, Madras	...	A I R 1941 Mad. 249; (1941) 1 M L J 103; 53 L W 96; 1941 M W N 81; 13 R M 772 S B.
445	Bishambharnath v. Sri Prakash Singh	...	A I R 1941 Oudh 405; 1941 O W N 783; 1941 O L R 486; 13 R O 613.
446	Kona Adinarayan v. Dronavalli Venkatasubbayya	...	A I R 1940 Mad. 625; (1940) 1 M L J 251; (1940) M W N 183; 51 L W 384; I L R (1940) Mad. 852; 13 R M 775.
448	Abani Nath Mukhopadhyaya v. Amar Nath Mukhopadhyaya	...	A I R 1941 Cal. 92; 72 Cal. C L J 348; 13 R C 507.
454	Shriram v. Banya Bai	...	A I R 1940 Nag. 129; I L R (1940) Nag. 244; 1940 N L J 78; 13 R N 369.
459	Chagganlal Marwari v. Indra Keat	...	A I R 1941 Pat. 495; 7 B R 775; 13 R P 723.
461	Mulchand Chandumal v. Harkishindas Parmanand	...	A I R 1941 Sind 88; (1941) Kar. 204; 13 R S 277.
464	Kaniram Ganpat Rai v. Commissioner of Income-tax, Bihar and Orissa	...	A I R 1941 Pat. 527; 7 B R 778; 13 R P 725.
466	Kunti Devi v. Bhola Ram	...	A I R 1941 Pesh. 43; 14 R Pesh. 81.
468	Mahamaya Ojha v. Laheria Sarai Central Co-operative Bank, Ltd.	...	A I R 1941 Pat. 497; 7 B R 780; 13 R P 727.
470	Chehkani Kondayya Rao v. Upplapati Naganna	...	A I R 1941 Mad. 367; 53 L W 218; 1941 M W N 191 (2); (1941) 1 M L J 336; I L R (1941) Mad. 720; 13 R M 776 F B.
476	Bechan Jha v. Emperor	...	A I R 1941 Pat. 492; 42 Cr. L J 579; 7 B R 785; 23 P L T 81; 14 R P L.
479	Nisar Mohammad Khan v. Tauquir Ahmad	...	A I R 1941 Pat. 529; 7 B R 782; 23 P L T 195 13 R P 729.
482	U Sin v. Ma Ma Lay	...	A I R 1941 Rang. 118; 1941 Rang. 14; 13 R Rang. 311.
486	Zamindar of Sannokhemedi v. Susi Iamala Patta Mahadevi	...	A I R 1940 Mad. 850; (1940) 2 M L J 47; 52 L W 214; (1940) M W N 723; 13 R M 782.
508	Mahendra Nath Sardar v. Kalipada Haldar	...	A I R 1940 Cal. 486; I L R (1940) 2 Cal. 573; 72 C L J 95; 44 C W N 1009; 13 R C 513.
510	Nagappa Channappa Tambrali v. Ramsing Jessasing	...	A I R 1941 Bom. 160; 43 Bom. L R 236; I L R (1941) Bom. 325; 13 R B 373.
511	Dhirendra Nath Roy v. Ijetali Miah	...	A I R 1940 Cal. 423; I L R (1940) 2 Cal. 148; 44 O W N 729; 13 R C 514.
514	Alagamai Achi v. Falaniappa Chettiar	...	A I R 1940 Mad. 580; (1940) 1 M L J 469; 51 L W 374; (1940) M W N 653; I L R (1940) Mad. 1012; 14 R M 4.
518	Jagat Singh v. District Board, Amritsar	...	A I R 1940 Lah. 509; I L R (1941) Lah. 413; 43 P L R 544; 13 R L 540.
520	Ujagar Lal v. Bahadur Lokendra Singh	...	A I R 1941 All. 169; (1941) A L J 111; I L R (1941) All. 240; 13 R A 502.
524	Nidhan Singh v. Prem Singh	...	A I R 1940 Lah. 498; 13 R L 543.
527	Kattameedi Chenna Reddi, In re	...	A I R 1940 Mad. 710; (1940) M W N 86; I L R (1940) Mad. 254; 52 L W 981; 42 Cr. L J 582; 14 R M 18.
533	Beni Madho v. Ram Nath	...	A I R 1941 Oudh 324; 1941 O W N 265; 1941 R D 100; 1941 O L R 489; 14 R O L.
537	Atmaramsao v. Bhupendranath	...	A I R 1940 Nag. 149; 1940 N L J 365; I L R (1941) Nag. 677; 13 R N 374.
543	Jagannath Singh v. Sita Ram	...	A I R 1941 Oudh 497; 1941 O W N 819; 1941 O L R 488; 1941 R D 488; 16 Luck. 775; 14 R O 5.
544	Commissioner of Income-tax, Madras v. Madras and Southern Mahratta Railway Co. Ltd.	...	A I R 1940 Mad. 598; (1940) 2 M L J 110; 52 L W 208; (1940) M W N 778; I L R (1940) Mad. 889; 14 R M 1 S B.
547	Nga Moe v. The King	...	A I R 1941 Rang. 141; 1941 Rang. 138; 42 Cr. L J 591; 14 R Rang. 4.
551	Girdharan Prasad Missir v. Bholi Ram	...	A I R 1941 Pat. 574; 7 B R 795; 14 R P 6.
554	Emperor v. Raghunath Ramchandra Karlekar	...	A I R 1941 Bom. 100; 43 Bom. L R 99; 42 Cr. L J 588; 13 R B 374.

557	King-Emperor v. Gaya Prasad	...	A I R 1941 Oudh 487; 1941 O L R 493; 42 Cr. L J 595; 1941 O W N 852; 14 R O 26.
564	Jahana v. Emperor	...	A I R 1941 Lah. 217; 43 P L R 162; 42 Cr. L J 601; 14 R L 7.
565	Mirza Jan Ghulam Haider v. Ghulam Raza Mian Mohammad	...	A I R 1941 Pesh. 41; 14 R Pesh. 1.
567	Manak Khan v. Mulkhan Bano	...	A I R 1941 Lah. 167; 14 R L 1.
568	Ram Kishore v. Yashpal Kunwar	...	A I R 1941 All. 224; (1941) A L J 258; 1941 O W N 599; 1941 R D 310; 14 R A 1.
569	Nallapareddi Annapoornama v. Pelleti Veeraraghava Reddi	...	A I R 1940 Mad. 547; 51 L W 391; (1940) 1 M L J 608; 14 R M 7.
580	Tulsiram v. Paikan	...	A I R 1941 Nag. 132; 1941 N L J 102; 14 R N 3.
581	Kumar Purnendu Nath Tagore v. Narendra Nath Samanta	...	A I R 1941 Cal. 302; 45 O W N 22; 14 R O 1.
582	Maruttreao Krishnaji v. Thakurdas Isardas	...	A I R 1941 Sind 96; 14 R S 2.
583	Rambilas Harsukhdas v. Jai Kisan	...	A I R 1941 Nag. 155; 1941 N L J 91; 14 R N 1.
585	Daulat Ram v. Meero	...	A I R 1941 Lah. 142; 43 P L R 16; 14 R L 2.
586	Radha Kishen v. Ikramu-uddin	...	A I R 1941 All. 217; (1941) A L J 238; 1941 O W N 676; 1941 R D 364; 14 R A 2.
587	Kalyanasundaram Ayyar, <i>In the matter of</i>	...	A I R 1941 Mad. 230; 53 L W 62; (1941) 1 M L J 128; 1941 M W N 56; 1941 O W N 803; 42 Cr. L J 602; 1 L R (1941) Mad. 354; 14 R M 40 S B.
588	Faqir Bux v. Thakur Prasad	...	A I R 1941 Oudh 457; 1941 O W N 801; 1941 O L R 499; 16 Luck. 832; 14 R O 6.
597	U Zawtipala v. U Thatdama	...	A I R 1941 Rang. 159; 1941 Rang. 204; 14 R Rang. 1.
600	Avadh Raj Singh v. Mangrey	...	A I R 1941 Oudh 403; 1941 O W N 752; 1941 O L R 508; 14 R O 16.
602	Gangadhar Kashinath Sakhare v. Dattatraya Vishavanath Sulakhe	...	A I R 1941 Bom. 209; 43 Bom. L R 341; 14 R B 1.
605	Suraj Bali v. Ganga Pershad	...	A I R 1941 Oudh 505; 1941 O W N 833; 1941 O L R 510; 14 R O 15.
606	Radhey Lal v. Niranjan Nath	...	A I R 1941 All. 211; (1941) A L J 265; 1941 O W N 455; 1 L R (1941) All. 364; 14 R A 3.
607	Pakkiri Muhammad Tharaganar v. U. T. Syed Sahib	...	A I R 1940 Mad. 418; (1940) 1 M L J 422; (1940) M W N 290 (1); 51 L W 756; 14 R M 24.
608	Mohammad Naqir v. Alauddin Ahmad	...	A I R 1941 Pat. 213; 22 P L T 26; 7 B R 739; 20 Pat. 513; 14 R P 10.
610	Trailokhya Nath Banerjee v. Sukumar Bose	...	A I R 1941 Cal. 202; 1 L R (1940) 2-Cal. 551; 44 C W N 1034; 14 R O 2.
613	Alam Khan v. Bhag Bhari	...	A I R 1941 Lah. 159; 43 P L R 126; 14 R L 3.
615	Mohd Ejaz Rasul v. Ali Mohammad	...	A I R 1941 Oudh 498; 1941 O W N 768; 1941 R D 43; 1941 O L R 512; 16 Luck 812; 14 R O 18.
622	Mahadeo Nath Khetri v. Emperor	...	A I R 1941 Pat. 550; 22 P L T 1035; 7 B R 802; 42 Cr. L J 603; 14 R P 60.
632	Vithaldas Bhagwandas Darbar v. Tukaram Vithoba Kshatri	...	A I R 1941 Bom. 153; 43 Bom. L R 225; 14 R B 3.
634	Lakhmi Chand v. Aulia Khan	...	A I R 1941 Lah. 225; 43 P L R 246; 14 R L 4.
637	Veerappa Chettiar v. Commissioner of Income-tax, Madras	...	A I R 1941 Mad. 247; (1941) 1 M L J 262; (1941) M W N 286; 53 L W 714 (2); 14 R M 25 S B.
640	Rati Ram v. Niader Mal	...	A I R 1941 All. 215; (1941) A L J 230; 1941 O W N 546 (2); 1941 R D 462; 14 R A 4.
641	Nathmal v. Balkrishna	...	A I R 1941 Nag. 152; 1940 N L J 319; 14 R N 4.
645	Dabi Radha Rani v. Ram Das	...	A I R 1941 Pat. 282; 22 P L T 278; 7 B R 815; 14 R P 14.
646	Thadi Chandrayya v. Vaitla Seethanna	...	A I R 1940 Mad. 689; (1940) 1 M L J 590; 51 L W 471; (1940) M W N 662; 14 R M 28.
649	Chota Nagpur Banking Association Ltd. v. Radha Gobinda Singh	...	A I R 1941 Pat. 561; 7 B R 813; 14 R P 12.
650	Bhadrabati Devi v. Jibanmal Babu	...	A I R 1941 Cal. 163; 1 L R (1941) 1 Cal. 155; 72 O L J 427; 45 C W N 68; 14 R O 5.

654	Ishwari Prasad Singh v. Sir Kameshwar Singh Bahadur	...	A I R 1941 Pat. 288; 22 P L T 284; 7 B R 812; 14 R P 13.
655	Nimmagadda Ramaseshayya v. Adusumilli Kutumba Rao	...	A I R 1940 Mad. 793; 52 L W 173; (1940) M W N 770; (1940) 2 M L J 235; I L R (1940) Mad. 943; 14 R M 27.
657	Pentakota Audinarayana Naidu v. Panchayat Board of Mangapaka	...	A I R 1940 Mad. 660; (1940) 1 M L J 582; 51 L W 437; (1940) M W N 423; 14 R M 31.
660	Ramlakhan Dhobi v. Raghya Kalwar	...	A I R 1941 Pat. 287; 22 P L T 237; 7 B R 814; 42 Cr. L J 632; 14 R P 16.
662	Brij Lal v. Surajman	...	A I R 1941 Oudh 420; 1941 O W N 832; 1941 O L R 519; 14 R O 32.
663	Jhalak Prasad Singh v. Province of Bihar	...	A I R 1911 Pat. 376; 7 B R 818; 20 Pat. 573; 22 P L T 863; 14 R P 17 S B.
704	Lilomai Manumal v. Emperor	...	A I R 1941 Sind 91; 42 Cr. L J 613; 14 R S 3.
705	Radha Shyam v. Nazir Husain	...	A I R 1941 All. 173; (1941) A L J 43; 1941 O W N 291; 1941 R D 469; 14 R A 6.
707	Vasireddi Balachandrasekhara Varaprasad Bahadur v. Mallela Lakshminarasimham	...	A I R 1940 Mad. 691; 51 L W 622; (1940) L M L J 820; (1940) M W N 927; I L R (1940) Mad. 913; 14 R M 35.
712	Patiala State Bank, <i>In re</i>	...	A I R 1941 Bom. 93; 43 Bom. L R 81; I L R (1941) Bom. 391; 14 R B 5.
716	Mahmud Jan Mir Hamza Khan v. Gutta Singh-Ajab Singh	...	A I R 1941 Pesh. 53; 14 R Pesh. 3.
719	Maghar Singh Nahar Singh v. Emperor	...	A I R 1911 Lah. 220; 43 P L R 95; 42 Cr. L J 614; I L R (1941) Lah. 366; 14 R L 11.
720	Shwe Hla U v. The King	...	A I R 1941 Rang. 149; 1941 Rang. 58; 42 Cr. L J 615; 14 R Rang. 9.
722	Municipal Council, Adoni v. G. V. G. Babu Naidu	...	A I R 1940 Mad. 731; 51 L W 181; (1940) M W N 111; (1940) 1 M L J 437; 14 R M 44.
724	Radhabai v. Pandharinath Bapu	...	A I R 1941 Nag. 135; 1941 N L J 87; 14 R 9.
727	Mamraj Maniram v. Muhammad Hashim	...	A I R 1941 Cal. 245; 14 R O 10.
728	Official Assignee, Madras v. Natesam Pillai	...	A I R 1940 Mad. 441; 51 L W 144; (1940) 1 M L J 254; (1940) M W N 598; I L R (1940) Mad. 845; 14 R M 41.
730	Hansraj Bhuteria v. Askaran Bhuteria	...	A I R 1941 Cal. 244; 14 R O 9.
731	Moreswar Parashram Damle v. Commissioner, Chhattisgarh Division, Raipur	...	A I R 1941 Nag. 129; 1941 N L J 42; 14 R N 7.
733	Commissioner of Income-tax, Madras v. Nadimathu Pillai	...	A I R 1940 Mad. 593; (1940) 2 M L J 217; 52 L W 108; (1940) M W N 1027; I L R (1940) Mad. 715; 14 R M 46 S B.
739	Lakshmana Sahu v. M. Simachala Patra	...	A I R 1941 Pat. 211; 7 B R 817; 14 R P 58.
740	Chhutai (Chitai) v. King-Emperor	...	A I R 1941 Oudh 509; 1941 O W N 867; 42 Cr. L J 617; 1941 O L R 21; 14 R O 3.
742	Guran Ditta Mal v. Ram Rakhi	...	A I R 1941 Lah. 218; 43 P L R 185; 14 R L 8.
744	Gaya Prasad v. Ahmad Husain	...	A I R 1941 Oudh 485; 1941 O L R 523; 1941 O W N 861; 14 R O 31.
746	Niratan Mukhopadhyaya v. Cooch Behar Loan Office Ltd.	...	A I R 1941 Cal. 64; I L R (1941) 1 Cal. 171; 72 C L J 148; 45 O W N 113; 14 R O 11.
750	Akki Dodda Rasappa v. Akki Mulla	...	A I R 1940 Mad. 458; (1940) 1 M L J 204; 51 L W 262; (1940) M W N 603; 14 R M 52.
753	Motam Kotayya v. Singampalli Venkata Punnayya	...	A I R 1940 Mad. 910; 52 L W 176; (1940) 2 M L J 202; (1940) M W N 809; I L R (1940) Mad. 1023; 14 R M 56.
755	Ram Dhani v. Nagar Mal	...	A I R 1941 Oudh 561; 1941 O W N 754; 1941 R D 578; 1941 O L R 525; 14 R O 36.
757	Kannabhiran Pillai v. Govindaswami Pillai	...	A I R 1940 Mad. 959; 52 L W 413; (1940) 2 M L J 473; (1940) M W N 947; 14 R M 51.
759	Bhairo Murid Jagirani v. Emperor	...	A I R 1941 Sind 82; 42 Cr. L J 623; (1941) Kar. 324; 14 R S 1.
760	Kowtha Suryanarayana Rao v. Patibandla Subrahmanyam	...	A I R 1940 Mad. 902; (1940) M W N 771; (1940) 2 M L J 330; 52 L W 308; 14 R M 57.

761	Dau Bhairuprasad v. Jugalprasad	...	A I R 1941 Nag. 102; 1940 N L J 651; 14 R N 11.
764	Jnanendra Narayan Bagchi v. Bhola Nath Mondal	...	A I R 1941 Cal. 252; 72 O L J 443; 14 R O 15.
766	Madina Bibi Sahiba v. Ismail Durga Association	...	A I R 1910 Mad. 783; 51 L W 608; (1940) M W N 481; (1940) 1 M L J 872; 1 L R (1940) Mad. 808; 14 R M 58.
769	Kuppu Goyinda Chettiar v. Uttukottai Co-operative Society	...	A I R 1940 Mad. 831; 52 L W 131; (1940) 2 M L J 241; (1940) M W N 782; 1 L R (1940) Mad. 929; 14 R M 67.
774	Seetharamachandra Rao v. Satyanarayana Rao	...	A I R 1940 Mad. 656; (1940) M W N 311; (1940) 1 M L J 699; 14 R M 72.
777	Fakir Muhammad v. Emperor	...	A I R 1941 Cal. 246; 72 O L J 611; 45 O W N 112; 42 Cr. L J 619; 14 R O 18.
778	Commissioner of Income-tax, Madras v. Harveys Ltd. Tuticcrin	...	A I R 1940 Mad. 602; (1940) 2 M L J 95; 52 L W 78; (1940) M W N 82; 1 L R (1940) Mad. 985; 14 R M 61 S B.
785	Ma E Thwe v. U Tha Yin	...	A I R 1941 Rang. 179; 14 R Rang. 8.
786	N. K. R. M. N. Nagappa Chettiar v. Srinanthu Muthu Vijaya Raghunath Doraisingam, Zamindar of Sivaganga	...	A I R 1940 Mad. 532; 1 L R (1940) Mad. 858; 51 L W 354; (1940) 1 M L J 442; (1940) M W N 293; 14 R M 80.
787	Jalal-ud-din v. Miran Bakhsh	...	A I R 1911 Lah. 240; 14 R L 10.
788	Rahmat Bi Saheba v. R. Krishna Doss Lala	...	A I R 1910 Mad. 641; (1940) M W N 413; 51 L W 655; 14 R M 76.
793	Dwarka Singh v. Jamuna Singh	...	A I R 1911 Pat. 281; 7 B R 860; 42 Cr. L J 620; 14 R P 72.
794	Chhiallu v. Emperor	...	A I R 1941 All. 288; (1941) A L J 326; 42 Cr. L J 621; 1 L R (1941) All. 441; 14 R A 9.
795	Manthiri Goundan v. Arunachalam Goundan	...	A I R 1940 Mad. 569; (1940) 1 M L J 711; 51 L W 600; (1940) M W N 462; 14 R M 82.
797	Antariyami Naik v. B. S. Rath	...	A I R 1941 Pat. 216; 7 B R 862; 14 R P 69.
799	Ram Renu Chatteraj v. Emperor	...	A I R 1941 Cal. 288; 42 Cr. L J 624; 14 R O 51.
800	Abdul Khalik Khan v. Emperor	...	A I R 1941 Lah. 221; 43 P L R 179; 42 Cr. L J 625; 14 R L 36.
801	Mohammad Mohtashim v. Joti Prasad	...	A I R 1941 All. 277; (1941) A L J 216; 1941 R D 460; 1911 O W N 502; 1 L R (1941) All. 360; 14 R A 7.
803	A. L. S. P. P. L. Subramaniam Chettiar v. Annamalai Chettiar	...	A I R 1940 Mad. 525; 51 L W 357; (1940) M W N 286; (1940) 1 M L J 553; 14 R M 89.
805	Mukimannissa Chowdhurani v. Rameswar Shukul	...	A I R 1941 Cal. 264; 45 O W N 379; 14 R O 17.
806	Shivjiram v. Ghulabchand	...	A I R 1941 Nag. 100; 1940 N L J 697; 1 L R (1941) Nag. 144; 14 R N 14.
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INDIAN CASES

1941

VOLUME—194

LAHORE HIGH COURT

Full Bench

Execution Second Appeal No. 419 of 1940
January 30, 1941

YOUNG, O. J., DALIP SINGH AND MONROE, JJ.
S. UDHAM SINGH—JUDGMENT-DEBTOR—

APPELLANT

versus

S. ATMA SINGH—DECREE-HOLDER—

RESPONDENT

Civil Procedure Code (Act V of 1908). O. XXI, r. 2—Completed contract immediately extinguishing and replacing decree, whether adjustment—Agreement to adjust decree on fulfilment of future condition—Decree still left existing pending fulfilment of condition—Agreement, if adjustment under O. XXI, r. 2—Question of completed contract—S. 92, Evidence Act (I of 1872), whether bars setting up of contract as adjustment of decree.

A completed contract, which immediately extinguishes and takes the place of the decree, is an adjustment within the meaning of O. XXI, r. 2, Civil P. O. If, there is only an agreement to adjust the decree on the fulfilment of a future condition and the decree is still left in existence pending its fulfilment then there is no adjustment. It is, of course, a question to be decided in each case by the executing Court whether there has been a completed contract or not. 132 Ind. Cas. 670 (1), *Overruled*. [p. 4, col. 1.]

Section 92, Evi. Act does not bar the setting up of a contract to operate as an adjustment of a decree. 64 Ind. Cas. 990 (3), not approved. [*ibid.*]

Exn. S. A. referred by Skemp, J., dated October 3, 1940.

Order of Reference

Skemp, J.—The facts leading to this second appeal are as follows: In 1937 Atma Singh obtained a decree against Udharn Singh for Rs. 1,632 and costs. Execution was sought in 1938 and during the proceedings on December 22, 1938 Udharn Singh, judgment-debtor, applied under O. XXI, r. 2, Civil P. O., alleging that at a *panchayat* held on December 16, 1938, it had been settled that the decree-holder should take in full settlement Rs. 900 to be paid by instalments of Rs. 50 per half year. On January 27, 1939, the decree-holder entirely denied

this stating that there had been not only no settlement but no discussion of the matter. The executing Judge, Sheikh Laiq Ali, framed two issues:

"(1) Whether a compromise was effected between the parties? and (2) If so, what were its terms and how does it affect the present execution petition?"

The judgment-debtor produced five witnesses three of whom were *lambardars* and he himself went into the witness box. The decree-holder also examined witnesses. The learned Senior Sub-Judge found that there was an adjustment and that it barred execution proceedings. The decree-holder appealed to the learned District Judge Rai Bahadur D. D. Dhawan who, without giving a finding as to whether he believed the oral evidence or not, said:

"It is settled law that an adjustment in order to be a compromise within the meaning of O. XXI, r. 2, Civil P. O., must be a settlement which extinguishes the decree-holder's debt and not one which if carried into effect will extinguish it."

He relied on *Bakshi Ram Varma v. Des Raj* (1) and *Bharat National Bank Ltd. v. Delhi v. Bhagwan Singh* (2). The judgment-debtor has come here in second appeal through Sardar Kartar Singh and the decree-holder has been represented by Mr. Durga Das. Order XXI, r. 2, runs as follows:

"(1) Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree and the Court shall record the same accordingly.

(2) The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified, and if, after service of such notice the decree-holder fails to show cause, why the payment or adjustment should not be recorded as

(1) A I R 1931 Lah. 608; 132 Ind. Cas. 670; 32 P L R 365; Ind. Rul. (1931) Lah. 634.

(2) A I R 1935 Lah. 347; 136 Ind. Cas. 807; 8 R L 26; 1 L R (1938) Lah. 470.

certified, the Court shall record the same accordingly."

Sardar Kartar Singh has taken me through the decisions for the last 14 years in this Court. At one time the leading case was regarded as *Lachhman Das v. Baba Ramnath Kali Kamliwala* (3), a Division Bench ruling which laid down that where there was an oral agreement alleged by the judgment-debtor and denied by the decree-holder and the judgment-debtor was unable to show that any part of the alleged agreement had been performed, it would not be set up under O. XXI, r. 2, Civil P. C. Walsh, J., further held that s. 92, Evi. Act, was a bar to setting up such an oral agreement. In Civil Appeal No. 799 of 1926, which I have not read, Jai Lal, J., apparently did not follow this ruling. He gave his reasons in a reported case, *Sumar Chand v. Chitrangi Lal* (4), saying that the question really depended upon the intention of the parties at the time when the agreement was entered into, and if they made a final and binding agreement regarding the decree then it amounted to an adjustment. A similar view was taken by Dalip Singh, J. in *Baga Mal v. Shib Parshad* (5). Jai Lal, J.'s unreported judgment of 1926 already referred to came before a Letters Patent Bench consisting of Sir Shadi Lal and Sir Alan Broadway whose judgment is reported in *Bakshi Ram Varma v. Des Raj* (1). The learned Chief Justice said:

"In the present case a certain sum of money has been paid. The rest was agreed to be paid in future and the question arises whether a settlement of that description constitutes an adjustment, of which cognizance can be taken by the executing Court. It is beyond dispute that the parties cannot, in execution proceedings vary the terms of the decree; and a contract which seeks to substitute one decree for another decree cannot be regarded as an adjustment. If, however, the terms of the compromise have been carried out and the decree is extinguished in whole or in part the compromise can be recognized by the Court."

The Letters Patent Bench accepted the appeal. This judgment was followed by Dalip Singh, J., in *Firm Thakur Das-Kalyan Das v. Firm Jagan Nath Charan Das* (6), who, however, clearly thought that it was erroneous and by Jai Lal, J., in *Hukam Chand v. Sadaq* (7) in a case which can be distinguished on the facts. The matter

(3) 44 A 258; 64 Ind. Cas. 990; A I R 1922 All. 13; 20 A L J 65.

(4) A I R 1927 Lah. 544; 102 Ind. Cas. 753.

(5) A I R 1930 Lah. 334; 120 Ind. Cas. 686; Ind. Rul. (1930) Lah. 142.

(6) A I R 1933 Lah. 732 (1); 150 Ind. Cas. 237; 6 R L 842 (1).

(7) A I R 1934 Lah. 679; 148 Ind. Cas. 446; 6 R L 570 (2).

came before another Letters Patent Bench consisting of Addison and Din Mohammad, JJ., who in *Bharat National Bank Ltd., Delhi v. Bhagwan Singh* (2), criticized the law as laid down by the previous Letters Patent Bench, but held that in the appeal before them there was no adjustment. In another very brief judgment *Firm Jagan Nath-Charan Das v. Firm Thakur Das-Kalyandas* (8), however, they held without giving the facts, that there was an adjustment and said:

"In all cases it is a question of fact to determine whether the alleged adjustment was intended to extinguish the decree and if it did, the adjustment will be complete, no matter whether the compromise that is made to wipe out the decree is to be performed at some future date."

This judgment was followed by Abdul Rashid, J., in *Darumal v. Todar* (9), which however, can be distinguished on the facts and is of no help in the present discussion. There are judgments of other High Courts which are referred to in several of the judgments I have quoted but at this stage it is not necessary for me to go into them. There is a clear distinction of principle between the two Letters Patent Benches, between *Bakshi Ram Varma v. Des Raj* (1), and the law as laid down in *Bharat National Bank Ltd., Delhi v. Bhagwan Singh* (2) and *Firm Jagan Nath-Charan Das v. Firm Thakur Das-Kalyandas* (8). I, therefore, think it desirable that the present appeal be decided by a larger Bench and refer this case to the Hon'ble the Chief Justice with the recommendation that it be laid down before a Full Bench. Costs of this hearing to be costs in the execution.

Sardar Kartar Singh, for the Appellant.

Mr. S. L. Puri, for the Respondent.

Opinion

Young, C. J.—The facts in this case are as follows: Atma Singh obtained a decree against Udham Singu for Rs. 1,632 and costs. Execution proceedings were commenced on December 22, 1938. The judgment-debtor applied under O. XXI, r. 2, Civil P. C., alleging that the decree had been settled by an agreement with the decree-holder that he should take in full settlement Rs. 900 to be paid by instalments of Rs. 50 every half year. The decree-holder denied that there had been any such agreement. The Judge in charge of the execution proceedings framed two issues:

(1) Whether a compromise was effected between

(8) A I R 1935 Lah. 589; 158 Ind. Cas. 701 (1); 37 P L R 288; 8 R L 285.

(9) A I R 1938 Lah. 602; 181 Ind. Cas. 243; 40 P L R 264; 11 R L 796.

the parties? (2) If so, what were its terms and how it affected the execution petition?"

Evidence was led and the learned Judge held that there was an agreement and therefore, an adjustment within the meaning of O. XXI, r. 2. On appeal the learned District Judge held, without going into the merits, that

"it is settled law that an adjustment in order to be a compromise within the meaning of O. XXI, r. 2, must be a settlement which extinguishes the decree-holder's debt and not one which, if carried into effect, will extinguish it."

On appeal to this Court the learned single Judge reviewed the various decisions of this and other Courts on the question of what amounted to an adjustment and as there were in this Court conflicting decisions of two Division Benches, referred it to the Chief Justice for appointment of a Full Bench. The essential part of O. XXI, r. 2, is as follows:

"Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly."

The question for decision in this case is what is the meaning of "adjustment." "Adjustment," according to Stroud's Judicial Dictionary, is a settlement among various parties...in respect of claims, liabilities, etc. According to Webster's Dictionary it is a regulation or settlement. In this Court there is a Division Bench decision reported in *Bakhshi Ram Varma v. Des Raj* (1). The learned Judges in that case held that

"a compromise can be held to be an adjustment only when all the terms thereof have been fulfilled by the judgment-debtor. If it contains any promise to be performed in the future, it cannot be treated as an adjustment so as to operate as a bar to execution... An adjustment of a decree is a transaction which extinguishes the decree as such in whole or in part and a contract containing stipulations to be carried out in future does not come within the purview of O. XXI, r. 2."

On the other hand another Bench of this Court in a case reported in *Firm Jagan Nath-Charan Das v. Firm Thakar Das-Kalyandas* (2) held that

"it is a question of fact to be determined whether the alleged adjustment is intended to extinguish the decree; if it does the adjustment will be complete no matter whether the compromise that is made to wipe out the decree is to be performed at some future date."

In my opinion the view of the law laid down in *Firm Jagan Nath-Charan Das v. Firm Thakar Das-Kalyandas* (2), is correct and that the earlier decision cannot be supported. There is nothing in my opinion to prevent the decree-holder and

the judgment-debtor entering into an entirely new contract for arranging their affairs so long as the contract is complete and the intention of the parties is to extinguish the decree altogether and to rely upon the new contract. A contract to be performed in the future is based on good consideration and so long as the contract complies with the rules of law laid down concerning contracts, the decree would be adjusted within the meaning of O. XXI, r. 2. We have been referred to decisions of other High Courts in support of the proposition that an agreement to be performed in the future is not an adjustment. For instance, there is a decision of a Division Bench of the Allahabad High Court reported in *Lachhman Das v. Baba Ramnath Kali Kamliwala* (3). In my opinion this decision is no guide. In that case the agreement was that the decree-holder

"would accept satisfaction of his decree in a modified form and would abandon the execution proceedings which were being taken as soon as four specified conditions had been fulfilled by the judgment-debtor."

None of those conditions had been fulfilled. This clearly was not a contract. It was merely inchoate, that is negotiations begun but not completed. The term "inchoate contract" which is sometimes used appears to me to be a contradiction in terms. There can be no contract until the parties are *ad idem*. The parties in this case would not be *ad idem* until the specified conditions had been fulfilled. This ruling therefore is no authority for the proposition that a completed contract cannot operate as an adjustment. In the same judgment one of the learned Judges held that s. 92, Evi. Act, also operated as a bar to setting up any such contract. Section 92, Evi. Act, embodies the principles of English Law that when the terms of a contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document have been proved, no evidence of any oral agreement shall be admitted as between the parties to any such instrument, for the purpose of contradicting, varying, adding to, or subtracting from its terms. Section 92 clearly refers in my opinion to a contract, grant or other disposition of property entered into by agreement between the parties to that document. It cannot refer to a decree which is imposed upon one of the parties by force *majori*. There is no mutuality about a decree which is passed in accordance with the wishes of one party

and contrary to the wishes of the other. Section 92 therefore in my opinion—and with due respect to the learned Judge—cannot bar the setting up of a contract to operate as an adjustment of a decree.

The opinion of the Calcutta High Court is divided in two cases, one reported in *Jhabar Md. v. Modan Sonabar* (10) and the other in *Azizur Rahman v. Aliraja* (11), both Division Bench rulings; one held in favour of the proposition that an adjustment may be a contract to do something in the future and the other was against this proposition. The Bombay High Court in a Division Bench decision reported in *Shankar Atmawani v. Kashav Govind Tambolkar* (12) held that it was not necessary that "there should be an actual payment in order to constitute a valid adjustment within the meaning of O. XXI, r. 2, and that an agreement to pay a portion of the decretal amount in instalments would amount to an adjustment." A Division Bench of the Madras High Court in a case reported in *Ramanarasu v. Matta Venkata Reddy* (13), came to the same conclusion. The Patna High Court in a decision reported in *Satyabadi Sahu v. Mani Sahu* (14) also held the same opinion. And finally a Full Bench of the Rangoon High Court reported in *A. N. A. R. Arunachallam Chettyar v. V. M. R. P. Firm* (15) came to the same conclusion.

It appears to me therefore that on a consideration of all these authorities the correct view appears to be that if there is a completed contract, which immediately extinguishes and takes the place of the decree, that contract is an adjustment within the meaning of O. XXI, r. 2. If, on the other hand, there is only an agreement to adjust the decree on the fulfilment of a future condition and the decree is still left in existence pending the fulfilment of the condition, then there is no adjustment. It is, of course, a question to be decided in each case by the executing Court whether there has been a completed contract or not. If the decree-holder wishes to give

up the strong position he holds in favour of instalments to be paid in the future that is a matter for him and the judgment-debtor. It may be a difficult contract to prove under all the circumstances; but if it is proved, the adjustment is complete. I would return the case to the District Judge in order that he may record a finding on the facts of this case and for his decision in accordance with the law laid down in this judgment. Costs will abide the result. Parties to appear before the District Judge, Amritsar, on February 25, 1941 and obtain a date.

Monroe, J.—I agree.

Dalip Singh, J.—I have little to say in this judgment except that I adhere to the views that I expressed in my judgment reported in *Baga Mal v. Shib Prashad* (5). So far as the point before us is concerned, namely whether a compromise in which certain terms are left to be executed in the future can or cannot be an adjustment wholly or partially of the decree, it appears to me always to be a question of fact or a mixed question of fact and law, namely as to what was the intention of the parties in arriving at the compromise. On the other point however, it may be necessary to modify that decision in view of the decision of their Lordships of the Privy Council in *Oudh Commercial Bank Ltd., Fyzabad v. Bind Basni Kuer* (16), namely whether the Court should leave undetermined the question whether the rights of the parties should be decided in a subsequent suit based on the new cause of action, namely the compromise, or whether the parties' method, if any terms of the compromise were not complied with, was by way of execution or not. As regards my second decision, namely that reported in *Firm Thakur Das-Kalyan Das v. Firm Jagan Nath-Charan Dar* (6) the only modification I have to make is in the sentence beginning "a contract is not executory because terms have to be performed in the future." What I meant and should have said was that a contract is not contingent or conditional because terms have to be performed in the future. Subject to these modifications, I only repeat that I abide by the view that I have already expressed in the rulings reported in *Baga Mal v.*

(10) 11 C 671.

(11) A I R 1928 Cal. 527; 113 Ind. Cas. 9; 32 C W N 434.

(12) 60 B 729; 164 Ind. Cas. 9; A I R 1936 Bom 277; 38 Bom. LR 505; 9 R B 70.

(13) 56 M 198; 141 Ind. Cas. 429; A I R 1933 Mad. 28; 63 M L J 598; (1932) M W N 840; 36 L W 558. Ind. Rul. (1933) Mad. 132.

(14) 15 Pat. 390; 165 Ind. Cas. 940; A I R 1936 Pat. 619; 3 B R 106; 9 R P 236; 18 P L T 110.

(15) (1938) Rang. 385; 175 Ind. Cas. 493; A I R 1938 Rang. 202; 10 R Rang. 500 (F B).

(16) 43 C W N 501; 180 Ind. Cas. 378; A I R 1939 P C 80; 1939 O L R 187; 11 R P O 176; 1939 O W N 313; 5 B R 476; 1939 R D 208; (1939) 1 M L J; 652; 69 C L J 317; 14 Luck. 192; 41 Bom. L R 708 50 L W 39; (1939) A L J 481; (1939) M W N 692; 66 I A 84; (1939) Kar. (P O) 136 Sup. (P O).

Shib Prashad (5) and *Firm Thakur Das Kalyan Das v. Firm Jagan Nath Charan Das* (6).

D. Answer accordingly.

BOMBAY HIGH COURT Full Bench

First Criminal Sessions of 1940 : Case No. 2
October 4, 1940

BEAUMONT, C. J., BROOMFIELD AND

WASSOODREW, JJ.

EMPEROR—PROSECUTOR

versus

THOKARSI NARSI—ACCUSED

Criminal Procedure Code (Act V of 1898), s. 289—Trial by jury—Function of jury—Duty of Judge in leaving case to jury—Prosecution case closed—Conclusion of Judge that jury will not be justified in convicting even if they believed all prosecution evidence—Judge is bound to say so and direct jury that in law they must give verdict of not guilty—He must not in such case leave matter to jury.

In a trial by jury if the Judge comes to the conclusion that there is no evidence to go to the jury, it is the duty of the Judge to direct the jury that in law they must acquit. It is the function of the jury, to determine whether the evidence is true, and if the Judge thinks that the prosecution evidence, if true, will lead to a conviction, then he is bound to leave the case to the jury. But if he thinks that though weak the evidence if true will justify a conviction, he must leave the case to the jury, cautioning them, of course, about the weak points in the evidence. But if the Judge, after the prosecution case is closed, comes to the conclusion that, assuming that the jury believe every word of the prosecution evidence, nevertheless they will not be justified in convicting, then he is bound in law to say so and to direct the jury that in law they must bring in a verdict of not guilty, and he ought not in such a case to leave the matter to the jury. [p. 7, col. 2.]

Messrs. A. C. Beynon and N. K. Pettigara (Public Prosecutor), for the Crown.

Sir Jamshedji Kanga, Messrs. V. G. Mohile and M. G. Dharamsey, for Accused No. 1.

Beaumont, C. J.—This matter comes before the Court on a certificate given by the Advocate General under cl. 26, Letters Patent. Under cl. 25, there is no appeal from a decision in the Sessions Court, but under cl. 26, the Advocate-General may certify the matter to the Court if he thinks that there has been some error in law on a matter which requires further consideration. Many people, including myself, think that it is very wrong that there should be no appeal, at any rate on points of law, from a trial in Sessions in this Court. But however that may be, in law there is no

appeal. The learned Advocate-General in deciding whether to give a certificate, and this Court in dealing with any matter which he has certified, is in a difficulty where the case is not one of murder, because owing to the insufficient number of shorthand writers supplied to the Court no shorthand note is taken of the learned Judge's charge to the jury. It is only in murder cases that a notice is taken. The ground on which the learned Advocate-General has certified that the case should be reconsidered is that he thinks that a question arises whether the learned Judge should not have withdrawn the case from the jury on the ground that there was no evidence to go before them. In determining that question it would assist us to know from the charge to the jury what view the learned Judge took of the evidence. However fortunately the learned Judge made a full note of the evidence and we can ascertain from that what the real case was.

There were three accused, and the general nature of the case was this. The present appellant, if I may so call him, accused No. 1, was one of the two cashiers with Messrs. Sulleman Mitha & Co. Ltd., Bombay. In the month of March 1939 Sulleman Mitha & Co. sent an agent named Ratansi into the Broach district to buy cotton. He bought certain cotton and drew a *hundi* on the firm by way of payment, cashed that *hundi* with one Achratlal or Amratlal Hirralal of Broach, and notified his firm of Sulleman Mitha & Co., on the same day by Ex. B that he had drawn such a *hundi*. The number of the *hundi* was No. 1604, and the evidence is that Ratansi took with him a book of forms of *hundis*, and it was from this book that he withdrew the form No. 1604 and filled it up in favour of the payee for Rs. 5,000. The evidence of the two directors of Sulleman Mitha & Co., who were called, is that in the normal course a *hundi* is presented for payment within a day or two after they have been notified that it has been drawn, and, having been presented, it would be the duty of one of the cashiers to check the particulars of the *hundi*, and if there was nothing suspicious about it, he would pay it, as he would have seen in the ordinary course the notification that the *hundi* had been drawn, and would probably have no difficulty in deciding whether it was a *hundi* which should be honoured. But in the case of this *hundi*, No. 1604, it was not presented for payment within the normal time, and accordingly the directors instructed accused No. 1 as cashier not to pay it

when it was presented without reference to them. The *hundi* was dated March 8, and these instructions were given, I suppose, about the 10th or 11th.

On May 5, *hundi* No. 1604 was presented for payment to Sulleman Mitha & Co. It was apparently received by some other clerk. Accused No. 1 says he was not in the office, and the particulars were entered in a book by that other clerk. But then accused No. 1 as cashier was informed about the presentation of this *hundi*, and he at once informed the two directors of the firm who told him not to honour it without further instructions. They then enquired into the matter. The *hundi* had been presented through a bank, called the New Citizen Bank, and they found that it had been paid into an account with that bank in the name of Shamji Damji, and it was not found possible to trace Shamji Damji. The directors also thought that the signature on the *hundi* was not that of Ratansi, their agent. Therefore they placed the matter in the hands of the Police, and I think we must take it for the purposes of this reference that it was definitely proved that accused No. 2 was the man into whose account this *hundi* had been paid, that Shamji Damji was a fictitious name taken by accused No. 2, and that accused No. 2 had forged the body of the *hundi*. The endorsements on the *hundi*, according to the evidence, had been forged by accused No. 3. But there is no suggestion that accused No. 1 had forged any part of the *hundi*. The actual charges against accused No. 1 were two:

First: That you, accused No. 1, Thokars Narsi between the 8th day of March 1939, and the 5th day of May 1939, at Bombay, being employed as a Mehta and cashier of Sulleman Mitha & Co. Ltd., Bombay, committed theft by stealing page No. 1904 from an *hundi* book (Ex. D) in the possession of the said Sulleman Mitha & Co. Ltd., Bombay, and thereby committed an offence punishable under s. 381, I. P. O.

Secondly: That you, accused No. 1, Thokars Narsi, at the time and place aforesaid, abetted the commission by accused No. 2, Khiasi Asaria, of the offence of forging a valuable security, which offence was committed in consequence of your abetment and that you have thereby committed an offence punishable under ss. 109 and 487, I. P. O."

The suggestion is that the forged *hundi*, which purports to bear the number 1604, had in fact been written on a blank form, and the number had been altered. It looks as if both numbers '6' and '0' had been altered, but the suggestion is that the original number of the form used was 1904, and the reason for that suggestion is that in the *hundi* book kept by the firm form No. 1904 is missing. So that the prosecution case

seems to be this, that the *hundi* No. 1604, which was a genuine *hundi*, was stolen. The evidence is that it was sent by post from Broach to the payee's agent in Bombay in order to be cashed, and that in fact it never arrived. So probably it was stolen, and it may be that originally it was intended to present that *hundi*, perhaps with a forged endorsement, for payment, but that was not done. Whether the *hundi* met with some accident or not, I do not know. But the suggestion is that, not being able to present the original *hundi*, the conspirators got another form with a number which could be easily altered to 1604, and they then altered the number and forged the contents of the *hundi*; so that the charge against accused No. 1 is that he stole the form No. 1904 and thereby enabled the forgery to be committed; and the question is whether there was any evidence to go to the jury on that charge.

Now, the book of forms, from which form No. 1904 was missing, was kept in a cupboard in a part of the office of Sulleman Mitha & Co. which was only occupied by a typist, and the typist was not there all day. It would, I think, have been easy for anybody to come up by the lift and enter this room, and if the typist was out, there would be no difficulty in getting to the cupboard. The door is just next to where the lift comes up. This cupboard was kept locked at night and each of the two cashiers, including accused No. 1, had a key. The other cashier was away when the forged *hundi* was presented though he had only gone away early in May, and his key was kept by the directors in his absence. So that, no doubt, accused No. 1 had access to this cupboard in which the forms were kept. But then the evidence of both the directors is that many other people had access to it as well, because stationery and other things were kept in the cupboard, and the cupboard was kept open during the day. It was unlocked by one of the cashiers in the morning, and left open during the day, and as there was only the typist in the room at certain periods, there would be no difficulty in many persons entering this room and taking away forms from the *hundi* book in the cupboard.

However, the first piece of evidence against accused No. 1 is that he had access to the cupboard from which it is suggested that the form was taken. I may say that there is no conclusive evidence to my mind that the forged *hundi* is on a form which was originally numbered 1904. It looks as

if the '6' and the '0' have been altered, but I am quite unable to say from the *hundi* itself that the original number was 1904. The second figure has been obliterated, and it is no more than a guess that it may have been 9.

Then the next piece of evidence against accused No. 1 is that accused No. 2, who did the major part of the forgery, is his cousin, and they lived in the same building, though not on the same floor. The third piece of evidence is that it is proved that on May 1, that is seven days before the forged *hundi* was presented, accused No. 1 drew a cheque on his bank account to self or bearer, and gave that cheque to accused No. 2, who cashed it, endorsing his name on the back of the cheque, because, although it was a bearer cheque, the bank apparently required anybody cashing it to endorse his name on the back. It is then shown that accused No. 2, very shortly after receiving this money from accused No. 1, opened an account in the name of Shamji Damji at the New Citizen Bank, and for that purpose he had to deposit at least Rs. 100 to open the account, and he did in fact deposit Rs. 150, and it is a justifiable inference that he obtained a part of that Rs. 150 by means of this advance from accused No. 1. But it is not shown that accused No. 1 knew the purposes for which the sum of Rs. 85 was required, or the manner in which it was in fact used. He says that accused No. 2, being his cousin, borrowed the money from him to go upcountry to his native place, and he says, though there is no independent evidence of the fact, that he had advanced him moneys before. That, at any rate, is not improbable seeing that accused No. 2 was his cousin and had apparently no work. That is the whole of the evidence against accused No. 1. Mr. Beynon, Counsel for the prosecution, in addressing the trial Court, said that he did not stress the charge of theft against accused No. 1, but relied on the abetment of forgery. It is, I think, difficult to see what abetment of forgery there was apart from the alleged theft of the form No. 1904. But the jury brought in a verdict of guilty against accused No. 1 on both charges, by a majority of 8 to 1, and the learned Judge accepted that verdict and sentenced accused No. 1 to five years' rigorous imprisonment.

The question which we have to determine is whether there was any evidence to go to the jury that accused No. 1 was guilty. Under s. 289, Criminal P. C., if the Court considers that there is no evidence that the accused

committed the offence, it may, in a case tried by a jury, direct the jury to return a verdict of not guilty. No doubt, the word used is "may" not "must," but it is well settled that if the Judge comes to the conclusion that there is no evidence to go to the jury, it is the duty of the Judge to direct the jury that in law they must acquit. In applying any rule, there are always cases on the border line, and it may be difficult some times to say on which side the particular case falls. But the general principle which governs the present matter is to my mind perfectly clear. It is the function of the jury, in a trial by jury, to determine whether the evidence is true, and if the Judge thinks that the prosecution evidence, if true, will lead to a conviction, then he is bound to leave the case to the jury. He may think that the prosecution story is inherently improbable, that the evidence is discrepant, and that it is of a class which is generally unreliable, for example, the evidence of discharged servants; but if he thinks that though weak the evidence if true will justify a conviction, he must leave the case to the jury, cautioning them, of course, about the weak points in the evidence. But if the Judge, after the prosecution case is closed, comes to the conclusion that, assuming that the jury believe every word of the prosecution evidence, nevertheless they will not be justified in convicting, then he is bound in law to say so and to direct the jury that in law they must bring in a verdict of not guilty, and he ought not in such a case to leave the matter to the jury.

Now, the question here is whether there was any evidence on which the jury could convict, assuming they believed the whole story against accused No. 1 to be true. To my mind there was not. It is perfectly clear that the particular items of evidence against accused No. 1 come to nothing. Any one may have a dishonest cousin, any one may lend money to that cousin, and it is shown that many people besides accused No. 1 had access to the cupboard in which the document alleged to have been stolen was kept. Therefore none of those particular items of evidence can lead to a conviction. But, no doubt, one has to consider their cumulative effect, and it seems to me that the cumulative effect comes at the very most to a case of suspicion. The learned Judge seems to have been most impressed, judging from the memorandum which he has been good enough to supply to the Court, with the fact that very shortly before

the forged *hundi* was presented, accused No. 1 had lent money, or given money, to accused No. 2, without which it might have been difficult or impossible for accused No. 2 to open the account though which the forged *hundi* was to be presented. But, that at the most raises mere suspicion.

If it had been shown that accused No. 1 knew the purpose for which the money was to be used, that would have been a different matter. But there is no evidence whatever that he knew the purpose for which it was intended, or the manner in which in fact it was used, and it is not by any means unlikely that he lent the money to his cousin because the cousin was in financial difficulties and wanted to go upcountry to his native place. But, at most, the evidence raises a case of suspicion, and I must confess that, to my mind, when one looks at the whole of the prosecution evidence, the suspicion is extremely faint. It is proved that accused No. 1 as cashier knew that this *hundi* No. 1604 was suspect. He had been warned by the directors that if it was presented for payment, he was not to pay it without reference to them; he was to take instructions; and in fact he reported to them the presentation of the *hundi*. Surely, therefore, if he was in a conspiracy to try and cash a forged *hundi* on form No. 1604, he would have told his fellow conspirators that it was perfectly useless to go on with the matter. He knew for a fact that the presentation of *hundi* No. 1604 was not going to lead to payment of Rs. 5,000, but was likely to lead to an enquiry by the police, and he would have warned his fellow conspirators that they had better take no further steps in the matter. That would have been the course he would probably have adopted, if he had really been in the conspiracy. These observations relating, as they do, rather to the weight of the evidence, go beyond the reference, but I have made them because it is only fair to the accused, who will have to take up again the threads of his life, to say that in my view on the materials before the Court there is no case against him even of serious suspicion.

So far as the question of law is concerned, I am clearly of opinion that the learned Judge erred in not ruling that there was no case to go to the jury, and that he ought to have directed the jury that in law they must bring in a verdict of not guilty. That being so, we must set aside the conviction, acquit the accused, and direct that he be released.

Broomfield, J.—I agree and have nothing to add.

Wassoodew, J.—I agree.

S.

Conviction set aside.

ODDH CHIEF COURT

Miscellaneous Appeal No. 63 of 1940

January 16, 1941

THOMAS, C. J. AND GHULAM HASAN, J.

Mahant SHEOAMBAR BAN—

DEFENDANT No. 1—APPELLANT

versus

MOHAN BAN—PLAINTIFF AND ANOTHER—

DEFENDANT No. 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Receiver—Appointment of—Rival claimants to property of deceased owner—None of claimants in possession of property since death of owner—Possibility of waste and mismanagement—Receiver should be appointed—Trial Court exercising discretion judicially—No interference by Appellate Court.

In a case where there are rival claimants to the property in dispute and the property has never been in the possession of any of the parties to the suit since the death of the deceased owner and the situation is fraught with the possibility of waste and mismanagement, it would eminently be a case for the appointment of a Receiver. [p. 13, col. 1.]

Where the trial Court, with whom the discretion under O. XL, r. 1 of the Civil P. C., primarily vests, has not exercised such discretion in an arbitrary fashion, illegally or improperly, the Appellate Court should not interfere with the order passed by the trial Court. [*ibid*]

Misc. A. against the order of the Civil Judge of Gonda, dated November 4, 1940.

Messrs. M. Wasim and K. M. Shamim, for the Appellant.

Messrs. S. N. Roy and K. L. Nigam, for Respondent No. 1.

Mr. B. N. Roy, for the Receiver.

Judgment.—This is an appeal by defendant No. 1 against the order dated November 4, 1940, passed by the Civil Judge of Gonda for the appointment of a Receiver in a pending suit between the parties.

The plaintiff-respondent filed a suit on September 18, 1940, for a declaration that he is the Mahant of Math Srinagar, pargana and District Gonda and is the heir of Mahant Rajendra Ban deceased and in the capacity of Mahant and heir he is entitled to get possession and occupation of certain properties in the District of Gonda, a list whereof was attached to the plaint. He also prayed for a decree for possession in respect of certain *pukhtadari*

land in village Anchalapur in the District of Bahraich. The ground of the plaintiff's claim was that there is an ancestral Math of the Nihang Faqirs of Ban Sanyasi class in village Srinagar, Pargana and District Gonda existing from Shahi times. According to the plaintiff the Mahant of this sect had always been a Nihang Goshain. Mahant Rajendra Ban, the last Mahant of the said Asthan, having died on March 16/17, 1940, without leaving any disciple, the plaintiff claimed to be the nearest heir, both legally as well as according to a custom, to the deceased Mahant according to a pedigree set out at the foot of the plaint. The plaintiff further alleged that on September 6, 1940, the Visnami and Sanyasi Faqirs assembled at the Math and in the presence of respectable persons admitted him to be a competent person for the Mahantship and to be the nearest heir of the deceased Mahant Rajendra Ban. The aforementioned Faqirs conferred on him the *tilak* and *chadar* (token of Mahantship) and declared him as the Mahant of the said Math.

The appellant, who is defendant No. 1, filed a written statement contesting the claim. The appellant denied the pedigree set up by the plaintiff in so far as his connection with the founder of the Math and the successive Mahants was concerned. The appellant on the other hand claimed exclusive right to succeed of the Mahant and alleged that on the 13th day ceremony a *bhandara* of the deceased Mahant took place and he had been properly selected as the Mahant of the said Asthan after due ceremonies.

There was another defendant impleaded in the case as defendant No. 2 but he does not appear to have filed any written statement and although notice has been served on him in the present appeal he has not put in appearance. He did not turn up in the trial Court in spite of service. He has been impleaded as defendant No. 2 in the case because he filed an application for mutation in May 1940 in the Revenue Court.

The plaintiff filed an application on September 19, 1940, for the appointment of a Receiver. The ground of the application was that the appellant had no right of any sort in the property of the Asthan. He was neither a Goshain nor was he entitled to succeed as the Mahant of Asthan Srinagar under law or custom. The plaintiff asserted that his own title to the property was unassailable. It was further stated that upon

the death of the deceased Mahant the Sub-Divisional Officer of Tarabganj visited the Asthan and locked up all the movables except some articles and that the Tahsildar of Gonda subsequently prepared a list of all the articles. It was alleged that many of these articles were found missing when another Tahsildar subsequently visited the Asthan. A cycle was alleged to have been given by the appellant to the *patwari* of village Srinagar and a motor-car had been given away to one Pandit Raj Kishore Upadhyay. Fifty thousand bricks out of four lakhs lying in the kiln, which had been started by the deceased Mahant, were said to have been removed from the kiln. There were many decrees and debts which were likely to become time-barred if necessary proceedings were not taken in time and there was a large amount of money in fixed deposit of the Allahabad Bank which was to mature on December 2, 1940, and the Math was liable to suffer loss if the deposit was not renewed. The immovable property situate in Gonda had been attached by the Deputy Commissioner in connection with the arrears of revenue and was still under attachment. The appellant had taken possession of the *pukhtadari* land in village Anchalapur, District Bahraich, and was misappropriating the income of that property. The appellant was possessed of no property and it would be difficult to realise any mesne profits from him in the event of a decree being passed in the plaintiff's favour.

A written reply was filed in answer to this application by the appellant in which the allegations were generally denied, particularly those relating to the disposal of the bicycle and the motor-car and the removal of the bricks. The appellant asserted that he was in possession of the entire movable and immovable property owned by the Asthan since the death of the deceased Mahant, except some movable property, which had been locked up by the Sub-Divisional Officer, and he continued to remain in possession, making collections and paying Govt. revenue until June 1, 1940, when the Deputy Commissioner of Gonda attached all the property in Gonda District under s. 150 of the Land Revenue Act leaving undisturbed the possession of the appellant over certain *sir* and *khudkast* lands. The appellant had further obtained mutation in regard to the villages situate in Tahsil Utraula, District Gonda, and the *pukhtadari* rights in Bahraich District. He had further been in possession and

occupation of the Math and had been conducting all arrangements for the worship of the Math. The right of the plaintiff to obtain an order for the appointment of a Receiver was emphatically denied.

The learned Civil Judge after hearing both parties allowed the application and appointed one Mr. Jwala Prasad Sinha as receiver over the entire properties belonging to the Math and directed him to take possession at once from the Deputy Commissioner. The Receiver was directed to deposit the valuables in some Bank or in the Treasury and the other movables in the *nazarat*. He was further directed to make proper arrangements for the custody of the live stock and manage the *zamindari* properties in accordance with the rules of the Court of Wards. He was allowed ten per cent. as his remuneration over the actual collections in addition to the expenses of management. The learned Judge held that there was no reliable evidence of the appellant's possession over the property since the death of the deceased Mahant and there was very great danger of the income of the property being spent over the litigation instead of over the purposes for which the endowment exists. He was of opinion that both the claimants in the case were of the mendicant class having no property in their possession and the loss, if caused by waste and mismanagement, will not be liable to be compensated. We understand that the Receiver has taken possession of the property in dispute with the exception of village Anchalapur and some *sir* lands being still in the possession of the applicant, cash in the Bank and movable property in the Math.

We have heard learned Counsel on both sides at some length and we are of opinion that the order of the lower Court appointing a Receiver should be maintained. Mahant Rajendra Ban, the deceased Mahant, died on March 17, 1940. The property left by him is valued in the plaint at Rs. 2,03,034-1-9. The income of the immovable property is stated to be about Rs. 14,090 a year. There is a fixed deposit of Rs. 55,000 in the Allahabad Bank standing in the name of the deceased Mahant. This deposit was due to expire on December 2, 1940. Rs. 43-12-9 are locked in the Math itself. There are cash certificates of the value of Rs. 1,070 and Rs. 435 are in the Post Office Savings Bank Account in the name of Naresh Ban, about which a succession certificate had been sanctioned in the name of the deceased Mahant. In addition to these there are 500 shares of the Indian

Iron & Steel Company and a number of decrees, bonds, promissory notes and deeds—the value is not stated—executed in favour of the deceased Mahant. It is no longer disputed between the parties that the Sub-Divisional Officer upon receipt of the news of the death of the deceased Mahant visited the Asthan on March 17, 1940, and locked the property in the Math leaving a few articles.

On March 21, 1940, the appellant made application to the Deputy Commissioner of Gonda in which he stated that the deceased Mahant had nominated no disciple in his lifetime and consequently the Sub-Divisional Officer of Tarabganj visited the Math on March 17, 1940, and appointed the appellant as the custodian of the Math. He further stated that as long as a lawful heir was not installed in the *gaddi* it was necessary to perform the Kriya Karma ceremonies of the deceased Mahant and since the appellant was not given any money and he possessed no independent means of his own wherewith to spend money on the Kriya Karma ceremonies, he requested that he may be given at least Rs. 2,000 for the performance of the Kriya Karma ceremonies. The appellant further asked that he may be permitted by an order to realise the aforesaid amount from the estate and that a Tahsil peon may be deputed to assist him in the collections. The Sub-Divisional Officer reported to the Deputy Commissioner as follows :

"I think there will be no harm in permitting collection of rent through Tahsildar to the extent of Rs. 2,000 and in handing over the amount to the applicant after deduction of necessary charges for expenditure on the Kriya Karma ceremony of the deceased which will be a legitimate charge on the deceased's property. The applicant has been put in charge of the deceased's property by Mr. Jayal, as he solemnly affirms, and he seems to be a proper person for the performance of the necessary ceremonies. He must, however, produce regular accounts of the expenditure."

The Deputy Commissioner approved of this report and the Sub-Divisional Officer then directed the Tahsildar to comply with the order. He further directed the applicant to keep regular accounts of the money handed over to him and produce them after the Kriya Karma.

On April 9, 1940, the Tahsildar of Gonda reported to the Sub-Divisional Officer that there were rival claimants to the Math and its property and that he apprehended difficulties in the realisation of Govt. revenue. He, therefore, recommended that the property should be attached.

The Sub-Divisional Officer in his report

dated April 12, 1940, made to the Deputy Commissioner with reference to the Tahsildar's report, stated that the title to the *gaddi* was contested by four claimants, two of whom, namely the plaintiff and the defendant, had filed applications for mutation of their names. He further stated that upon enquiry he had come to know that the alleged election in favour of Sheoambar Ban (defendant No. 1), who claims to have been duly elected on March 21, 1940, was more or less a farce. There were no written proceedings of the so called election and there were wild stories abroad about its farcical nature. He agreed with the report of the Tahsildar that each disputant would try to secure forcible possession of the estate and the task of the collection of revenue would be beset with numerous difficulties. He supported the Tahsildar's recommendation to attach the entire estate under s. 150 of the Land Revenue Act.

On May 15, 1940, the Tahsildar of Gonda similarly reported that there is no likelihood of the revenue being recovered as there is no living Mahant of the vacant *gaddi* of Srinagar. The Deputy Commissioner thereupon ordered the attachment of the property, which accordingly took place on June 1, 1940.

It appears that on April 1, 1940, the plaintiff applied for mutation of names in the Revenue Court while the defendant made a similar application two days later, namely April 3, 1940. It has been urged on behalf of the defendant-appellant that he has been in possession of the property in dispute from the death of the deceased Mahant, namely March 17, 1940, up to June 1, 1940, when the attachment took place, and during this period he has realised Rs. 4,966-2-6 and paid Rs. 1,903 as Govt. revenue. In support of this contention he has relied on certain receipts. On behalf of the plaintiff the possession of the defendant has been strenuously denied and it has been urged that a number of receipts showing realisation of Rs. 2,900 and odd relate to the period between May 20, 1940, to June 1, 1940. Be that as it may, we are satisfied from the circumstances of this case that the defendant-appellant has not been able to establish that he was in possession of the property in dispute in his own right from the time of the death of the deceased Mahant. The various reports of the Tahsildar, and the orders of the Sub-Divisional Officer and the Deputy Commissioner unmistakably show that the defendant was

appointed as a custodian of the Math to look after the worship as well as to see to the performance, of the Kriya Karma ceremonies, which was considered to be essential. It was with this object that he was allowed a sum of Rs. 2,000. It is not unlikely in these circumstances that under colour of the permission granted to him, by the executive authorities he may have collected money from the tenants in the estate and issued receipts to them. We are not prepared to hold that the defendant-appellant was in peaceable and effective possession in his own right from the time of the death of the deceased Mahant and we do not, therefore, place any reliance upon the documents evidencing the possession of the defendant-appellant.

It has also been urged in this connection that the defendant has obtained mutation of the *pukhtadari* rights in Bahraich district and that in regard to certain villages in the Utraula Tahsil he has obtained a similar order in course of the record operations. There is no doubt, however, that the mutation proceedings are still pending before the Sub-Divisional Officer of Gonda in regard to the entire *zamindari* property in Gonda District belonging to the Math and that no order for possession has been made in favour of the defendant-appellant by the Revenue Court.

The position, therefore, is that at the time of the death of the deceased Mahant on March 17, 1940, neither of the parties was in possession of the property in dispute and the possession, if any exercised by the defendant-appellant, was in no sense a possession in his own right, nor can it be said that it was peaceable or undisturbed because it is clear from the circumstances of the case that the Sub-Divisional Officer upon finding that the deceased Mahant had left no disciple took immediate action in locking the movables and prevented the scramble by allowing the defendant-appellant to perform the Kriya Karma ceremonies of the deceased Mahant and for the aforesaid purposes to make certain collections of the rent. It is also clear that in view of the rival claims having been put forward in the mutation Court the Revenue authorities anticipated a scramble for forcible possession and consequently, recommended attachment of the property with a view to securing the realisation of the Govt. Revenue, and this attachment accordingly took place on June 1, 1940. Neither party having been in possession of the property from March 17, 1940, till June 1, 1940, when

the attachment took place, the property must be considered to have been in medio and the possession of the Deputy Commissioner must, therefore, be deemed to be the possession of the rightful owner of the property. The observation of Lord Cranworth in the case of *Owen v. Homan*, (4 H. L. 1031), (1), so often quoted in cases arising under O. XL, r. 1, of the Civil P. O., are fully applicable to the circumstances of the case. It was observed in the said case:

"In such cases the Court must of necessity exercise a discretion as to whether it will or will not interfere by this kind of *interim* protection of the property. Where indeed the property is as it were in medio in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is the common interest of all parties that the Court should prevent a scramble. Such is the case when a Receiver of a property of a deceased person is appointed pending a litigation in the Ecclesiastical Court as to the right of probate or administration. No one is in the actual lawful enjoyment of property so circumstanced, and no wrong can be done to any one by taking it and preserving it for the benefit of the successful litigant. But where the object of the plaintiff is to assert a right to property of which the defendant is in the enjoyment, the case is necessarily involved in further questions. The Court by taking possession at the instance of the plaintiff may be doing a wrong to the defendant, in some cases an irreparable wrong."

Reference was made on behalf of the defendant appellant to *Ali Raza Khan v. Nawazish Ali Khan* (1936 O. W. N., 466) (2), *Ali Raza Khan v. Nawazish Ali Khan* (1937 O. W. N., 197) (3), *Bidurramji v. Kesho Ramji* (1938 O. W. N., 1153) (4), *Bisheshar Singh v. Jadunath Singh* (1939 O. W. N. 59) (5), *Ali Raza Khan v. Nawazish Ali Khan* (1939 O. W. N., 615), (6) and *Benoy Krishna Mukherjee v. Satish Chandra Giri* (L. R. 55 I. A., 131), (7).

It was held in *Ali Raza Khan v. Nawazish Ali Khan* (1936 O. W. N., 466), (2), that the question whether a Receiver should be appointed cannot be decided on the rulings but according to the circumstances of each case. It was further held that in order to succeed in getting a Receiver

appointed the plaintiff must show that *prima facie* he has the title and that the defendant has no title. In that case the mutation Courts in Oudh and Lahore had decided the matter in favour of the defendant. It was held therefore that the Court could not at that stage decide the entire case by holding that the Revenue Courts were wrong and *prima facie* the defendant had no title and that the plaintiff had title.

The decision in the original suit reported in *Ali Raza Khan v. Nawazish Ali Khan* (1936 O. W. N. 466, (2), came up in appeal before a Bench of this Court and is reported in *Ali Raza Khan v. Nawazish Ali Khan* (1937 O. W. N., 197 (3). It was held, confirming the decision, that the appointment of a Receiver is a matter entirely within the discretion of the trial Judge and unless it can be shown by the applicant that the trial Judge has not exercised a judicial discretion in the matter, he cannot succeed in an appeal filed by him against the order of the trial Judge rejecting his application for the appointment of a Receiver. It was also held that where the defendant in a suit has been put in possession of the properties in dispute by the Revenue Courts after contest on the ground of his *prima facie* title to them, it would not be just and convenient for the Court to deprive him of that possession and to appoint a Receiver in his place to manage the property.

The case of *Bidurramji v. Kesho Ramji* (1938 O. W. N., 1153 (4), was a case in which the defendant had been in peaceable possession for about 15 years without objection on behalf of anybody and it was held therefore that it would not be in the interests of justice to deprive him of his possession at the instance of a plaintiff who bases his claim on a custom denied by the defendant. It was further ruled that in matters which lie within the discretion of the trial Court such as under O. XL, r. 1 of the Civil P. O. the Appellate Court should not interfere with the trial Court's discretion unless that discretion has been exercised illegally and improperly.

The two cases reported in 1939 Oudh Weekly Notes at pp. 59 and 615 *Bisheshar Singh v. Jadunath Singh* (5), and *Ali Raza Khan v. Nawazish Ali Khan* (6), are wholly inapplicable as in both those cases there had been a decision on the merits deciding the rights of the parties in the property.

(1) (1853) 4 H. L. 1031.

(2) 1936 O. W. N. 466; 161 Ind. Cas. 838; 8 R. O. 351; 1936 O. L. R. 213.

(3) 1937 O. W. N. 197; 166 Ind. Cas. 983; A. I. R. 1937 Oudh 280; 9 R. O. 356; 1937 O. L. R. 83.

(4) 1938 O. W. N. 1153; 178 Ind. Cas. 725; A. I. R. 1938 Oudh 61; 1938 O. L. R. 512; 11 R. O. 123.

(5) 1939 O. W. N. 59; 179 Ind. Cas. 245; A. I. R. 1939 Oudh 94; 1939 O. L. R. 6; 11 R. O. 154.

(6) 1939 O. W. N. 615; 183 Ind. Cas. 16; A. I. R. 1939 Oudh 229; 1939 O. L. R. 464; 12 R. O. 16; 14 Luck. 666.

(7) 55 I. A. 131; 108 Ind. Cas. 348; A. I. R. 1928 P. O. 49; 27 L. W. 333; 5 O. W. N. 272; 54 M. L. J. 423; I. L. T. 40 Cal. 99; 26 A. L. J. 481; 47 O. L. J. 424; 30 Bom. L. R. 815; 32 O. W. N. 681; 55 C. 720 (P. O.).

concerned and there could be no question of the appointment of a Receiver in such a case.

The case of *Benoy Krishna Mukherjee v Satish Chandra Giri* (L. R. 55 I. A. 131) (7), was a case in which their Lordships of the Judicial Committee upheld the order of the High Court discharging the order of the trial Court appointing a Receiver in respect of the properties which had been in the Mahant's possession and enjoyment for a considerable number of years and were his self-acquired properties. Their Lordships observed that the order of the trial Judge appointing a Receiver over properties, which had been in the possession of the defendant for a long time as his self-acquired properties, was not altogether within the principles of a judicial exercise of discretion, and although the order of the trial Court is no doubt discretionary in such a case yet that discretion is liable to interference if it is not in accordance with the principles on which judicial discretion must be exercised. If the Appellate Court in such a case concludes that proper discretion was not used by the Court below, it is free to exercise its own discretion in the matter.

As regards the merits of the claim of either party to the property in dispute, we consider it obviously undesirable to express any opinion one way or the other without running the risk of its being used hereafter in such a way as to prejudice the case of either party. It is enough for our purpose to state that the questions raised by both parties as regards their title to the property in dispute are serious questions to be tried at the hearing of the case and it would be extremely unwise to prejudice the matter at this stage of the case. There is no doubt however, that in a case such as the present where there are rival claimants to the property in dispute and the property has never been in the possession of any of the parties to the suit since the death of the deceased owner and the situation is fraught with the possibility of waste and mismanagement, it would eminently be a case for the appointment of a Receiver. We are further of opinion that the trial Court, with whom the discretion under O. XL, r. 1 of the Civil P. C. primarily vests, has not been shown to have exercised such discretion in an arbitrary fashion, illegally or improperly.

The result, therefore, is that we uphold

the order of the lower Court and dismiss the appeal with costs.

In addition to the directions given by the trial Court in its order we direct that as regards the property entered in list E of the plaint the Receiver shall renew the fixed deposit in the Allahabad Bank in the name of the lower Court for a period of one year in the first instance, and further the cash certificates shall remain invested as before.

The interim order dated November 25, 1930 passed by us is discharged, excepting in so far as it relates to the furnishing of the security by the Receiver and the rate of remuneration allowed to him.

S.

Appeal allowed.

CALCUTTA HIGH COURT

Application in Suit No. 1319 of 1933

April 5, 1940

McNAIR, J.

Smt. SARBASUNDARI DASSI—PLAINTIFF

versus

Smt. NANDARANI DASSI AND OTHERS—

DEFENDANTS

Receiver—Receiver, appointment of, in partition suit—Receiver considering his personal interest to the exclusion of those of parties—Removal of such Receiver—Commissioner—Costs—Appointment of Commissioner in partition suit—Whether can apply to Court for payment of costs—Bill of Commissioner of partition, if can be taxed—Court, if can order, in suit for partition, Receiver to pay costs of attorney of deceased party.

Where the attitude of a Receiver appointed in a partition suit is inconsistent with the attitude of a Receiver, that is, where he is considering his own personal interests to the exclusion of the interests of the parties whose representative he is and whose benefit should be his concern, such Receiver should be removed.

A stranger may apply in proper circumstances, for costs and a Commissioner of partition is justified in applying to the Court which appointed him for payment of costs if he is unable to receive payment of costs to which he is entitled. *Brookbank v. East London Ry. Co.* (1), explained.

The bill of a Commissioner of partition can be taxed by taxing officer.

In a partition case the Court can order against the Receiver for payment of costs incurred by an attorney of a deceased party.

Messrs. B. C. Ghosh and N. C. Chatterjee, for the Plaintiff.

Messrs. P. C. Ghosh and J. C. Sett, for the Defendants.

Order.—This is an application by the attorney of a deceased plaintiff, by a Commissioner of partition and special referee appointed in the suit, and by the Commissioner's clerk, for an order for taxation of the Commissioner's remuneration and ex-

penses, for an order for taxation of the costs of the deceased plaintiff, for removal of the defendant Jogendra Nath Law as Receiver in the suit, for appointment of the Official Receiver, and for payment by him on appointment of the costs of the petitioner. The plaintiff brought a suit on June 20, 1933, for administration of the estate of Beni Madhab Law deceased, for construction of his will, for partition, and for possession. The plaintiff was a daughter-in-law of Beni Madhab, being the widow of his son Bhupen who died in 1921. Bhupen had three brothers, Jogendra, Mahendra and Nagendra. Jogendra is the Receiver. Jogendra and Mahendra were two of the defendants in the suit as were the sons of Nagendra who had died, and the other defendant was the widow of Beni Madhab. On April 6, 1936, there was a consent decree in which the shares of the parties were declared: "The plaintiff Smt. Sarbasundari Dassi was declared entitled as a Hindu widow to one fourth share. Jogendra was also entitled to one-fourth share, and he was appointed Receiver of the secular property belonging to the deceased Beni Madhab, and empowered to collect the rents, issues and profits, of the *debutter* property. One of the present applicants, Hemanta Kumar Mitra was appointed Commissioner and special referee, and there were directions for partition and division of the estate and for the usual enquiries and report. The decree further provided that the Receiver do out of the estate pay the costs of the respective parties to this suit up to this decree, to be taxed by the taxing officer of this Court as between attorney and client as of a defended suit, to their respective attorneys and that

"the costs and expenses of the Commissioner of partition, namely, of issuing and executing the same and of confirming the Commissioner's report of the respective parties be paid by the respective parties in proportion to the value of their respective shares and that the same be paid to the respective attorneys by the Receiver and be debited by the latter to the respective shares of the parties, with liberty to apply."

Hemanta Kumar Mitra was duly appointed, and held a number of meetings. With the consent of parties he appointed two surveyors, who are now supporting this application, and a clerk. The Commissioner held his last meeting on February 25, 1938 and he states that most of his duties had then been completed except for the actual framing of the scheme and making the allotments report. There were

several interlocutory applications in which the plaintiff was awarded costs. On February 26, 1938, the plaintiff died. She left a will and her executors obtained probate and applied for substitution of their names in the place of the deceased plaintiff in the suit. That application has been adjourned from time to time and is still pending in circumstances which will be related hereafter. Nandarani, Beni Madhab's widow, died in 1939 and the other defendants contend that they are the sole reversioners and that the administration and partition suit which was brought by Sarbasundari was unnecessary. In December 1939 they brought a suit for a declaration that all causes of action and all rights to prosecute or further proceed with this suit had ceased on the death of Sarbasundari and had become vested in Jogendra and Mahendra, and further for a declaration that Sarbasundari had no right to dispose by her will of the rents, issues and profits, to which she was entitled as a Hindu widow. Having filed this suit, Jogendra then applied for an injunction restraining the executors from being substituted in the place of Sarbasundari in her suit. The result is that nothing further has been done in this suit, and the suit brought by Jogendra and Mahendra is still pending. The application for substitution has been directed to be heard after that suit is concluded.

The applicants point out that Jogendra as Receiver was directed to file his accounts half yearly. He failed to do so, and an order was made at the instance of the plaintiff during her lifetime ordering those accounts to be filed. In spite of that order which was made nearly three years ago, the accounts are still in arrears. Apart from the question whether the applicants should receive the payments for which they ask it appears to me quite clear that Jogendra should no longer be retained as Receiver. In addition to his failure to file his accounts his whole attitude is inconsistent with the attitude of a Receiver. He has his own personal interests, and it is clear from the attitude which he has adopted on this application, and in fact ever since the death of the plaintiff, that he is considering his own personal interests to the exclusion of the interests of the parties whose representative he is and whose benefit should be his concern. There will be an order that Jogendra do file his accounts within one month from the date of this order, that he be forthwith removed from acting as Receiver, and that the Official Receiver be appointed in his stead. The

Registrar will report to this Court within five weeks from the date of this order whether the accounts have or have not been filed. If Jogendra fail to comply with this order the Court will consider the action that should be taken against him. The remainder of the application relates to the costs of the attorney and the Commissioner of partition who was appointed in the partition suit. It is argued on behalf of Jogendra that no costs should be payable on the ground that on the death of the plaintiff the suit no longer exists and that the question whether or no any costs or fees are payable will depend upon the result of the suit which he has filed and which is now pending.

It is argued further that the applicants are not parties to the suit, and therefore they have no right to any of the reliefs which they claim. In support of this contention reliance has been placed on the case in *Brocklebank v. East London Ry. Co.* (1) where it was held that a person who is not a party to an action is not entitled to apply by motion for payment of money to him by a Receiver appointed in the action. In the course of the argument it was pointed out by the learned Judge (Fry, J.) that the considerations might have been very different on that motion had the suit been, as it is here, an administration suit. The decision is a decision on the facts of that particular case, and to my mind it decided no more than that there is no general principle that a person who is interested in having money paid to him by a Receiver has for that reason alone a right to apply to Court for an order on the Receiver to pay his costs. In Halsbury's *Laws of England*, Edn. II, Volume 28, para. 99 of the general rule is stated:

"On any application by a stranger to enforce his rights, the Court will examine the claim and either give effect to it by an order in the action or, if this is impracticable, allow any necessary proceedings to be taken outside the action."

Clearly, a stranger may apply in proper circumstances, and a Commissioner of partition is amply justified in applying to the Court which appointed him, and in the suit in which he was appointed, if he is unable to receive a payment to which he is entitled. Furthermore, in the present instance there has been a consent decree so far back as April 1936, to which the Receiver was a party and by which the Receiver was ordered to pay the costs of the respective parties and the costs and expenses of the Commissioner

of partition. Those costs were to be paid by the respective parties in proportion to the value of their respective shares and would be paid to the respective attorneys by the Receiver. It has been suggested that the Commissioner's bill cannot be taxed. Learned Counsel has however produced before me several bills of Commissioners which have been taxed by the taxing officer of this Court, and where the Commissioner has been appointed by this Court. I fail to see what objection there can be to the taxation of this bill. In fact, I should have thought that the Receiver would welcome taxation in order that he might be satisfied that the fees and expenses which he as Receiver has been ordered to pay were properly incurred. It is admitted that had the plaintiff been alive there would have been no difficulty in obtaining payment, but Jogendra argues that his share, which belonged to the plaintiff, has now vested in him and the other defendants in that suit. With regard to the attorney's costs, this matter was dealt with by this Court in *Harnandroy Foolchand v. Gootiram Bhuttar* (2). That was an application by a solicitor whose client had been awarded costs, and it was held that in a proper case the Court in the exercise of its discretion could make an order for payment of such costs to the solicitor by the opposite party. The applicant there was the solicitor for the defendant. The defendant died. But before his death he had obtained an order against the plaintiff for certain costs which had been taxed. On the death of the defendant no steps were taken to reconstitute the action, which was dismissed, and the solicitor for the defendant sought an order against the plaintiff in the action. In deciding that the solicitor was entitled to the relief which he prayed, Rankin, J. in the course of his judgment, said that he considered that it was a matter of settled law that when the Court had jurisdiction in an action it had jurisdiction not only as between the parties to that action but also as regards those officers of the Court who acted for the parties.

I can see no objection in the present instance to the payment by the Receiver to the applicant attorney and to the other applicants of the costs and expenses which have been incurred by them in the course of the partition suit. It may be that the partition suit will be held to have been misconceived, as Jogendra now suggests. The costs, however, have been incurred and

(1) (1879) 12 Ch. D. 839; 48 L. J. Ch. 729; 41 L. T. 205; 28 W. R. 30.

(2) 46 C. 1070; 54 Ind. Cas. 691; A. I. R. 1920 Cal. 122.

Jogendra himself, as one of the parties to that suit, consented to a decree under which he as Receiver was to pay the costs incurred and the costs and expenses of the commission. The surveyors appointed by the Commissioner have appeared in support of his application, although they are not parties to it. They were undoubtedly appointed with the consent of the parties and are also entitled to their fees. Jogendra having been discharged from acting as Receiver, the Official Receiver will be appointed and he will be directed to pay the taxed costs of the attorney for Sarbasundari, the costs incurred by or under the directions of the Commissioner of partition, including the costs of a clerk and surveyors. There will be an order in terms of cls. 1, 2, 3, 4 and 5 of the notice of motion. Certified for two Counsel. The applicants are entitled to their costs certified for two Counsel. No costs are allowed either to Jogendra or to the learned Counsel appearing for the surveyors.

D.

Order accordingly.

ODUH CHIEF COURT

Miscellaneous Appeal No. 52 of 1940

January 14, 1941

YORKE AND AGARWAL, JJ.

HARI SARAN DAS—DEFENDANT—

APPELLANT

versus

HAR KISHAN DAS—APPLICANT—

RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXII, r. 10—Testator making legatee owner of decrees which might be acquired subsequently—Testator dying after obtaining decree for mesne profits—Legatee is entitled to be substituted in place of testator in proceedings for determination of mesne profits—Practice—Precedents—Right acquired not under statute but under deed—Cases of Hindu widow or widows of taluqdars cannot be relied on.

Where a person has obtained a decree for mesne profits he can make a will in respect of them. Where the will was made when there was no subsisting decree for mesne profits and it had made certain person owner not only of the movables and decrees in existence at the time of its execution but also of those which might be acquired subsequently and the testator dies after the decree for mesne profits is passed, the heir-at-law and legatee under the will is entitled to be substituted in the place of the testator in proceedings for the determination of mesne profits.

It would not be safe to rely on the cases of Hindu widows or the widow of taluqdars, where the right has come into existence under the deed and not under any statute.

Misc. A. against the order of the Additional Civil Judge of Lucknow, dated August 14, 1940.

Messrs. M. Wasim and B. P. Misra, for the Appellant.

Messrs. Niamatullah, G. D. Khare, Karti Krishna and Rameshwar Dayal, for the Respondent.

Judgment.—This is an appeal from an order of the Additional Civil Judge of Lucknow, allowing the respondent's application under O. XXII, r. 10, Civil P. C.

There is a history behind this case and it is necessary to mention it in order to understand the points in question. There is in the city of Lucknow an Udasi shrine to the Mahant of which valuable taluqdari property and certain other property, movable and immovable belong. Sant Rain Das was the Mahant of the shrine. He died on January 8, 1922. Har Narain Das claimed the property as his chela. The mother of Sant Rain Das and the appellant Hari Saran Das alias Satgur Prasad were his rival claimants. The dispute was compromised by an agreement dated January 20, 1922, which in substance provided that Har Narain Das should hold the properties for life and Satgur Prasad alias Hari Saran Das should be the remainderman. In 1924 Hari Saran Das induced Har Narain Das to enter into an agreement dated November 25, 1924, whereby the whole of the properties were released to Hari Saran Das on certain terms. Under this agreement, Hari Saran Das in addition to the immovable property obtained possession of the cash at the Banks and estate treasuries together with the proceeds of War Bonds and other movables. Har Narain Das brought a Suit No. 1 of 1927 against Hari Saran Das impugning the agreement dated November 25, 1924, on the ground that it had been obtained from him by the fraud and undue influence of Hari Saran Das. That suit was decided by Mr. Justice Pullan of this Court on November 29, 1927. The deed of November 25, 1924, was set aside, the plaintiff was held entitled to the possession of the immovable properties and the cash and movables of Sant Rain Das. The cash and movables were found to be worth Rs. 1,83,000. It was also held that the plaintiff was entitled to mesne profits from the date of the agreement, November 25, 1924. There was an appeal to a Bench of this Court and it was held that the plaintiff was entitled to mesne profits not from the date of the agreement but from the date of the suit. There was a further appeal to the Privy Council and the judgment of the first Court in regard to

mesne profits. was restored. Har Narain Das obtained possession under the decree and also executed his decree for Rs. 1,83,000 by attachment and sale of Hari Saran Das's interest in the property as remainderman. Hari Saran Das filed an objection that his interest as remainderman could not be attached. This objection was disallowed by the Civil Judge. Hari Saran Das then appealed to this Court on August 25, 1933, and during the pendency of the appeal, Har Narain Das, the decree-holder died. The question then arose between one Har Kishan Das and Hari Saran Das whether the former could be substituted as the respondent in the appeal. Har Kishan Das's contention was that he was the *chela* legatee of Har Narain Das and so he could be substituted in his place. Hari Saran Das's contention was that the rights of the decree-holder had passed to himself and so it could not be executed. The Chief Court found in favour of Hari Saran Das by upholding his contention that the sum of Rs. 1,83,000 vested in him. There was an appeal to the Privy Council and it was held that that sum passed to the legatee or legal heir of Har Narain Das and not to Hari Saran Das. The decision of the Privy Council that Har Narain Das was entitled to mesne profits from the date of the agreement was given in 1932. After it Har Narain Das applied for ascertainment of those mesne profits. When Har Narain Das died on December 26, 1933, Har Kishan Das applied under O. XXII, r. 3, Civil P. C. that he be substituted in place of Har Narain Das. That application was opposed by Hari Saran Das but has been allowed by the lower Court. The defendant Har Saran Das has appealed from that order.

The argument of the learned Counsel on behalf of the appellant is that Har Narain Das's interest in the decree in question ceased on his death and the said decree became part of the estate vested in the appellant. We have to decide whether the decree for mesne profits passed by the Privy Council devolved on the death of Har Narain Das on his heir or legatee or it became part and parcel of the estate vested in Hari Saran Das. The important clauses of the agreement dated January 20, 1922, are given in the judgment of the Privy Council in which it was decided that the sum of Rs. 1,83,000 devolved on the legal heirs or legatees of Har Narain Das. That case is reported in 1938 Oudh Appeals, 87. The following relevant clauses of the

agreement are reproduced below—

2. The first party *Mahant* Har Narain Das shall remain owner and in possession of the immovable property, *talugdari* and non-*talugdari* for his lifetime without the power of transfer in any form.

4. After the death of *Mahant* Har Narain Das the first party Satgur Prasad *alias* Hari Saran Das shall own and possess the entire movable and immovable property, *talugdari* and non-*talugdari*.

9. As to the movable property it has been settled that *Mahant* Har Narain Das the first party shall be owner of the whole except the property specified below.

These clauses were interpreted by the Chief Court and their Lordships of the Privy Council. The question of mesne profits was also discussed by the Chief Court and the Privy Council. It is argued that the question of mesne profits was not before the Courts and so they could not come to a decision about them which could bind the parties. Hari Saran Das in reply to the application for ascertainment of mesne profits stated that the judgment of the Chief Court dealt not only with movable and immovable properties directly and specifically referred to in the family arrangement dated January 20, 1922, but also dealt with mesne profits and cash which had either been decreed to *Mahant* Har Narain Das or in respect of which the claim was still pending and the judgment operated as *res judicata*. It was held by the Chief Court that the decree for movables could not be executed against Hari Saran Das, because the rights of the original decree-holder had passed along with the rest of the property to Hari Saran Das. It was also held that the right to mesne profits, together with the estate out of which they arose, had on the death of Har Narain Das come into the ownership and possession of Hari Saran Das. The Privy Council observed that they could not accept the view of the Chief Court as to the nature of a life estate in immovable property and they discerned no merits in the novel doctrine propounded by the Chief Court that a tenant for life of immovable had only a limited interest in the rents and profits which had accrued in his lifetime and is not complete owner thereof. Accordingly, if there is *res judicata* it is against the appellant. At least we have the pronouncement of the Privy Council on the agreement of January 20, 1922. Their Lordships observed that "the entire movable and immovable property, *talugdari* and non-*talugdari*" in cl. 4 of the

agreement could not in their opinion be stretched to cover all property whatsoever which Narain Das might acquire or which he might possess at the time of his death. It was also observed that it was not part of the purpose of the agreement to constitute Hari Saran Das the general heir of Narain Das, still less so to do this as to defeat the latter's right to leave the smallest legacy by will or to deal with accrued rents and profits as in his lifetime he might desire. The words "movable and" in cl. 4 were construed to mean that they referred to property in existence at the time of the agreement. It appears from the judgment of the Privy Council that Hari Saran Das was owner only of the movables which existed at the time of the agreement and that Har Narain Das was owner of the rents and profits which accrued in his lifetime. It was also held that Har Narain Das could transfer immovable property subsequently acquired by him by will or transfer *inter vivos*, and that Har Narain Das was full owner of Rs. 1,3,000 which he could dispose of by will and if he did not his heir-at-law would succeed him. There is no reason to distinguish that sum from the rents and profits which had not only accrued due to Har Narain Das but had also been realised though not by him in his lifetime. We think that the point in question before us is covered by the Privy Council decision.

The learned Counsel for the appellant has relied on *Sarnam v. Bisheshwar Bakhsh Singh* (7 O. W. N. 128) (1). This case was relied on by the Chief Court in the judgment reported in *Hari Saran Das v. Har Kishan Das* (11 O. W. N. 917) (2) which was set aside by the Privy Council in 1938 Oudh Appeals, 87. The argument of the learned Counsel for the appellant is that in that case the arrears of rent due to the widow of a *taluqdar* who was a life estate holder were held after her death to have passed to the estate and not to her personal heirs. We think it would not be safe in this case to rely on the cases of Hindu widows or the widows of *taluqdars*. In this case the right of Har Narain Das came into existence under the deed of January 20, 1922 and not under any statute.

Moreover, it appears that in the case of *Sarnam* the learned Judges of this Court

decided the case as if the rights of a Hindu widow were in question. It was subsequently held in this Court in *Bisheshwar Bakhsh Singh v. Jang Bahadur Singh* (7 O. W. N. 173) (3) in respect of the same *taluqdar's* widow, that her rights were not those of Hindu widow but those of a *taluqdar's* widow and those rights were laid down in the Oudh Estates Act. It was observed that the provisions of the Oudh Estates Act would apply whether the *taluqdar's* widow was a Hindu, a Muhammadan or a Christian. The peculiarities of the estate of a *taluqdar's* widow do not appear to have been brought to the notice of their Lordships in the case of *Sarnam Singh v. Bisheshwar Bakhsh Singh* (1). The decision in that case was based on a dictum of their Lordships of the Judicial Committee in *Isri Dut Koer v. Mst. Hensbutti Koerain* (L. R. 10 I. A., 150) (4) which was a case of Hindu widow. In *Sarnam's* case it was held that a creditor of a *taluqdar's* widow cannot attach the arrears of rent due to her which were not realized by her in her lifetime. But that is not the position here. In the present case Har Narain Das obtained a decree for mesne profits against Satgur Prased on the ground that he was in wrongful possession of the property. Har Narain Das was certainly entitled to the rents and profits of the property which accrued in his lifetime and which were realized by Hari Saran Das from the tenants. Har Narain Das could make a transfer of the decree for mesne profits *inter vivos* and there was no reason why he could not make a will in respect of them. This was so held by the Privy Council. The rents had been realized by the defendant and so they had ceased to be part of the estate. We think we need not discuss the cases of Hindu widows cited before us and that on the interpretation of the agreement dated January 20, 1922, put on it by their Lordships of the Privy Council, Har Narain Das was the absolute owner of the rents and profits which had been realised in his lifetime and he could transfer them by transfer *inter vivos*. The lower Court has held that Har Kishan Das is the *chela* and legatee of Har Narain Das.

The will was made on December 8, 1931, when there was no subsisting decree for mesne profits but it made Har Kishan Das owner not only of the movables and decrees

(1) 7 O W N 128; 125 Ind. Cas. 161; A I R 1931 Oudh 66; Ind. Rul. (1930) Oudh 289; 5 Luck 608.

(2) 11 O W N 917; 150 Ind. Cas. 425; A I R 1934 Oudh 337; 6 R O 648.

(3) 7 O W N 173; 122 Ind. Cas. 614; A I R 1930 Oudh 225; Ind. Rul. (1930) Oudh 118.

(4) 10 I A 150; 10 O 324; 13 O L R 418; 4 Sar. 459; 7 Ind. Jur. 557 (P O).

in existence at the time of its execution but also of those which might be acquired subsequently. This finding has not been challenged before us.

We therefore hold that Har Kishen Das as the heir-at-law and legatee of Har Narain Das is entitled to be substituted in place of Har Narain Das and to proceed with the application for determination of mesne profits.

We accordingly dismiss this appeal with costs.

S.

Appeal dismissed.

NAGPUR HIGH COURT

Civil Revision Application No. 562 of 1939
September 10, 1940

Bose, J.

Mst. SHAKUNTALABAI—APPLICANT—
DEFENDANT No. 2

versus

ROSHANLAL AND OTHERS—OPPOSITE
PARTY

Mortgage—Suit on—One of defendants claiming paramount title and disclaiming any interest in equity of redemption—Question of title, if can be decided.

In a mortgage suit no question of title arises. The mortgagee clearly has no interest and in fact cannot, if he wishes to succeed, challenge the title of his mortgagor. All that the Court is concerned with in a mortgage suit is the question of redemption. Only the persons who are interested in paying in order to save the property are necessary parties to the suit. All other matters are irrelevant. Where, therefore, in a mortgage suit one of the defendants claims a paramount title and disclaims all interest in the equity of redemption, this defendant must be discharged from the suit for the question of his title cannot be tried in such a case. Where in such a case the lower Court passes a wrong order, the High Court can interfere because the question of parties and persons is fundamental and goes to the very root of jurisdiction. 130 Ind. Cas. 105 (1), explained, *Iqbal Begam v. Misri Lal* (2), not followed, 170 Ind. Cas. 192 (3), explained, 164 Ind. Cas. 846 (4), followed.

O. R. App. of the order of the Court of the Third Sub-Judge, Second Class, Nagpur, dated July 6, 1939.

Dr. W. S. Barlingay, for the Applicant.

Mr. A. L. Halve, for Non-applicants
Nos. 1 to 4.

Order.—The question here is whether a person who claims a paramount title in a mortgage suit should be discharged. The mortgage was executed by the 1st defendant. The plaintiff has joined the 2nd defendant to the suit alleging that the 1st defendant and the husband of the 2nd defendant (the husband is now dead) formed a joint Hindu family and that the

mortgage was executed by the 1st defendant on behalf of the family. The 2nd defendant contests this and states that her husband was separate from the 1st defendant at all relevant times and that the property in suit was his exclusive property which the 1st defendant had no right or authority to mortgage. The lower Court holds that the 2nd defendant is a necessary party as it is necessary to have her here in order to give complete relief to the plaintiff.

I am not able to see how this case differs from one in which a person has mortgaged property which another claims as his exclusive property. It is to my mind evident that the title of that other to that property cannot be tried out in a mortgage suit unless all parties desire that or unless that other claims some interest in the equity of redemption either by way of an alternative case or in spite of his paramount title.

It is, I think, elementary that in a mortgage suit no question of title arises. The mortgagee clearly has no interest and in fact cannot, if he wishes to succeed, challenge the title of his mortgagor. All we are concerned with in a mortgage suit is the question of redemption. The mortgagee sues for the money which he has lent for the enforcement of his security if the money is not paid. Only the persons who are interested in paying in order to save the property are necessary parties to the suit. All other matters are irrelevant.

• Unless that were so it would be possible for complicated questions of title in relation to some vast estate to be decided in a trumpery mortgage suit concerned with a comparatively small sum of money. It would be possible for a person who wants to get property from another and have the question of title tried out to take a mortgage from a man of straw who has no possible interest in that property for some small amount and then to sue him on the mortgage and to join the real owner of the property on the ground that he claims a right to the property. The court-fees payable would be negligible on the mortgage and the complicated question of title would be tried out on payment of a small court-fee as a side issue in some trumpery mortgage matter. Clearly that is neither the object nor the intention of the law.

The learned Counsel for the non-applicant

however relies on *Ishwardas v. Hirralal* (1), *Iqbal Begam v. Misrilal* (2) and *Motiram v. Lalchand Gulabchand* (3). So far as the first of these three cases is concerned, it was a case in which all the defendants pleaded to the mortgage and desired to fight out the question of the mortgage. Of course if that is so, they are all necessary parties. It does not matter whether some one of them claims in addition a paramount title. If he wants to fight out the mortgage matter because he says he is interested in the equity of redemption and the plaintiff agrees that he is so interested, clearly he is a necessary party. The learned Counsel however relies on a somewhat wider pronouncement made by the learned Judge in that case which is to the effect that there is no inflexible rule either in law or in practice excluding questions of title from a mortgage suit and that such titles may be investigated in such a suit if it is necessary to give complete relief to the plaintiff or to secure to him, as a result of the decree in the mortgage suit, a quiet and unobstructed possession. Those observations read in conjunction with the facts of the case in which they were made are of course unexceptionable. But what does one mean by stating that all matters necessary to give complete relief to the plaintiff may be investigated? It is only matters in suit which can be investigated and not matters which are beyond the suit. The only relief claimed in a mortgage suit is the relief to enforce the security against persons interested in the equity of redemption. If a person is not interested in the equity of redemption, whatever else he may be interested in, forms no part of the relief claimed in the mortgage suit and it is not necessary to go into those other matters in order to give the plaintiff the relief which he claims, namely a right to enforce his security against those interested in the equity of redemption.

As regards *Iqbal Begam v. Misrilal* (2) that is a very short judgment in which no facts are given. Staples, A. J. C. merely states, after referring to a Patna ruling which has not been referred to here, that it would be just and convenient to join the applicant as a party to the suit before him and to adjudicate upon her claim. Unless one knows the facts on which the learned Judge proceeded it is quite im-

(1) 26 N L R 359; 130 Ind. Cas. 105; A I R 1931 Nag. 20; Ind. Rul (1931) Nag. 41.

(2) A I R 1935 Nag. 68.

(3) A I R 1937 Nag. 121; 170 Ind. Cas. 192; 10 R N 52; 1 L R (1937) Nag. 366.

possible to comment on that decision. There are undoubtedly cases in which it would be proper to inquire into these matters. I have already mentioned some of them, namely when all parties desire this to be done, or when the person claiming a paramount title also pleads to the mortgage and claims a right to contest the mortgage on the ground that he is also interested in some way in the equity of redemption.

As regards *Motiram v. Lalchand Gulabchand* (3) that is a case which is not in favour of the non-applicant. The decision there is that a son is not a necessary party to a suit against his father on a mortgage of joint family property because the son can bring a suit for a declaration that the mortgage decree does not bind his share. The learned Judge, however, goes on to state that if the son should himself come in and ask to be joined on the ground that he is interested in the equity of redemption and wants to be given a chance to challenge the mortgage or redeem it in the alternative, then he ought to be joined. With that of course I agree, but that is not the case here. The 2nd defendant does not wish to be joined. She claims a paramount title and claims the right to be discharged. According to the ruling just cited, she is bound to be discharged in those circumstances.

It is next urged that whatever be the rights or wrongs of the matter, the lower Court, even if it has decided wrongly, had jurisdiction to do so and that the High Court cannot interfere in revision with a decision when a party who claims a paramount title is necessary to the case. Again reliance is placed upon *Iqbal Begam v. Misrilal* (2). As I have already said, so far as that decision is concerned, it is not possible for me to comment on it because I do not know what the facts there were. If a more general proposition was intended, then with respect I dissent from that view and have so dissented in a ruling published in the authorised reports. *Devidas v. Nilkanthrao* (4). When I say "dissent from that view" I do not mean that I have referred to the ruling of Staples, A. J. C. or indeed to the question of paramount title; but I have referred to and followed a number of decisions which state that the question of parties and persons is fundamental and goes to the very root of jurisdiction. This will

(4) 1 L R (1936) Nag. 73; [164] Ind. Cas. 848; A I R 1936 Nag. 157; 9 R N 36.

be found at pp. 76 and 77 of my decision. As my decision is the later of the two, and as it is published in the authorised reports, and as no facts are given in the ruling of Staples, A. J. C. so that I cannot determine whether what he has said is *obiter* or not, I prefer, with respect, to follow my own view.

In my opinion the second defendant must be discharged from this suit on the ground that she claims a paramount title and disclaims all interest in the equity of redemption. The application is allowed, the order of the lower Court is set aside and an order will now be passed discharging the 2nd defendant from the suit. Costs of the revision will be paid by the plaintiff. Counsel's fee Rs. 25. Costs in the lower Court will also be paid by the plaintiff.

D.

Application allowed.

PATNA HIGH COURT

Civil Revision No. 575 of 1939

August 14, 1940

HARRIES, C. J., AND FAZL ALI, J.

BINRAJ MARWARI AND OTHERS—DECREE-HOLDERS—PLAINTIFFS

versus

RAM SAHAI MAHTO AND OTHERS

JUDGMENT-DEBTORS—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), s. 115—Execution sale set aside on ground of insufficiency of stamp—No appeal by decree-holder but application to Court to vacate its order under s. 151—Refusal by Court—High Court held could not interfere in revision.

A sale held in execution was set aside on the ground of insufficiency of stamp. The decree-holder took no steps to challenge that decision by an appeal but he applied to the Court to vacate its order under its inherent powers under s. 151 and the Court refused to interfere. The decree-holder applied in revision to the High Court against the order:

Held, that under the circumstances the High Court could not interfere in revision.

C. R. from an order of the Subordinate Judge, Bhagalpur, dated September 4, 1939.

Mr. S. N. Bose, for the Petitioners.

Messrs. S. M. Mullick, B. B. Sahay and Shambhu Nath, for the Opposite Party.

Harries, C. J.—This is a decree-holders' petition for revision of an order made by the learned Subordinate Judge of Bhagalpur on September 4, 1939. The decree-holder petitioners had obtained a money decree in the Calcutta High Court which had been transferred to the Court of the Subordinate Judge at Bhagalpur for execution. In the execution proceedings twenty-four items of property were put up to sale

severally, and the total price obtained for these twenty-four properties amounted to Rs. 1,755.

On April 21, 1930, the decree-holders filed a stamp as required by law, and the stamp was of the value of Rs. 30. That would have been sufficient if the sale had been a sale of one lot for Rs. 1,755; but there had been twenty-four sales, and the amount of the stamps, if calculated on each sale, came to Rs. 36-15-0, and, therefore, there was a deficit of Rs. 6-15-0. As in the view of the Court the stamp was insufficient, the Court had no alternative but to set aside the sale. No steps were taken by the decree-holders to challenge that order in this Court; but on May 15, 1939, the decree-holders petitioned the lower Court and asked it to vacate its previous order under its inherent powers under s. 151, Civil P. C., or to accept the stamp of Rs. 30 as sufficient for such items of property on the sale of which the stamp amounted to Rs. 30. It is to be observed that the Court had never been asked previously to confirm the sale of such items the stamps on the sale of which would amount to Rs. 30. The lower Court refused to interfere seeing no reason to exercise its inherent jurisdiction in the matter.

This petition for revision is directed towards the order of the learned Subordinate Judge refusing to exercise his inherent jurisdiction, and in my judgment this Court cannot interfere in the circumstances. If the decree-holders-petitioners felt aggrieved with the order setting aside the sale, they could, in my view, have challenged it in this Court. It was an order passed relating to execution and was, in my view, appealable. No steps, however, were taken to challenge that decision. In such circumstances, the learned Subordinate Judge was right in refusing to interfere even if he had inherent jurisdiction to do so, a point which I do not decide. As I have stated, he had never been asked to confirm the sale of only some of the items of property, and that being so he was perfectly right in refusing to adopt that course when the subsequent application was made to him.

In the circumstances of this case, I do not see that this Court can interfere in revision and accordingly this petition fails. I would, therefore, discharge the rule with costs, which I would assess at one gold mohur.

Fazl Ali, J.—I agree.

s.

Rule discharged.

OUDH CHIEF COURT

Execution of Decree Appeal No. 10
 of 1938

March 27, 1941 .

THOMAS, C. J.

Raj Kumari KANIZ BAQAR—APPELLANT

versus

Rani KANIZ ABID AND ANOTHER—

RESPONDENTS

Oudh Rent Act (XXII of 1886), ss. 152, 154—Suit by superior proprietor for arrears of under-proprietary rent—Mortgagee of under-proprietor not made party—Decree against under-proprietor and purchase of property by superior proprietor in execution—Mortgage-decree—Under proprietary rent, whether charge on mortgaged property—Liability of mortgagee, if came to end by satisfaction of rent decree.

It is true that under s. 154 of the Oudh Rent Act where an under-proprietor creates any incumbrance and fails to pay to the proprietor all or any part of the rent subsequently accruing in respect of the land subject to the incumbrance, the incumbrancer shall be liable to pay to the proprietor the whole or part of that rent as the case may be. This section lays down the liability of a mortgagee of any under-proprietary tenure for payment of arrears of rent due to the superior proprietor, but where the superior proprietor in his suit for rent did not make the mortgagee of the under-proprietor a party and sued the under-proprietor alone, obtaining a decree against him and in execution of that decree has purchased the property put up for sale, the decretal amount is satisfied and the liability to pay rent by the mortgagee thus comes to an end. Section 152 of the Oudh Rent Act provides that where a decree is for an arrear of rent due in respect of an under-proprietary right, the interest of a judgment-debtor in that right may be sold in execution of the decree. This shows that if the under-proprietary holding has been mortgaged by the judgment-debtor, the only thing that can be sold is the interest of the judgment-debtor, which in such a case would be his equity of redemption. The auction-purchaser therefore cannot claim priority against the mortgagee who is no longer liable for any payment under the provisions of s. 154. Hence in such a case the under-proprietary rent is not a charge on the mortgaged property and the mortgaged property can be sold in execution of the mortgage-decree. 117 Ind. Cas. 452 (1), distinguished.

Ex. D. A. against the order of the Civil Judge of Barabanki, dated August 4, 1937.

Messrs. Haider Husain and P. N. Bhatt, for the Appellant.

Mr. Akhlaque Husain, for Respondent No. 1.

Judgment.—This first execution of decree appeal has been filed on behalf of Raj Kumari Kaniz Baqar, who is the superior proprietor of half of the village Achecha in the Bara Banki District against the judgment and decree of the learned Civil Judge of Bara Banki, dated August 4, 1937.

The facts given in the judgment of the learned Judge are rather brief, but the

following facts have been admitted by the learned Counsel for the parties:

It appears that one Ghazanfar Ali Khan was the under-proprietor of the plots in dispute and he on June 28, 1917, executed a mortgage-deed in favour of Raja Abul Hasan Khan, the *taluqdar* of Belahra estate. On his death and under a will executed by him he was succeeded by Rani Kaniz Abid, one of the respondents in this case. The Court of Wards on behalf of Rani Kaniz Abid obtained a preliminary decree on May 29, 1925, on the basis of the mortgage-deed of June 28, 1917, and this decree was made final on May 16, 1927.

On August 17, 1933, the mortgagee-decree-holder applied for sale of the mortgaged property, and as it was an ancestral property, it was sent to the Collector. In the meantime on September 24, 1933, the Court of Wards representing the superior proprietor of village Achecha obtained a decree for under-proprietary rent against Ghazanfar Ali Khan and in execution of that decree purchased the under-proprietary rights on September 20, 1934. It is important here to note that Rani Kaniz Abid or the Court of Wards which represented her was not made a party to the suit or to the execution proceedings.

On August 19, 1935, Rani Kaniz Abid (the mortgagee-decree holder) applied to the execution Court that the auction-purchaser of the under-proprietary rights (that is the Court of Wards) be made a party in her execution case. Her prayer was granted.

The auction-purchaser appealed to this Court against the said order, but the appeal was dismissed by a Bench of this Court on November 9, 1936, (*vide* Execution of Decree Appeal No. 19 of 1936).

After the decision of the appeal, the second objection of the auction-purchaser, which was to the effect that the under-proprietary rent was a charge on the mortgaged property and that the mortgaged property could not be sold in execution of the mortgage-decree was taken up and decided by the learned Civil Judge against the auction-purchaser on August 4, 1937, and it is this order which is now under appeal before me.

The contention on behalf of the appellant is that the arrears of rent being a statutory liability it cannot be wiped out on the ground that Rani Kaniz Abid was not made a party and that the mortgagee is liable to pay the under-proprietary rent as it is a prior charge on the property. Reliance is placed on a Bench decision of this

Court reported in *Bisheshar Dayal v. Rai Bajranj Bahadur Singh*, (6 O. W. N. 469) (1). I regret I am unable to accept the contention of the learned Counsel. It is true that under s. 154 of the Oudh Rent Act where an under proprietor creates any incumbrance and fails to pay to the proprietor all or any part of the rent subsequently accruing in respect of the land subject to the incumbrance, the incumbrancer shall be liable to pay to the proprietor the whole or part of that rent as the case may be. This section lays down the liability of a mortgagee of any under-proprietary tenure for payment of arrears of rent due to the superior-proprietor, but in this case as I have mentioned the superior proprietor did not make Rani Kaniz Abid a party and sued Ghazanfar Ali Khan alone, obtaining a decree against him and in execution of that decree purchased the property put up for sale. The decretal amount was satisfied and the liability to pay rent by the mortgagee thus came to an end.

It was conceded by the learned Counsel on behalf of the appellant that no arrears of rent were due. Under s. 154 of the Oudh Rent Act the liability arises when the under-proprietor fails to pay the rent to the proprietor, in other words the charge which is sought to be declared on the mortgaged property is not due.

I am of opinion that the case reported in (6 O. W. N. 469) (1), relied on by the learned Counsel for the appellant is clearly distinguishable. In fact the learned Counsel frankly admitted that the facts were distinguishable, but he contended that there were observations in the judgment which helped the appellant. In that case the property had been sold under a mortgage decree and then a decree for arrears of rent was obtained and the superior proprietor then wanted to make the auction-purchaser a party to the execution proceedings for arrears of rent. The decree was still outstanding. In the present case as I have said the mortgagee was never made a party and nothing is due.

It is difficult to understand how the liability can be extended to Rani Kaniz Abid when once it has been discharged.

Section 152 of the Oudh Rent Act provides that where a decree is for an arrear of rent due in respect of an under-proprietary right, the interest of a judgment-debtor in that right may be sold in execu-

tion of the decree. This shows that if the under-proprietary holding has been mortgaged by the judgment-debtor, the only thing that can be sold is the interest of the judgment-debtor, which in a case like this would be his equity of redemption. The auction-purchaser, therefore, cannot claim priority against the mortgagee who is no longer liable for any payment under the provisions of s. 154 of the Oudh Rent Act.

I am, therefore, of opinion that the sum of Rs. 742-7-4 cannot be declared a charge. I, therefore, dismiss the appeal with costs.

s.

Appeal dismissed.

PATNA HIGH COURT

Appeal from Original Decree No. 195 of 1937

September 24, 1940

HARRIES, O. J. AND MANOHAR LALL, J.
MON MOHAN SINGH—APPELLANT

versus

RAGHU NANDAN SINGH AND OTHERS

—RESPONDENTS

Chota Nagpur Encumbered Estates Act (VI of 1876), ss. 3, 9—Word 'alienation' in s. 3, meaning of—Holder, whether prohibited from making testamentary disposition—Word 'heir', in s. 3 scope of—Object of the Act explained—Interpretation of Statutes—Restricted meaning, when to be given to words.

The word "alienation" ordinarily means alienation of all kinds but applying the principle of *ejusdem generis* as the general words in s. 3 follow specific words and again are followed by specific words, the word alienation means an alienation *inter vivos* only. In other words the prohibition against alienation in the Chota Nagpur Encum. Estates Act is a prohibition against alienation *inter vivos* and does not affect the testamentary power of the holder. 82 Ind. Cas. 886 (1), followed. [p. 25, col. 2; p. 30, col. 1.]

As the Act is obscure the word 'heir' has been loosely used in the Act and may be taken to include a person who has a right to succeed in law to the holder. [p. 26, col. 2.]

The object of Chota Nagpur Encum. Estates Act is that the manager shall have unfettered power of management and control over the property so that he may apply the rents and profits of the land to speedily relieve the holder's estate from the burdens created on it by the holder before the provisions of the Act were brought into operation for his benefit. The Act does not make the manager the holder of the estate but merely prohibits the holder in his own interest from exercising the acts of ownership so that they may not interfere with the wide powers given to the manager to manage the estate. [p. 25, col. 2; p. 26, col. 1.]

The words appearing in a statute must be given their natural meaning whenever possible, but a restricted meaning must be given in cases where it is clear that such restricted meaning was intended. [p. 28, col. 1.]

(1) 6 O W N 469; 117 Ind. Cas. 452; 13 R D 311; A I R 1929 Oudh 353; Ind. Rul. (1929) Oudh 356.

As from a decision of the Subordinate Judge of Purulia, dated May 31, 1937.

Messrs. S. M. Mullick, R. S. Chatterji and Prem Lall, for the Appellant.

Messrs. P. R. Das, S. C. Mazumdar and Ramanugrah Narain Sinha, for the Respondents.

Manohar Lall, J.—This is an appeal by Mon Mohan Singh, who has been substituted in this appeal in place of the deceased plaintiff, against the decision of the learned Subordinate Judge of Purulia dated May 31, 1937, by which he dismissed the suit instituted by the original plaintiff for a declaration of her title to the entire Raj Jaypur and for recovery of possession thereof together with mesne profits. Various issues of facts and law were raised in the Court below by the defendants who claimed title to remain in possession of the Rajas legatees under a will executed by the late Raja in their favour. But with the exception of one question they have all been decided in favour of the plaintiff. The sole question which remains for determination in this appeal is whether the will executed by the late Raja, who was the last holder of this Raj, in favour of the respondents was a valid will in view of the provisions of the Chota Nagpur Encum. Estates Act (VI of 1876) hereinafter to be referred to as the Act in the following circumstances.

It is common ground that the Raj was taken charge of by the Court of Wards under the provisions of the Court of Wards Act (Act IX of 1879) but subsequently in October 1916, when it was found that Raja Bhikhambar Singh, the last holder of the Raj, had become heavily indebted, the Raj came under the management of the authorities as provided by the Act. The Raja executed a will on September 24, 1919, by which he bequeathed 8 annas share in it to his fourth wife Rani Chandrabali and the remaining 8 annas to the first defendant who has now been found to be the illegitimate son of the Raja in the sense that he was not his real *aurash* son. The Raja died on February 25, 1921, and the Raj which has been found to be governed by the rule of impartibility was released from the charge as an Encumbered Estate on March 6, 1931, and handed over to the two legatees under the will which had been probated by the decision of the High

Court in 1925. Rani Chandrabali, one of the legatees died on March 21, 1934. She was the last survivor of the four wives of the Raja, and, therefore, the plaintiff as the daughter of the second wife instituted the present suit on May 13, 1936, on the ground that the succession then opened out to her, she being the eldest surviving member in the family of the Raja. Defendant No. 2 as the daughter of Rani Chandrabali is in possession of the 8 annas share which had been bequeathed by the will to her mother.

The learned Subordinate Judge upon a consideration of the various provisions of the Act and in particular relying upon the decision of the Calcutta High Court in *Protap Chandra Deo v. Jagadish Chandra Deo* (1), rejected the contention advanced on behalf of the plaintiff that the Raja had no right to make a will. Hence the appeal by the plaintiff.

As has been observed by Viscount Haldane who delivered the judgment of the Board in *Raja of Pachete v. Kumud Nath* (2), the language of the Act is obscure but the preamble is material in order to construe its various provisions. The preamble defines the purpose of the Act which is intitulated "Chota Nagpur Encum. Estate Act" for the "relief of holders of land in Chota Nagpur who may be in debt, and whose immovable property may be subject to mortgages, charges, and liens." The Act by its various sections makes careful provisions for the management of the estate while it is in charge of the authorities appointed under the Act. Section 3 provides that the holder and his heir shall be incompetent to mortgage, charge, lease or alienate their immovable property, or to grant receipts for rents or profits and shall also be incompetent to enter into any contract which may involve them in pecuniary liability. The manager has by s. 4 been vested with large powers of management and for liquidating the debts due from the holder. By s. 8 he is entitled to determine the amounts of principal justly due to the creditors of the holders of the property and to the mortgagees on it. By s. 9 he may enquire into the consideration given for leases or rent free and main-

(1) 40 O L J 321; 82 Ind. Cas. 886; A I R 1925 Cal. 116.

(2) 45 I A 103; 45 Ind. Cas. 827; A I R 1918 P C 41; 46 O I; 16 A L J. 569; 5 P L W 64; (1918) M W N 441; 24 M L T 66; 28 O L J 165; 8 L W 186; 22 C W N 1009; 20 Bom. L R 856; 35 M L J 347 (P O).

tenance grants (the grants were included in the section by an amendment made in 1909) and, regarding leases or grants of a later period if it appears insufficient, cancel them or cause the person so in possession to pay such consideration as the manager may think fit. By ss. 17 and 18 the manager has been granted the power to lease and to mortgage and sell (in the latter cases with the assent of the Commissioner). As observed by Viscount Haldane in *Raja of Pachete v. Kumud Nath* (2).

"After considering the Act as a whole, their Lordships have arrived at the conclusion that the primary intention to be collected from its language is that of providing, by a measure of local application, for the relief of the burdens affecting the land within Chota Nagpur owned by a class of landholders there."

By s. 23 the jurisdiction of the Civil Courts is saved with regard to the determination of the question of succession which it was admitted before us must obviously include testamentary as well as non-testamentary succession.

Such being the purpose of the Act namely, to vest the management of the estate in the manager appointed under the Act with the object of relieving the burdens affecting the land owned by the holder it is provided in the Act that after the holder has been relieved of the burdens the estate shall be restored to him if he is alive at the time or to his heir (see s. 12). But in order to provide against the contingency that the holder may not again burden the estate after it is released to him and thus defeat the very object of the Act provision has been made that if the holder again burdens the estate or attempts to burden it the Collector may with the approval of the Commissioner again resume possession of the estate, but the estate shall thereafter not be restored to the holder even after the new debts have been paid off (see s. 12, proviso).

The question, therefore, is, whether by reason of the words used in s. 3 of the Act namely,

"So long as such management continues the holder of the said immovable property and his heir shall be incompetent to mortgage, charge, lease or alienate their immovable property or any part thereof or to grant valid receipts for the rents and profits arising or accruing therefrom"

the holder is prohibited from making a will. The argument advanced by the appellant was that if the scheme of the Act is carefully examined the holder should be held to be incompetent to make a will firstly because the word 'heir' has been used in

the Act as meaning an heir on intestacy and the word devisee or legatee is not to be found in it and is repugnant to the whole scheme of the Act; secondly because the word 'alienation' used in s. 3 must include alienation by means of a will.

It is needless to refer to the large number of cases cited by the learned Advocate for the appellant which lay down that the owner of an impartible Raj, whether it is governed by the Mitakshara or the Dayabhaga School of Hindu Law, is not debarred from making a will with respect to it, the reason for the rule so laid down being that the power of alienation by gift *inter vivos* carries with it a testamentary power. But the only question is whether the Act contemplates alienations which are prohibited by it as being alienation *inter vivos* or alienations by will also which come into operation only on the death of the testator.

It is argued on behalf of the respondent that although the word "alienation" ordinarily means alienation of all kinds but applying the principle of *ejusdem generis* the general words in s. 3 following specific words and again being followed by specific words compel us to interpret the meaning of the word alienation as being an alienation *inter vivos* only. In my opinion this argument is sound. The preamble of the Act as already indicated is to give relief to the holders whose property may be subject to "mortgages, charges and liens". All these three kinds of alienations are alienations *inter vivos*. The Act by its several provisions already referred to forbids the holder to create these kinds of alienations and empower the manager to cancel these alienations. It will be noticed that the word "lease" is not mentioned in the alienations in the preamble, but as the manager has to administer the estate in the sense of paying off the liabilities and debts due on it he has been given power under s. 9 to enquire into the consideration for the leases and if they appear insufficient to cancel them. If the holder on the other hand during the course of the management creates a mortgage, charge, lien or grants a valid receipt for the rents and profits arising and accruing therefrom these acts of the holder are also avoided by s. 3. The combined effect of the provisions of ss. 3 and 9 as construed in the light of the preamble induces me to hold that the object is that the manager shall have unfettered power of management and control over the property so that he may apply the rents and profits of the land

to speedily relieve the holder's estate from the burdens created on it by the holder before the provisions of the Act were brought into operation for his benefit. The Act does not make the manager the holder of the estate but merely prohibits the holder in his own interest from exercising the acts of ownership so that they may not interfere with the wide powers given to the manager to manage the estate.

It must be admitted that a will speaks from the death of the testator and so long as the testator is alive the will is merely an expression of his intention how the property should devolve on his death. It is, therefore, difficult to see how the mere execution of a will is an alienation of the property—as was sought to be contended at one stage of the argument—when it can in no way affect the possession of the estate by the manager.

But a more serious argument was advanced that in any case a will amounts to an alienation operating at the time of the death of the testator and, therefore, it was argued that where the debts and liabilities due from the holder have not been paid off at that time the will would then amount to a disturbance of the possession of the manager and thus render several provisions of the Act nugatory. But the answer to this contention is that the possession of the manager is not at all affected by the succession to the estate created by the testator. The manager is required by the statute to continue in possession of the estate of the holder so long as the debts and liabilities are not paid off and as provided by s. 12 must give up possession as soon as the debts and liabilities are paid off. The question as to who succeeds to the Raj is a question which can only be determined in the case of a dispute by the civil authorities as specially provided by s. 23. It may be observed that by an amendment made in 1909 the requirement that in all such suits the manager shall be a party has been omitted. It is obviously undesirable that such a serious question should be decided by the revenue authorities.

Again, I do not see what difficulty arises if the word 'heir' is taken to mean an heir on intestacy only as contended for by the learned Advocate for the appellant. It only means that the manager when he comes to relinquish the estate will relinquish it to the heir, and if some body else has a better title as a devisee under a will that question will be determined by the Civil Courts under s. 23 and such a person if he is suc-

cessful will recover possession from the heir. But I am inclined to take the view that as the Act is obscure the word 'heir' has been loosely used in the Act and may be taken to include a person who has a right to succeed in law to the holder. In the present case I notice that the manager relinquished the estate to the legatees and not to the heirs only. No body has suggested that the present suit is incompetent by reason of the fact that the manager has relinquished the estate to the legatees. The question of title is always open to be decided by the Civil Courts in a proper proceeding.

An examination of the terms of s. 12A lead to the same conclusion. By s. 12A (4) the Deputy Commissioner has power to ascertain on enquiry (with a view to resume possession of the estate of the holder with the approval of the Commissioner) if the holder since the estate was restored to him has made or attempted to make any alienation or charge without the previous sanction of the Commissioner. But in the course of the enquiry he is bound to consider and place on record all representations made by the person in whose favour such alienation or charge is made. A devisee under a will has no present right till the testator is dead. Now can such a person make any representation to the Deputy Commissioner? Obviously not. This strongly suggests to my mind that the word alienation in this section means alienation *inter vivos*.

In the case reported in *Protap Chandra Deo v. Jagdish Chandra Deo* (1), a Division Bench of the Calcutta High Court examined the provisions of the Act with great minuteness and came to a similar conclusion and held that the restrictions as to the alienations mentioned in the provisions of the Act referred only to alienations *inter vivos* having present operation and not to testamentary dispositions. It was argued on behalf of the learned Advocate for the appellant that the observations of the learned Judges of the Calcutta High Court were in the nature of *obiter dicta* because the will in that case was executed on May 11, 1905 about three months before the notification was made under the Act vesting his property in the manager. I do not agree that these observations were *obiter dicta* because no matter when the will is made whether before or after the property went in charge of the manager under the Act the alienations would take effect at a time after the estate

had come under the charge of the manager. I respectfully agree with these observations of the learned Judges of the Calcutta High Court.

In *Mohammad Sayeed v. Muhammad Ismail* (3), the question arose for decision whether a will (a gift at the time of death to a Muhammadan) was an alienation falling within the prohibition in section 325A of the Civil P. C. (Act XIV of 1882) which corresponds to Sch. III, para. 11 of the present Code. In the Third Schedule provision is made for execution of decrees by Collector. By s. 68 the Local Govt. may declare by notification in the local official gazette that in any local area the execution of decrees in cases in which the Court has ordered immovable properties to be sold shall be transferred to the Collector. Then by para. 11 of Sch. III it is provided that

"so long as the Collector can exercise or perform in respect of the judgment-debtor's immovable property, or any part thereof, any of the powers or duties conferred or imposed on him by paras. 1 to 10, the judgment-debtor, or his representative-in-interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector".

It will be noticed that the words which impose these restrictions on the judgment-debtor or his representative-in-interest during such time are exactly the same as in the provision of the Act which we are considering.

It was argued before the Division Bench of the Allahabad High Court that a will comes within the term alienate as mentioned in these words but they overruled the contention in these words at p. 235* :

"We are unable to agree with this contention. The word 'alienate' in our opinion was used *ejusdem generis* with the words preceding, namely, mortgage, charge, lease, and manifestly contemplates a transfer which would have present effect and not a devise which can only have operation after the death of the testator. In this view the will was not void and the lady was not incompetent to make it."

This decision in my opinion helps *a fortiori* to construe the terms of s. 3 of the Act where it will be noticed the word alienate follows the words used in the Allahabad decision and is also succeeded by the words "to grant a valid receipt for the rents and profits arising or accruing therefrom" indicating to my mind that the import of the word "alienate" should be construed on the *ejusdem generis* principle.

It may also be pointed out that whenever it is intended to restrict alienation by will or to prevent adoption of a ward it is expressly so provided, for instance in the Mad. Court of Wards Acts s. 34 (c) and (d) of Act I of 1902. in the Ben. Court of Wards Act IX of 1879, s. 61. in the Bom. Act I, of 1905, s. 38 and in s. 37 of the U. P. Court of Wards Act.

After this judgment was prepared I have come across the case of *Hukum Chand v. Ran Bahadur Singh* (4). In that case their Lordships of the Judicial Committee had to construe the provisions of the Act in order to consider what are the position, legal status and rights of the manager appointed by virtue of the Act. Lord Shaw of Dunfermline in delivering the judgment of the Board examined most of the provisions which I have examined above, namely, ss. 2, 3, 10, 12, 13 to 18 and came to the conclusion at p. 213* that

"It is clear that the owner is disabled not only from acts of management but from mortgaging, charging, leasing or alienating the property, whereas on the other hand the manager is vested and alone vested with such powers".

The importance of this observation is that it indicates very strongly that the interpretation which I have endeavoured to put upon the meaning of the word 'alienation' is correct. Again at p. 214* after referring to the effect of ss. 19, 20 and 21 His Lordships observed :

"In the opinion of the Board it is necessary to give very full and careful effect to the position of a manager vested under the Act, in the management of the property of the nature already described. It is, in their Lordships opinion, clear that the owner of such property is expressly disabled from making any effective contract with regard to it and it is equally clear that no other officer, whether political or departmental, could occupy the place, or enjoy or exercise the rights, of the disposal of the estate the management of which estate is vested in the manager and the manager alone."

This passage again shows that the Act is prohibiting the owner from making any effective contract with regard to his property. The execution of a will by the owner is in no sense any contract with regard to the property.

For these reasons I agree that the learned Subordinate Judge has taken a correct view and hold that the Raja was not incompetent to make the will of Feb-

(4) 51 I A 208; 80 Ind. Cas. 841; A I R 1924 P O 156; 3 Pat. 625; 34 M L T 120; (1924) M W N 710; 47 M L J 562; 22 A L J 935; 5 P L T 639; 21 L W 1; L R 5 A (P O) 190; 29 O W N 342; 3 Pat. L R 137 (P O).

(3) 33 A 233; 8 Ind. Cas. 834; 7 A L J 1176.

*Page of 33 A.—[Ed.]

*Pages of 51 I. A.—[Ed.]

August 25, 1921, by reason of any prohibition in the Act.

Some argument was finally advanced on the question of mesne profits. The learned Subordinate Judge dealt with this matter under issue No. 10. He found that after the estate was released the legatees have been in possession and that the defendant No. 1 and the mother of defendant No. 2 who died in March, 1934, got their name mutated in the land registration department and they are in possession since then. The plaintiff claimed mesne profits from March 21, 1934 from the defendants when the succession opened out to the plaintiff, is their view. But as the plaintiff has not been able to establish his title no enquiry into the amount of mesne profits can be gone into in these proceedings. I would dismiss the appeal with costs.

Harries, C. J.—I agree. It was conceded by Counsel for the appellant in this case that in the events that had happened Raja Bhikhambar Singh, the last holder of the Raj, could have disposed of the property by will but for the provisions of the Chota Nagpur Encum. Estates Act. It was however, strenuously argued that Act deprived the Raja of the power to make a will and that the will which he made was, therefore, invalid.

It is to be observed that the Act does not expressly deal with testamentary power; but it was urged that the Raja's power to make a will was taken away by s. 3 of the Act. That section provides that when the management of an encumbered estate is taken over under s. 2 of the Act the holder of the Estate and his heir shall be incompetent to mortgage, charge, lease, or alienate their immovable property or any part thereof, or to grant valid receipts for the rents and profits arising or accruing therefrom. It was contended that this provision expressly prohibited all forms of alienation and that it covered a devise of property by will. There can be no doubt that a devise operates as an alienation of the property at the testator's death; but it was urged on behalf of the respondents that this provision only prohibits alienation during the life-time of the holder of the encumbered estate. The words appearing in a statute must be given their natural meaning whenever possible, but a restricted meaning must be given in cases where it is clear that such restricted meaning was intended. The word "alienate" in this provision follows the words "shall be incompetent to mortgage, charge, lease" immediately following

them must be construed as alienation *inter vivos*. Following the phrase "alienate their immovable property or any part thereof" follow these words "or to grant valid receipts for the rents and profits arising or accruing therefrom." This latter provision applies to acts *inter vivos* because receipts for rents and profits can only be granted by the person who is the actual landlord or holder of the land. It will, therefore, be seen that the word "alienate" appears in a provision which otherwise applies to acts done in the lifetime of the holder or his heir. The word "alienation" also appears in s. 12-A of the Act, which provides for the continuance of certain disabilities after the restoration of the property to the owner thereof. Sub-s. (1) provides that in which circumstances the owner shall not be competent without the previous sanction of the Commissioner (a) to alienate such property, or any part thereof, in any way, or (b) to create any charge thereon extending beyond his life-time. The prohibition here is against alienation of the property in any way, and at first sight that is wide enough to cover not only alienations *inter vivos* but alienations by will. However, on consideration of the other subsections of s. 12A, it appears tolerably clear that the prohibition against alienation in this section is directed against alienations *inter vivos*. The prohibition is against alienation without previous sanction of the Commissioner. As a devise of property does not operate as an alienation until the date of death, it is difficult to understand how previous sanction of the Commissioner could be obtained for such alienation. It is true that the Commissioner could be asked for his sanction to a proposed alienation by will; but such alienation might never take effect by reason of the revocation of the will or a transfer of the property *inter vivos*. Sub-s. (4) of s. 12-A provides that the Deputy Commissioner may, on obtaining information that the owner of the estate has made or attempted to make any alienation in contravention of that section, conduct an inquiry, and in that inquiry he has to hear any representations made by the holder and by the person in whose favour such alienation is alleged to have been made. This, in my view, suggests that the alienation referred to in the section is an alienation *inter vivos*. The devisee has no interest in the property until the death of the testator, and the inquiry contemplated in sub-s. (4) could not be made upon the

Deputy Commissioner obtaining information that the holder has made a will. There would be no person in whose favour an alienation had been made until the death of the testator and then it would be impossible for the Deputy Commissioner to hear any representation made by the holder of the estate who made the will. Sub-section (5) of s. 12A provides that if after inquiry the Deputy Commissioner is satisfied that the holder has made or attempted to make an alienation, he may request that the provisions of the Act be re-applied to the holder, and the provisions of the Act may be so applied and the manager re-appointed. This sub-section also, in my view, contemplates an alienation *inter vivos*, because a will does not operate till death, and then it would be too late to re-appoint the manager and vest in him the property of the holder. In my judgment the words "alienate" and "alienation" used in s. 12A mean alienation *inter vivos*, and in my view the same meaning must be given to the word "alienate" in s. 3 of the Act.

The preamble of the Act sets out its object and purpose and that is to relieve holders of land in Ohota Nagpur who may be in debt, and whose immovable property may be subject to mortgages, charges and liens. The Act divests the holder of the property for the time being of all powers of management and vests the same in a manager appointed under the Act. The holder of the encumbered estates still remains the owner, but he cannot interfere with the management. To give the manager complete freedom of management, it was essential to take away from the holder all powers of mortgaging, leasing, charging or selling the land. Otherwise, it would be impossible for the manager to arrange satisfactorily for the payment of debts. A devise in a will could not possibly affect the management of the estate as it would not take effect until the death of the holder. Section 12 provides that the manager may continue in possession after the death of the holder until all the debts are paid, and then he must restore the property to the heir. It was urged that as the heir is mentioned in this section it is clear that the Act contemplated that the estate should in every case go to the heir, and such could not happen if the holder of the encumbered estate retained his testamentary capacity. It is true that the word "heir" appears in a number of sections in the Act; but, in my view, there

is nothing to suggest that the legislature intended that in every case in which an encumbered estate was taken over under the Act the heir and the heir alone should be the person entitled to it on the death of the holder. Section 23 of the Act makes it clear that neither the manager, Deputy Commissioner or Commissioner have anything to do with deciding claims to succession and the jurisdiction of the Courts of Ohota Nagpur in respect thereof is not affected by the act. It may be that after the debts have been paid the Deputy Commissioner must restore the property to the heir; but that does not mean that the heir would be entitled to it as against a devisee under a valid will. The various sections of this Act were very minutely examined by a Bench of the Calcutta High Court in *Pratap Chandra Deo v. Jagadish Chandra Deo* (1). That Bench came to the conclusion that a will executed by an owner of an impartible estate at the time when his estate had not come under the Encum. Estates Act, is valid though at the time of his death the estate had not been released from management under that Act. If the Act takes away the holder's power to make a will, it must also invalidate a will made before the estate of the holder was taken over under the Act. As a will speaks from death s. 3 of the Act would invalidate wills made either before or after the Act came into operation in cases where the holder died whilst the estate was still under management contemplated by the Act. I agree with Manohar Lal, J. that the case in *Pratap Chandra Deo v. Jagadish Chandra Deo* (1), is a direct authority in favour of the validity of the will, and, in my view, should be followed.

Words very similar to those appearing in s. 3 of the Act were given a restricted meaning in *Muhammad Sayeed v. Muhammad Ismail* (3), in which it was held that the restriction against alienation contained in what is now para. 11 (1) of the Third Schedule to the Civil P. C. meant alienation *inter vivos*. That schedule deals with execution by Collectors and provides that the Collector may manage the property for a period to enable decrees for payment of money to be liquidated. To prevent interference in such management on the part of the judgment-debtor para. 11 (1) provides:

"So long as the Collector can exercise or perform in respect of the judgment-debtors immovable property, or any part thereof, any of the powers or duties conferred or imposed on him by paras. 1 to 10, the judgment-debtor or his representative-in-interest

shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, not shall any Civil Court issue any process against such property or part in execution of a decree for the payment of money."

In this paragraph "the judgment-debtor or his representative-in-interest" is made incompetent to mortgage, charge, lease or alienate, whereas in s. 3 of the Encum. Estates Act the holder or his heir is made so incompetent. A Bench of the Allahabad High Court held that the prohibition against alienation in this paragraph referred to alienation *inter vivos* and could not prevent the judgment-debtor making a will which would operate as an alienation at the date of his death. It is true that it is often dangerous to apply a construction given to a section in an Act to a similar section in a different Act. However, the provisions of the Third Schedule are in many ways similar to those of the Encum. Estates Act. Both provide for a period of management of an estate to enable debts to be paid without the destruction of the estate. The purpose of para. 11 of the Third Schedule is similar to the purpose of s. 3 of the Encum. Estates Act, and in my view the reasoning of the learned Judges in the Allahabad case applies equally to the facts of this case. Further there is an added reason in the present case for restricting the meaning of the word "alienate" in s. 3 of the Encum. Estates Act, because it appears immediately after words which refer to alienations *inter vivos* and is immediately followed by words which clearly relate to other acts which can only be done in the life time of the holder or his heir. That being so, it must, in my view, be held that the prohibition against alienation in the Chota Nagpur Encum. Estates Act is a prohibition against alienation *inter vivos* and does not affect the testamentary power of the holder. That being so, the will made by Raja Bhikhambar Singh was not invalid and the defendants, who were the beneficiaries under the will, are entitled to the property.

For these reasons I agree with Manohar Lal, J., that this appeal should be dismissed with costs.

s.

Appeal dismissed.

PATNA HIGH COURT

Criminal Revision No. 206 of 1941

March 25, 1941

AGARWALA, J.

MANGAL SINGH AND OTHERS

—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), s. 341—Wrongful restraint—Complainant on tumtum—Accused obstructing it and preventing complainant from proceeding on his way—Offence under s. 341, held committed.

Where the complainant was proceeding on a road on tumtum and by obstructing the tumtum the accused prevented the complainant from proceeding on his way and assaulted him:

Held, that the facts constituted the offence of wrongful restraint under s. 341, I. P. C. *Jaggeshwar Das v. Koylash Chandra Chatterjee* (1) and 155 Ind. Cas. 444 (1) (2), distinguished.

Cr. Rev. App. against an order of the Appellate Magistrate, Muzaffarpur, dated January 15, 1941.

Mr. G. P. Shahi, for the Petitioners.

The Govt. Pleader, for the Opposite Party.

Order.—The petitioners have been convicted of offences under ss. 323 and 341 of the I. P. C., and sentenced to pay a fine of Rs. 20 each in respect of the conviction under s. 323 and to undergo a month's rigorous imprisonment in respect of the conviction under s. 341.

The facts were that the complainant, who is a Pleader living in the same village as the petitioners, was proceeding on a road on tumtum when the petitioners appeared, stopped the tumtum, abused the complainant and assaulted him with umbrella, slippers and slaps. In the course of this occurrence they wrongfully stopped the complainant for about 15 minutes. The evidence with regard to this occurrence has been found by both the Courts below to be reliable; but it is contended in this Court that the acts committed do not establish a charge of wrongful restraint. It is contended that what was restrained was the tumtum and not the complainant. Reference was made to two cases which, however, do not support this contention. In *Jaggeshwar Das v. Koylash Chandra Chatterjee* (1) the facts were that the complainant had loaded certain goods upon a cart for the purpose of removing them when the accused came and unyoked the bullocks and turned the goods off the cart. It was held on these facts that the accused could not be convicted under s. 341. In *Durgapada Chatterjee v. Nil-*

(1) 12 O 55; 10 Ind. Jur. 297.

mony Ghosh (2) the facts were that one Kalipada purchased paddy which was loaded on the carts of the complainant. The accused prevented these carts from proceeding along the public way with the object of compelling the payment of certain dues to the landlord of the village. There is no evidence in that case that the complainant or anybody else was on the cart at the time they were obstructed. In the present case the complainant was on the tumtum and by obstructing the tumtum the accused prevented the complainant from proceeding on his way. These facts constitute the offence of wrongful restraint.

With regard to the sentence, however, I would maintain the sentence of fine under s. 323 and change the sentence of imprisonment passed for the conviction under s. 341 to a fine of Rs. 20 each or in default simple imprisonment for one week each.

s. *Order accordingly.*

(2) 39 C W N 143; 155 Ind. Cas. 444 (1); A I R 1935 Cal. 252; 60 C L J 472; 36 Cr. L J 740 (1); (1935) Cr. Cas. 334; 7 R C 586.

RANGOON HIGH COURT

First Appeal No. 29 of 1940

May 29, 1940

MYA BU AND MOSELY, JJ.

U MIN SIN—APPELLANT

versus

KO KYE AND ANOTHER—RESPONDENTS

Transfer of Property Act (IV of 1882), s. 107—Rice mill leased for one month—If after expiry of lease unmilled paddy was left, fixed monthly rent was payable for five years—Lease held for over one year—Registration Act (XVI of 1908), s. 49—Lessees admitting lease but pleading inadmissibility of lease-deed for want of registration—Court, if can go behind lease and determine validity—Plea taken by one of lessees—Lease found invalid—It is invalid against all lessees—Admission—Defendant admitting execution of document but pleading it to be of no effect—It is no admission of liability.

Where a lease of a rice mill is executed for one month with a condition that if there was paddy left unmilled at the expiry of the lease a fixed monthly rent would be paid every month for five years, the lease is a lease for over one year and requires registration.

Where the lessee admits the lease but pleads that the lease deed is inadmissible in evidence for want of registration, the Court is fully entitled to go behind the lease and determine its validity. 35 Ind. Cas. 18 (4), relied on. 49 Ind. Cas. 278 (5), referred to.

And where such a plea of inadmissibility is taken only by one of the lessees and the lease is found to be invalid, it is invalid against all the lessees.

An admission by a party that he had executed the document on which the plaintiff relies, accompanied by a pleading that the document is of no effect, is no admission at all of the defendant's liability.

F. A. against the decree of the District Court, Pyinmana, dated December 16, 1939

Mr. P. K. Basu, for the Appellant.

Messrs. E. Hay and K. N. Dangari, for Respondents Nos. 1 and 2, respectively.

Moseley, J.—This appeal can be shortly disposed of. The plaintiff-appellant, U Min Sin, sued the two defendant-respondents, Ko Kye and his son E Maung, on, it was said, two agreements of lease of December 21, 1935 and January 2, 1936. The first one was a lease of a rice mill for one month from January 15, 1936 to February 15, 1936 at Rs. 350 for the month. The second document recited that if there was paddy left unmilled on February 15, Rs. 350 monthly rent would be paid every month for five years. The lease then was a lease for over one year and required registration: *vide* s. 107, T. P. Act. In a previous suit (No. 1 of 1937 of the Sub-Divisional Court) the plaintiff obtained a decree against the defendants for nine months' rent, Rs. 1,950. The present suit was filed in the District Court and was for Rs. 8,750, rent for 25 months from October 15, 1936 to November 14, 1938.

The first defendant in his written statement admitted the allegations in para. 1 of the plaint, that is to say that he hired the mill on those two agreements. His defence was that he had given up the mill at an oral compromise relinquishing his claim to compensation against the plaintiff for not allowing night work. How defendant No. 1's Advocate, an experienced Advocate, Mr. S. Roy Chowdhury, came to overlook the fact that Ex. B was unregistered I am totally at a loss to conceive. However this defect was remedied in the written statement of defendant No. 2 filed by a different Advocate, U Hla Maung. This defendant merely said as regards these leases that he was assured that he would be under no liability and so signed them. In para. 8 he said that these leases or deeds of agreement were inadmissible in evidence. What he obviously meant by this is that he executed the leases but that they were bad leases for lack of registration and that the plaintiff could not sue on them. The diary of March 15, 1939 recites that the Advocate for the parties were present, (I presume this means all the Advocates were present), when issues were framed, but for some extraordinary reason the Judge failed to frame an issue as to whether the leases were valid or not. When it came to judgment, however, it appears that this point was raised in argument for the

defendants, and it also appears from the heading of the judgment that Mr. Chowdhury was the only Advocate who argued the case for the defendants, so the point must presumably have been raised by Mr. Chowdhury. The Judge decided, *inter alia*, that the suit for rent did not lie on this unregistered lease, Ex. B.

It is now argued before us that the lease or leases, having been admitted, need not have been proved. This might have been so had defendant No. 1 only been concerned and had the point not been taken up for him and had the leases not been proved, but the leases were actually sought to be proved on behalf of the plaintiff. The rulings cited in this connection are *Maung Kat v. Maung So* (1), *Maung Wala v. Maung Shwe Gun* (2), at p. 475 and *Mallappa v. Matum Nagu Chetty* (3). Per contra, I note *Kotamreddi Septamma v. Krishnaswamy Row*, 35 Ind. Cas. 18 (4), where a Bench of the Madras High Court had previously held in the case of an unregistered lease that the Court should not act on admissions made by parties in their pleadings when the documents whose execution or contents are thus admitted are not receivable in evidence and when the admissions are accompanied by denial of liability on the ground of such defect. This appears to me to go for granted, because an admission by a party that he had executed the document on which the plaintiff relies, accompanied by a pleading that that document is of no effect, is no admission at all of the defendant's liability. But it was also held (Per Sadasiva Aiyar, J.):

"If the legislative provision (here s. 49, Regis. Act) declaring such a document to be inadmissible in evidence or ineffectual for certain purposes is based on reasons of public policy, a Court ought to go behind the admissions in the pleadings and refuse to act on the admitted facts in favour of either party."

This ruling is not cited in *Mallappa v. Matum Nagu Chetty* (3); see also *Muniappa Chettiar v. Vallachamy Munnadi*, 49 Ind. Cas. 278 (5). In my opinion, the trial Court, which could and ought to have framed a formal issue as to the validity of the document was fully entitled to go into its validity in view of the pleadings and to come to the decision it did, which was obviously a correct decision. If the document is

- (1) (1897-01) 2 U B R 379.
- (2) 1 R 472 (475); 82 Ind. Cas. 610; A I R 1924 Rang. 57; 2 Bur. L J 188.
- (3) 42 M 41; 48 Ind. Cas. 158; A I R 1919 Mad. 833; 35 M L J 555; 8 L W 522; (1918) M W N 719; 24 M L T 400.
- (4) 35 Ind. Cas. 18; A I R 1917 Mad. 718; 31 M L J 240; (1916) 2 M W N 33; 20 M L T 44.
- (5) 49 Ind. Cas. 278; A I R 1919 Mad. 469; (1918) M W N 853; 25 M L T 19; 9 L W 5.

found to be invalid against one party it was rightly held to be invalid against both. As regards the contention of *res judicata*, it having apparently been held in the previous suit that Ex. B was a valid lease, it is only necessary to point to the words of s. 11, Civil P. C. The Sub-Divisional Court was not competent to come to a finding in this suit subsequently filed in the District Court which was for subsequent rents of the value of Rs. 8,750. The suit was one for rent, not for damages for use and occupation. This appeal will be dismissed with costs.

Mya Bu J.—I agree not only in the decisions of my learned brother but also in the expression of amazement at the failure of Mr. Roy Chowdhury to raise a question as to the validity of the lease sued upon in the written statement of his client, defendant No. 1.

D.

Appeal dismissed.

MADRAS HIGH COURT

Criminal Revision Case No. 257 of 1940
Criminal Revision Petition No. 246
of 1940

October 29, 1940

LAKSHMANARAO, J.

THOONGA VEDAN *alias* CHINNA
NAICKEN AND OTHERS—PETITIONERS
versus

PERUMAL GOUNDAN AND OTHERS—
RESPONDENTS

Criminal Procedure Code (Act V of 1898), s. 147—Costs—No order as to costs made in decision under s. 147—Subsequent order for costs cannot be made.

Where no order as to costs was made in the decision under s. 147, Criminal P. C., the award of costs by a subsequent order cannot be made.

Cr. R. C. and Cr. R. P. under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate, Namakkal, dated March 20, 1940, and passed in M. C. No. 56 of 1939.

Messrs. V. T. Rangaswami Iyengar and T. R. Ramachandran, for the Petitioners.

Messrs. K. S. Jayarama Iyer and S. Arunachalam, for the Respondent.

Mr. A. S. Sivakaminathan, for the Public Prosecutor, for the Crown.

Order.—There was no order as to costs in the decision under s. 147 of the Criminal P. C., and the award of costs by a subsequent order cannot be supported. The revision petition is therefore allowed and the order as to costs is set aside.

N.S.

Petition allowed.

MADRAS HIGH COURT

Civil Revision Petition No. 592 of 1939

August 15, 1940

WADSWORTH J.

CHIMAKURTI SESHAYYA—PETITIONER
versus

Sait HIRACHAND CHUNILAL FIRM,

REPRESENTED BY UTTAMOHAND

—RESPONDENT—

Provincial Insolvency Act (V of 1920), ss. 72 (2) 75—Before directing prosecution, notice to insolvent; if essential—Decision to prosecute—Insolvent has right of appeal—Court's refusal to prosecute on creditor's application—Creditor, if has right of appeal—Power to prosecute under s. 72 (2)—Purpose and scope of—Bar of res judicata against Court—Insolvency Court, if can reconsider its decision not to prosecute in light of second application by creditor—Court prosecuting undischarged insolvent under s. 72 (2)—Before dismissal of appeal, insolvent obtaining discharge—Proceedings against him, if made void—Civil Procedure Code (Act V of 1908), s. 115—Mere question whether Court's order is wise or unwise cannot be gone into.

Substantially the provisions of s. 72 (2), Prov. Insol. Act, are analogous to those of s. 476, Criminal P. O., and the Insolvency Court should ordinarily give notice to the insolvent before directing his prosecution.

An insolvent has a right of appeal similar to that provided by s. 476-B, Criminal P. O., against the order of the Court directing his prosecution.

Where the Court refuses to prosecute the insolvent under s. 72, Prov. Insol. Act on a creditor's application it is doubtful whether the creditor has a right of appeal.

Under s. 72 (2), there is a power given, not to the interested party, but to the Court itself on being satisfied that an offence of the kind contemplated had been committed, to send the case to the Magistrate. This is a power conferred not in the interests of this or that party, but in order that the Court itself may prevent an offence against the insolvency law. Hence there can be no question of a bar of *res judicata* operating against the Court. The Insolvency Court can, therefore, consider a decision of its own not to prosecute in the light of a second application from the creditor, although the Court, will not ordinarily prosecute on the strength of information on which it has previously declined to act.

Where the Insolvency Court prosecutes an undischarged insolvent under s. 72 (2), and before the dismissal of his appeal against the prosecution the insolvent obtains his discharge, the discharge cannot render the proceedings against the insolvent void. 151 Ind. Cas 1026 (4), distinguished.

A mere question whether the order of the Court is wise or not cannot be gone into in revision.

O. R. P. to revise an order of the District Court, Guntur, dated March 7, 1939.

Mr. K. Kameswara Rao, for the Petitioner.

Mr. K. Bhimasankaram, for the Respondent.

Order:—This civil revision petition is preferred against a decision in appeal against an order directing the prosecution of an

insolvent for an offence under s. 72, Prov. Insol. Act. A preliminary objection was taken by the respondent on the ground that the appeal itself was incompetent. The objection is based on English decisions, *vide In re Marsden* (1), and *Ex parte Brown In re Appleby* (2), where it is held that under the corresponding provisions of the English Bankruptcy Act, no notice should be given to the bankrupt before directing the trustee to prosecute for the offence of obtaining credit without disclosing the fact of bankruptcy and no right of appeal exists in favour of the person to be prosecuted. It seems to me that the above decisions throw very little light on the question which I have to decide. The provisions of the English Bankruptcy Act, though similar, are not identical with those of the Prov. Insol. Act and the main reason, which influenced the English Courts in denying a right of appeal or a right of notice to an insolvent are that the concession of such rights would be contrary to English criminal procedure and would imply that the person to be prosecuted had to state his defence and submit to decisions in appeal before his case was heard in the Criminal Court. It cannot be urged that such a procedure is foreign to criminal procedure in India.

Substantially the provisions of s. 72 (2), Prov. Insol. Act, are analogous to those of s. 476, Criminal P. O., and there is nothing unreasonable in supposing that the insolvency Court should ordinarily give notice to the insolvent before directing his prosecution or in holding that the decision to prosecute is a decision against which the aggrieved party has a right of appeal similar to that provided by s. 476B, Criminal P. O. I note that s. 75, Prov. Insol. Act, gives a right of appeal to a person aggrieved not merely by an order made but by a decision come to. When the Court decides to prosecute an insolvent for an offence under s. 72 of the Act, does it not make a decision which aggrieves the person to be prosecuted? Whether the creditor who moves the Court to prosecute has a grievance is another matter. There is a Nagpur decision reported in *Pursingh v. Aladadkhan* (3), to the effect that he has no right of appeal. But it is

(1) (1876) 2 Ch. D 786; 45 L J K B 141; 34 L T 700; 24 W R 714.

(2) (1876) 2 Ch. D 799; 45 L J B K 115; 35 L T 10; 24 W R 750.

(3) A I R 1933 Nag. 9; 41 Ind. Cas. 350; 28 N L R 286; Ind. Rul. (1933) Nag. 59.

unnecessary for me to go into that question though it may be noted as a matter of interest that in the present case there had been a prior refusal to prosecute reversed on appeal at the instance of the creditor. However that may be, I hold that there was a right of appeal to the District Judge by the insolvent against the order of the Court directing his prosecution. It follows therefore that the correctness of the dismissal of the appeal by the District Judge can be canvassed in revision.

Two main grounds have been urged in revision. The first is that the application of the creditor is barred by *res judicata* by reason of the previous decision. On September 6, 1935 the creditor moved the Court to prosecute the insolvent for obtaining credit without disclosing that he was an undischarged insolvent. The then subordinate Judge refused to prosecute, directing the creditor first to establish the fact of his debt in a Civil Court. The creditor appealed to the District Judge. As I have indicated, it is doubtful whether such an appeal lay. Nevertheless, it was entertained and the District Judge took the reasonable view that the Subordinate Judge should himself have found out whether there was a *prima facie* case on the facts before refusing to order prosecution. The matter was therefore remanded to the Subordinate Judge who was directed to hold an inquiry into the facts. On the day when the inquiry should have been commenced the creditor was absent and on the insolvent denying his indebtedness, the petition was dismissed. An application for restoration was made by the creditor, but was rejected with an observation that perhaps it is open to the creditor to file a fresh petition. The creditor did file a fresh petition and the Subordinate Judge held that there was no bar by reason of the previous order which was one for default. The reasoning of the learned Subordinate Judge is perhaps defective, but his conclusion is, I think, sound. It was upheld by the District Judge in appeal.

The point, as I understand it, is not whether the previous application was dismissed in default or dismissed on the merits. Under s. 72 (2), there is a power given, not to the interested party, but to the Court itself on being satisfied that an offence of the kind contemplated had been committed, to send the case to the Magistrate. This is a power conferred not in the interests of this or that party, but in order that

the Court itself may prevent an offence against the insolvency law. Presumably a creditor who has been wrongfully induced to give credit could himself complain to the Magistrate under s. 72 (1) without obtaining the leave of the insolvency Court. We are not therefore concerned with the question whether there is a bar of *res judicata* against the individual who gives the information on which the insolvency Court acts, but whether the Court should or should not reconsider a decision of its own not to prosecute in the light of further information. There can be no question of a bar of *res judicata* operating against the Court. The most that can be said is that the Court cannot prosecute for an offence of which an accused person has already been acquitted and the Court will not ordinarily prosecute on the strength of information on which it has previously declined to act. In the present case owing to the absence of the person who laid the information, the Court declined to proceed with the prosecution. On the subsequent occasion, the Court had before it far more materials and reasonably came to the conclusion that a prosecution was desirable in the interests of the maintenance of the insolvency law. It is no longer a question whether the creditor should succeed or the insolvent should succeed. It is the question whether the Court had materials before it which placed upon it a duty to take action. In such circumstances no question of *res judicata* arises and if it is a mere question whether the order of the Court is wise or unwise, it is not a matter that should be gone into in revision.

The second contention is based on a decision of the Calcutta High Court reported in *W. D. Jorden v. Mahadeo Lal and Bros.* (4), to the effect that after an insolvent has obtained a discharge, the insolvency Court has no jurisdiction to direct prosecution under s. 72 (2), Prov. Insol. Act. Assuming that this decision is correct—though there are criticisms which might be urged against the reasoning with which it is supported—it has to my mind no bearing on the present case. When the insolvency Court directed this complaint to be filed, the present petitioner was an undischarged insolvent over whom the insolvency Court certainly had jurisdiction. The complaint therefore was filed by the Court empowered to institute proceedings.

(4) 61 O 605; 151 Ind. Cas. 1028; A I R 1934 Cal. 764; 59 C L J 399; 7 R O 201.

When the insolvent appealed to the District Judge, there was presumably a complaint pending before the Magistrate and that complaint had been regularly instituted. During the pendency of the appeal before the District Judge, the insolvent obtained his discharge. It is argued that the judgment of the District Judge dismissing the appeal amounts to an order under s. 72 (2), Prov. Insol. Act, directing the filing of a complaint and that having been passed after the discharge of the insolvent, that order is without jurisdiction. I cannot accept this contention. We are not here concerned with a decree of the trial Court becoming merged in the decree of the Appellate Court. We are concerned with the act of the insolvency Court in filing a complaint which act is subject to review by an Appellate Court under s. 75, Pr v. Insol. Act. It cannot be contended that when the Appellate Court declines to stop the proceedings instituted by the insolvency Court, it is for the first time instituting those proceedings. The proceedings have already been instituted, and all that has happened is that an attempt to get them stopped has failed. They were instituted when the Court directing them had jurisdiction and the subsequent discharge of the insolvent before the appeal was dismissed cannot make those proceedings void. In the result, therefore, I dismiss the civil revision petition with costs.

N.D.

*Petition dismissed.***CALCUTTA HIGH COURT**

Appeal No. 213 of 1939 (S. M. A.)

MAY 30, 1940

EDGLEY, J.

LAKSHMI NARAYAN KOLLEY

—JUDGMENT-DEBTOR—APPELLANT

versus

LALIT MOHAN BHATTACHARJEE,
SECRETARY CHATRA-SERAMPORE
CO-OPERATIVE CREDIT SOCIETY

LTD.—DECREE-HOLDER—RESPONDENT

*Co-operative Societies Act (II of 1912), s. 43—
Rules under, r. 22—Award under—Date of award—
Execution application within three years from date
of communication of award to party, is within
time.*

In the case of an award made under r. 22 of the rules framed under the Co-operative Societies Act. The date of the award should be regarded as the date on which such award is officially communicated to the person or persons affected thereby and not the date of the decision of the arbitrator. An execution application filed within three years of the

date on which award is communicated to the party will be within time. *Sreenath Chatterjee v. Kytash Chunder* (1) and *Dutto Singh v. Dosad Bahadur* (2), applied.

A. from the appellate order of the Sub-Judge, First Court, Hooghly, dated June 3, 1939.

Messrs. *Gopendra Nath Das* and *Lala Hemanta Kumar*, for the Appellant.

Messrs. *Binode Charan Deb* and *Sailendra Nath Mitra (Jr.)*, for the Respondent.

Judgment.—The judgment-debtor is the appellant in this case and the decree-holder is the Chatra-Serampore Co-operative Credit Society Ltd. It appears that in 1932 a dispute arose between the judgment-debtor and the Co-operative Credit Society, which was referred to the Registrar under the provisions of r. 22 of the statutory rules framed under s. 43, Co-operative Societies Act (II of 1912). The Registrar referred the matter to the Assistant Registrar who on May 31, 1932 recorded an order in favour of the Society which entitled the latter to realize the sum of Rs. 114-12-0 from the judgment-debtor together with interest at the rate of 9½ per cent. per annum. No steps appear to have been taken to communicate this award officially to any of the persons affected thereby until October 13, 1935, when it was forwarded to the Society with the Assistant Registrar's letter No. 13449-B of that date. Admittedly, awards under r. 22, Co-operative Societies Rules, are executable as decrees and this being the case, the provisions of Art. 182 (1), Lim. Act, will apply. It therefore follows that the Society should have applied for execution within three years of the date of the award. Actually they instituted execution proceedings on October 26, 1938, which was the re-opening date after the Civil Court vacation of 1938. In these circumstances, the execution proceedings taken by the Society are within time if limitation runs from the date of the Assistant Registrar's letter, by which the award was communicated to the Society, but will be out of time if limitation is held to run from the date of the order which was made on May 31, 1932. The question therefore which requires consideration is whether the date of the award should be deemed to be the date of the decision of the arbitrator or the date on which such decision is communicated to the party concerned.

Rule 22 of the rules under the Co-operative Societies Act, which prescribes the procedure to be followed in connexion with

matters of this sort, does not provide that the decision of the Registrar or the award of an arbitrator appointed under the rule should be communicated to any of the parties directly interested in that decision or award. But obviously it must be taken to be the intention of the framers of the rules that a decision of this nature should be communicated to the parties affected thereby. In this connexion, it may be noted that there is also no provision in the rules contained in Sch. II, Civil P. C., that, in connexion with an arbitration without the intervention of the Court, an award should actually be communicated to the parties concerned. In such matters, limitation as regards the filing of the award, runs from the date of the award under Art. 178, Lim. Act, and it has been held by this Court in *Sreenath Chatterjee v. Kylash Chunder* (1) and *Dutto Singh v. Dosad Bahadur* (2), that in such a case the date of the award does not mean the date written therein, but the time when it is handed over to the parties, so that they may be able to give effect to it. Similarly, in connexion with the matter with which we are now dealing, it is clear that the party in whose favour an award has been made, cannot give effect to it until it has been communicated to him, and, in my view, the principles laid down in the above mentioned cases should be applied in calculating the period of limitation for executing as a decree an award made under r. 22 of the rules framed under the Co-operative Societies Act. In this view of the case, the date of the award should be regarded as the date on which such award is officially communicated to the person or persons affected thereby. That date in the present case was October 10, 1935. As the last date for taking execution proceedings under Art. 182 (1), Lim. Act, fell within the Civil Court vacation of 1938, the requisite application for execution was made on the re-opening date, viz., on October 26, so it must be regarded as within the time. The decision of the lower Appellate Court is, therefore, correct and it will be affirmed. This appeal is consequently dismissed. I make no order with regard to costs. Leave to appeal under cl. 15, Letters Patent, is refused.

D

Appeal dismissed.

(1) 21 W R 248.

(2) 9 C 575.

MADRAS HIGH COURT

Civil Revision Petition No 1723 of 1938

August 26, 1940

WADSWORTH AND PATANJALI SASTRI, JJ.

PALANI GOUNDAN—PETITIONER

versus

MUTHUSWAMI GOUNDAN—RESPONDENT

Madras Agriculturists Relief Act (IV of 1938), ss. 11, 19—Interest on costs, if excluded from scaling down operation.

There is nothing in the Act which excludes from the scaling down operation interest on costs. There is nothing in s. 19 which is inconsistent with the view that the appropriation therein provided for was intended to be only in respect of the principal sum for costs or that this provision had any other object than to give effect to the provisions of s. 11. When there is a decree for costs which forms part of a decree being scaled down under s. 19, the provisions of the decree relating to interest on costs should be amended by the process laid down in ss. 8 and 9.

O. R. P. to revise the order of the Sub-Judge, Coimbatore, dated November 15, 1938.

Mr. S. Ramachandra Ayyar for Mr. M. Krishna Bharathi, for the Petitioner.

Mr. A. C. Sampath Iyengar, for the Respondent.

Wadsworth, J.—The petitioner was defendant No. 3 in a mortgage suit and he applied under ss. 8 and 19, Mad. Act IV of 1938, to scale down the decree. The learned Subordinate Judge has given decree for the principal amount of the debt with interest at 6 per cent. from October 1, 1937 and also for Rs. 1,855-3-0 for costs and has provided that this amount awarded for costs shall carry interest at 6 per cent. from the date of the decree which is March 12, 1932. Petitioner seeks to revise this order by applying to the decree for costs the scaling down provisions of the Act so as to cancel the interest as on 1-10-1937. There is nothing in the Act which excludes from the scaling down operation interest on costs. The principal sections dealing with costs are ss. 11 and 19. Section 11 states that where a debt includes any sum decreed as costs by any Court or sums lawfully expended by a mortgagee or other person in order to preserve the property mortgaged such sum or sums shall be recoverable in addition to the sum recoverable under the provisions of ss. 8 and 9. We doubt whether this section was intended to safeguard not only costs but interest thereon, for the section couples costs with sums recoverable as having been lawfully expended by a mortgagee. Such sums would normally be added to the principal amount of the mortgage and would bear

interest at the contract rate. If it had been the intention to exclude interest on such sums due to the mortgagee from the scaling down provisions, surely there would have been an express indication of the fact. We are constrained to the view that there was no intention to safeguard interest on sums payable to a mortgagee and if there was no such intention, similarly there can be no intention to exclude from the scaling down provisions interest on any sum decreed as costs.

The other main provision relating to costs is found in the proviso to s. 19 which is to the effect that payments in respect of a decree shall first be applied in payment of all costs as originally decreed to the creditor. It is contended that the phrase "costs as originally decreed" means costs without any scaling down. It is equally likely that the phrase was intended to mean the principal amount of costs and to exclude interest thereon. At any rate, there is nothing in s. 19 which is inconsistent with the view that the appropriation therein provided for was intended to be only in respect of the principal sum for costs or that this provision had any other object than to give effect to the provisions of s. 11. We are of opinion that when there is a decree for costs which forms part of a decree being scaled down under s. 19, the provisions of the decree relating to interest on costs should be amended by the process laid down in ss. 8 and 9. In the present case, the result will be that the amount decreed for costs will carry interest at 6 per cent. per annum with effect from October 1, 1937. The revision petition is allowed with costs and the decretal order of the lower Court will be amended in the light of this judgment.

N.-S.

*Petition allowed.***NAGPUR HIGH COURT**

Miscellaneous Civil Case No. 65 of 1940

March 27, 1940

PURANIK, J.

LALSA MOTISA—PLAINTIFF—**APPLICANT***versus***BHAGWANT RAMJI NAIK KANAO****AND OTHERS—DEFENDANTS****—NON-APPLICANTS**

Practice—Appeal—Decree adjudicating rights between defendant No. 1 and plaintiff—Other defendants discharged under O. I. r. 10, Civil Procedure Code (Act V of 1908)—Appeal against decree—Question of liabilities of defendants discharged cannot be agitated—Order under O. I. r. 10, Civil

Procedure Code (Act V of 1908), discharging defendants on ground that there was no cause of action—Appeal, if maintainable.

The judgment and decree of the Court below did not contain any adjudication regarding the liability of defendants Nos. 2 to 9 who were discharged under O. I. r. 10 by a separate order passed by the Court. The decree in the case was a decree which could be said to be adjudicating the questions as between the plaintiff on the one hand and defendant No. 1 on the other only.

Held that in an appeal from such a decree it was not possible for the plaintiff to have raised the contention regarding the liabilities of defendants Nos. 2 to 9. 176 Ind. Cas. 33 (3), relied on.

Where the name of a defendant is struck out under O. I. r. 10, Civil P. C., on the ground that the plaint does not disclose any cause of action against him, the order operates as a decree and is appealable as such.

[Case-law relied on.]

Misc. C. O. for revision of the order First Additional District Judge, Akola, dated November 20, 1939.

Mr. W. B. Peadharkan, for the Applicant.

Order.—This is an application for revision against an order passed by the lower Court on November 20, 1939, discharging the defendants Nos. 2 to 9 from the suit. In the application for revision Counsel for the applicant prayed that this Court may be pleased to set aside the finding and the order of discharge and to send the case back for further trial and for passing if possible a decree against the defendants and it was also prayed in the alternative that assuming that no revision lay this petition might be accepted by way of appeal and justice be done to the plaintiff as prayed. This led the office of this Court to see as to whether an application for revision lay or it should be treated as an appeal. The application was also accompanied by a copy of the judgment and decree. That judgment showed that after discharging defendants Nos. 2 to 9 from the array of defendants the Court proceeded to decide the case against the defendant against whom the suit was tenable and decreed the claim against him. The office note suggests that as a decree has been passed in the case it is open to the applicant to agitate the question regarding the discharge of the other defendants in an appeal which can be filed by him against the decree that has been passed and in that view it was suggested that the revision application that has been filed was not tenable. The office also wanted a decision from the Court as to whether this application should be treated as a revision or an appeal.

If it is treated as an appeal, the office is of opinion, that it is not properly stamped. Counsel for the applicant urged before me as this is an application against an order discharging the defendants the order must be treated as one passed under O. I. r. 10, and as no appeal is provided for such an order an application for revision is tenable. He relied upon *Shanker Rao v. Raghunathrao* (1) and *Raghubans Puri v. Jyoti Swarupa* (2) and some other All India Reporter cases in support of his contention.

I think it proper to decide first the question as to whether the office is right in stating that the question that is being raised in the application could be raised by the applicant in an appeal against the decree that has been passed against defendant No. 1. I think this is not correct. The judgment and decree of the Court below does not contain any adjudication regarding the liability of defendants Nos. 2 to 9 who were discharged by a separate order passed by the Court. The decree in the case which has been actually drawn up is a decree which can be said to be adjudicating the questions as between the plaintiff on the one hand and defendant No. 1 on the other only. In an appeal from such a decree it was not possible for the plaintiff applicant to have raised the contention regarding the liabilities of defendants Nos. 2 to 9. Bose, J., in *Chetanlal v. G. S. Gupta* (3) has very clearly shown that such a question could not have been raised in an appeal against such a decree which adjudicated the rights of defendant No. 1 only. This leaves me to decide as to whether the present application for revision should be registered as an application for revision or as a memorandum of appeal. This in its turn depends upon the construction of the order that has been passed. It may be an order under O. I. r. 10 of the Civil P. O., but I find from the body of the order that the Court ordered the discharge of defendants Nos. 2 to 9 from the case as there was no cause of action against them and the Court has given its reasons for coming to the conclusion as to how there was no cause of action against these defendants. Such an adjudication will fall within the definition of a decree as given in s. 2 (2) of the Civil P. O. That is a formal expression of an

adjudication which so far as regards the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. As it is a decree it has to be appealed against if it is intended to be challenged. In Mulla's Civil Procedure Code, p. 47, this point is made clear and it is stated that where the name of a defendant is struck out under O. I. r. 10, Civil P. O., on the ground that the plaint does not disclose any cause of action against him, the order operates as a decree and is appealable as such. Cases relied on are *Rama Rao v. Raja of Pittapur* (4) and *Sher Ali v. Jagmohan Ram* (5). The Judicial Commissioner's Court, Nagpur also has taken a similar view in *Punjaji v. Jairam* (6) and Bose, J., in *Chetanlal v. G. S. Gupta* (3) had followed *Punjaji v. Jairam* (6) in preference to *Shanker Rao v. Raghunathrao* (1).

I am of opinion that this application for revision must be treated as a memorandum of appeal and should be laid before the Division Bench for further decision regarding court-fee and other matters.

D.

(4) 42 M 219; 49 Ind. Cas. 835; 36 M L J 169; 9 L W 329; 25 M L T 104; A I R 1919 Mad. 871.

(5) 53 A 466; 131 Ind. Cas. 542; A I R 1931 All. 333 (3); (1931) A L J 181; Ind. Rul. (1931) All. 388.

(6) 26 N L R 24; 127 Ind. Cas. 887; A I R 1930 Nag. 122; Ind. Rul. (1930) Nag. 359.

CALCUTTA HIGH COURT

Criminal References Nos. 60 and 61

and

Criminal Revision Petition No. 437 of 1940

July 16, 1940

EDGLEY, J.

HAFIZAR RAHMAN—COMPLAINANT

versus

AMINAL HAQUE—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 192, 560, 190, 202, 201, 439—Magistrate to whom case is transferred under s. 192, must be empowered to try it—S. 192 (1) is wider than s. 190 (1)—Scope of s. 192 (1)—Matter in respect of which trial or enquiry may be held under Code—Magistrate, if can take cognizance—Magistrate when competent to transfer under s. 192 (1)—Inquiry under s. 192 (1), nature of—Inquiry under s. 202, nature and scope of—Magistrate ordering enquiry under s. 202, whether transfers case—Transfer under s. 192 (1), as soon as accused appears or at any time thereafter when case is ready for inquiry or trial—Case transferred under s. 192 (1)—Magistrate to whom it is transferred, powers of—Duty and powers of transferee Magistrate—Transferring Magistrate, powers of, issuing order connected with case, under s. 528 or Chap. XXXII—Piecemeal transfer of case under

(1) A I R 1926 Nag. 75 (1); 89 Ind. Cas. 331.

(2) 29 A 325; A W N 1907 68.

(3) A I R 1938 Nag. 233; 176 Ind. Cas. 33; 11 R-N 22.

s. 192, legality—Opinion of Magistrate that there is sufficient ground for issuing process under s. 204, whether should be based on evidence—Record of reason—Magistrate summoning only one accused—Transfer of case under s. 192 (1)—Death of aforesaid accused subsequently—Proceedings in case against others, if terminated—Revision against conviction on ground of insufficient evidence—Interference, propriety of—Penal Code (Act XLV of 1860), s. 425—Magistrate satisfied from evidence that offence under s. 425, Penal Code (Act XLV of 1860), is committed—Conviction, if can be given—Judgment, if should contain precise expression used in section defining the offence.

The Magistrate to whom a case is transferred under s. 192, Criminal P. O., must be empowered to try it, otherwise the trial would be void under the provisions of s. 530 of the Code. [p. 41, col. 2.]

Section 192 (1) refers not merely to take cognizance of offences but to cases of which cognizance has been taken and the language used is wider in its character than that which has been employed in s. 190 (1). Therefore, cognizance can be taken by a Magistrate of any matter in respect of which an enquiry or trial may be held under the provisions of the Criminal P. O., and in taking cognizance of an offence or other cases, for example, cases under ss. 107, 110 or 145 of the Code, a Magistrate merely takes seisin of the matter for the purpose of exercising the specific powers with which he has been vested under the Code in connection with the case in question. As soon as a Magistrate duly empowered has taken cognizance of a matter, there is a case before him which he is competent to transfer to a Subordinate Magistrate under the provisions of s. 192 (1) of the Code. Although s. 192 appears in Part VI of the Code relating to proceedings in prosecutions, nevertheless it is sufficiently wide to cover cases under the Code other than criminal cases. [*ibid*]

Consequently the Magistrates mentioned in s. 192 (1) have power to transfer cases to Subordinate Magistrates either for the purpose of holding a trial for example under Chaps. XX or XXI of the Code or for enquiry, for example under Chaps. VIII, XII or XVII of the Code. 6 Ind. Cas 8 (1, referred to, *Satish Chandra Panday v. Rajendra Narain Bagchi* (2), *Lalit Mohan Moitra v. Surja Kanta* (3) and *Chintamon Singh v. Emperor* (4), relied on.

The term "inquiry" in s. 192 (1) is used with special reference to such inquiries as are held in connection with proceedings under Chaps. VIII, XII and XVIII of the Code. The inquiry which is contemplated by s. 202, on the other hand, is merely for the limited purpose of ascertaining the truth or falsehood of a complaint in order to enable the Magistrate to decide whether an accused person should be summoned or the complaint against him should be dismissed under s. 203. The plain meaning of s. 192 (1) of the Code is that a case which is transferred to a subordinate Magistrate under that section is transferred to him in order that he may complete the inquiry or trial to be held in connection with the case and take all requisite steps to that end. The holding of an inquiry under s. 202 in a suitable case is merely one of such requisite steps to be taken by a Magistrate who has taken cognizance of a case or to whom a case may have been transferred for trial under s. 192 (1). It is clear that a Magistrate who orders an inquiry under s. 202 of the Code does not transfer the case at all. Ordinarily he merely retains the case on his own file and directs some suitable person to hold an inquiry and send the report to him. It

follows, therefore, that an order for an inquiry under s. 202 of the Code cannot operate as a transfer under s. 192 (1). [p. 42, col. 2.]

If ss. 192 (1), 202 and 204 are read together, it is clearly competent for the Sub-Divisional Magistrate to transfer the case as soon as the accused has appeared or at any time thereafter when the case becomes ready for the inquiry or the trial. It would be equally competent for the Sub-Divisional Magistrate to transfer the case to a subordinate Magistrate immediately after the complainant had been examined. [p. 43, col. 1.]

When a case has been transferred to a Magistrate under s. 192 (1, Criminal P. O.), that Magistrate has the same authority to deal with the case which has been transferred to him, as regards the issuing of processes and other matters connected with the inquiry or trial, as is vested in the superior Magistrate from whom he received the case on transfer. When once a case has been validly transferred to a subordinate Magistrate under s. 192 (1) of the Code, such Magistrate has no authority to return the case to the transferring Magistrate in order that the latter might issue process under s. 204 and his duty is to complete the trial according to law. The superior Magistrate has no jurisdiction to issue any orders connected with the case except such as are contemplated under the provisions of s. 528 or Chap. XXXII of the Code. [p. 43, cols 1 & 2.]

The legality of the piecemeal transfer of a case under s. 192 (1), Criminal P. O., is doubtful. Even if such piecemeal transfer is in certain circumstances valid, that portion of the case which has not been transferred must be clearly indicated in the order of transfer recorded by the transferring Magistrate who acts under s. 192, Criminal P. O. In the absence of a clear indication as to which part of the case is retained on the file of the transferring Magistrate or some further indication to the effect that such Magistrate intended to dismiss the complaint against those accused persons in respect of whom he did not issue process, it must be taken that the whole case had been transferred to the subordinate Magistrate not only as against the accused persons actually summoned but against all other persons whom the subordinate Magistrate might consider to be implicated in the offence. [p. 44, col. 2.]

It is not necessary that the opinion that there is sufficient ground for issuing process against certain accused persons under s. 204 should be based on evidence in the case nor that the reasons for such an opinion should be recorded. When the sworn statements, the reports of the enquiring officers under s. 202 of the Code and the petitions of complaint are before the Magistrate it must be presumed that he had perused these documents and the other papers on the record and that, after having done so, he was of opinion that there was sufficient ground for proceeding against some of the accused persons other than those in respect of whom process had originally been issued. [*ibid*]

Where a Magistrate summons only one of the accused persons mentioned in the complaint and transfers the case under s. 192 (1), the death of the aforesaid accused subsequent to the transfer does not terminate the proceedings in the case against the other accused persons unless the Magistrate to whom the case is transferred thinks fit to conclude the proceedings against him.

Where the Magistrate applies his mind to the evidence and in finding that the accused had caused mischief to the complainant he must have been satisfied that the ingredients of the offence defined

in s. 425, I. P. O., were present "the finding is sufficient to warrant a conviction. It is not necessary in a case of this sort to embody in the judgment the precise expressions which have been used in the section of the I. P. O., which defines the offence of which the accused person is convicted. [p. 45, cols. 1 & 2.]

Appreciation of the evidence is a matter for the Courts which deal with the facts of the case. The conviction cannot be set aside on revision merely because of inadequate evidence. [p. 45, col. 2.]

Messrs. Ajit Kumar Dutt and S. C. Talukdar, In Support of Reference.

Messrs. Jitendra Mohan Bannerjee and Nirmal Kumar Sen, for the Crown.

Mr. Imam Hossain Choudhury, In Opposition to Reference.

Mr. Hamidul Huq, for the Petitioner (in Cr. Rev. No. 437).

Order.—References Nos. 60 and 61 of 1940 have been made to this Court by the learned Sessions Judge of Chittagong with his letter, dated March 14, 1940. They arise with reference to two accused persons who were convicted respectively in two separate cases under ss. 427, and 447 I. P. O. In the first of these cases Nurul Huq was convicted by Rai Saheb Aparna Charan Ray, Honorary Magistrate of Chittagong on February 5, 1940 and sentenced to pay a fine of Rs. 40 and in the second case Aminoal Haque was convicted by the same Honorary Magistrate on the same date and sentenced to pay a fine of Rs. 25. These two references have been heard together with a rule issued in Criminal Revision Case No. 437 of 1940 as the main points for consideration in the two references and the rule are similar.

In the first of these cases a man named Hafizar Rahman had filed a complaint on February 19, 1939 against certain persons in respect of alleged offences under ss. 427, 447 and 352, I. P. O. The main allegation was to the effect that the accused persons had committed mischief in respect of the complainant's land while they were engaged in cutting a *khal*. An enquiry was held under the provisions of s. 202, Criminal P. O., and thereafter one of the accused persons, Aminoal Rahman, was summoned. He appeared on June 9, 1939 and the case was then transferred to the learned Honorary Magistrate for disposal. Aminoal Rahman died on August 15, 1939. Thereafter, on August 18, 1939, the complainant filed a petition in which he stated that the other accused persons were taking advantage of Aminoal Rahman's death and were threatening to take possession of the complainant's land by force. He also stated that there was ample evidence against all the accused per-

sons and in these circumstances he asked that the other accused might be summoned. The learned Honorary Magistrate then directed that one of the other accused persons, Nurul Haque, should be summoned. The case then proceeded to trial and this person was duly convicted under s. 427, I. P. O.

The second case related to a portion of the same land that was in dispute in the case under s. 427, I. P. O. It arose with reference to a complaint filed on April 17, 1939 by Hafizar Rahman against eight accused persons in which it was alleged that they had committed offences on April 12, 1939 under ss. 447, 404 and 143, I. P. O. In this case it was alleged that the accused persons had trespassed into Plot No. 7323, which was in the possession of Hafizar Rahman, and had encroached on the same by putting a fence round it, ploughing it and planting trees thereon. In this case also the learned Sub-Divisional Magistrate directed an enquiry under s. 202, Criminal P. O., and he summoned Aminoal Rahman on June 1, 1939. Thereafter, on June 9, 1939, he transferred the case to the learned Honorary Magistrate for disposal. After Aminoal Rahman's death on the August 15, 1939 the complainant filed a petition similar in terms to the one which was filed in the case under s. 427, I. P. O. with the result that the learned Honorary Magistrate summoned one of the other accused persons, Aminoal Haque who was in due course convicted under s. 447, I. P. O. In referring these two cases to this Court under the provisions of s. 438, Criminal P. O., the learned Sessions Judge of Chittagong expresses the opinion that in the first case the findings recorded by the learned Honorary Magistrate were insufficient to warrant a conviction whereas in the second case he was of opinion that the accused had been convicted on inadequate evidence. The main ground, however, upon which the learned Judge referred these two cases was that, in his view, the learned Honorary Magistrate had no jurisdiction to summon persons against whom process had not been issued by the Sub-Divisional Magistrate before the cases were transferred to him. In this connexion, he refers to s. 204, Criminal P. O., and states that:

"It would *prima facie* appear that the 'case' is, for issue of summons upon the accused, to go back to the file of the Magistrate who took cognizance of the 'offence.' It would, therefore, also seem that a Magistrate who has not taken cognizance of an 'offence' has no jurisdiction to summon an accused person."

He goes on to say :

"In my view, when a case has been transferred for trial to a subordinate Magistrate, with one accused summoned and appearing, the death of that accused terminates the case and the jurisdiction of the Magistrate. The complainant's remedy is to make another complaint before the Sub-Divisional Magistrate. I submit that the subordinate Magistrate has no jurisdiction to summon another accused.

The learned Judge concludes his letter as follows:

"In all the circumstances I consider that the convictions should be quashed, and I request that the Hon'ble High Court will rule whether a subordinate Magistrate whether with or without taking evidence, has jurisdiction to summon and prosecute, in a case which has been transferred to him for disposal after the accused who was summoned by the Sub-Divisional Magistrate has appeared, a person other than the accused before him."

Criminal Revision Case No. 437 of 1940 relates to three petitioners who were convicted under ss. 426 and 447, I. P. C. by Babu Bhupendra Nath Ghosh, Honorary Magistrate of Tippera, on January 17, 1940. Originally, two other persons had been summoned in this case by the learned Sub-Divisional Magistrate of Tippera who on June 7, 1939, transferred the case to the learned Honorary Magistrate for disposal. On July 25, 1939 the complainant was absent and the learned Honorary Magistrate acquitted the accused persons before him under s. 247, Criminal P. C. Later, on the same day the complainant filed an application in which he asked that process might issue against the other accused persons who had not been summoned by the Sub-Divisional Magistrate and the learned Honorary Magistrate thereupon summoned the petitioners under ss. 447 and 426, I. P. C. and in due course convicted them under those sections. The only ground upon which the rule was issued in this case was that the learned Honorary Magistrate had no jurisdiction to summon the petitioners. The main point for consideration in these cases is whether a Magistrate to whom a case is transferred under the provisions of s. 192 (1), Criminal P. C., by reason of such transfer becomes vested with the same powers in respect of the case transferred to him as may be exercised by the Magistrate from whom he receives it on transfer. Section 192 (1) of the Code is in the following terms:

"Any Chief Presidency Magistrate, District Magistrate or Sub-Divisional Magistrate may transfer any case, of which he has taken cognizance, for inquiry or trial to any Magistrate subordinate to him."

It is, of course, obvious that the Magistrate to whom a case is transferred under

s. 192 must be empowered to try it otherwise the trial would be void under the provisions of s. 530 of the Code. In these cases, however, there can be no doubt that the learned Honorary Magistrate had jurisdiction to try the cases under ss. 426, 427 and 447, I. P. C. The expression cognizance has not been defined in the Code. This expression is also used in s. 190 (1), Criminal P. C., which empowers certain Magistrates to take cognizance of offences. On this point Stephen and Carnduff, JJ. pointed out in *Emneror v. Sourindra Mohan* (1) that "taking cognizance does not involve any formal action, or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence."

Section 192 (1) however refers not merely to take cognizance of offences but to cases of which cognizance has been taken and the language used is wider in its character than that which has been employed in s. 190 (1). It would, therefore, appear that cognizance may be taken by a Magistrate of any matter in respect of which an enquiry or trial may be held under the provisions of the Criminal P. C., and in taking cognizance of an offence or other case, for example, cases under ss. 107, 110 or 145 of the Code, a Magistrate merely takes seisin of the matter for the purpose of exercising the specific powers with which he has been vested under the Code in connexion with the case in question. As soon as a Magistrate duly empowered has taken cognizance of a matter, there is a case before him which he is competent to transfer to a subordinate Magistrate under the provisions of s. 192 (1) of the Code. Although s. 192 appears in Part VI of the Code relating to proceedings in prosecutions, it has nevertheless been held from its terms that it is sufficiently wide to cover cases under the Code other than criminal cases. In this connexion Macpherson and Gordon, JJ., observed in *Satish Chandra Panday v. Rajendra Narain Bagchi* (2) that

"the power of transfer conferred upon Magistrates and Sub-Divisional Magistrates is a general power, and unless cases under Chap. XII are expressly excluded, it must extend to them also. It is argued that s. 192 applies only to criminal cases, as it occurs in a chapter which deals with offences, and the preceding section relates to the cognizance of offences. The words are, however, quite wide enough to include cases under Chap. XII. We may observe also that in the Code of 1872, s. 44, which is the section corresponding to s. 192, provided only for the transfer of 'criminal cases.' By the Amending Act XI of 1874, the word 'criminal' was struck out,

(1) 37 C 412; 6 Ind. Cas. 8; 14 O W N 512; 11 Cr. L. J 217.

(2) 22 C 898.

and it has been omitted from all the subsequent enactments."

Again, in *Lolit Mohan Moitra v. Surja Kanta* (3 Ghose J. holds that a Magistrate taking cognizance of a case under s. 145 is a Criminal Court within the meaning of the Code and he also refers to cases under ss. 10 and 110 of the Code as criminal cases which District Magistrates or Sub-Divisional Magistrates would have jurisdiction to transfer under s. 192 of the Code. Further, in *Chin'amon Singh v. Emperor* (4) Rampini and Sharfuddin, JJ. said:

"It is to be observed that the expression used in s. 192, cl. (1), Criminal P. O., is 'any case,' and not any 'criminal case.' It has been contended that s. 192, Criminal P. O., applies only to criminal cases, as it is part of a chapter which deals with offences, and the preceding section relates to the cognizance of offences. The words are however quite wide enough to include cases under Chap. VIII, Criminal P. O."

It is therefore clear that the Magistrates mentioned in s. 192 (1) of the Code have power to transfer cases to subordinate Magistrates either for the purpose of holding a trial, for example, under Chap. XX or Chap. XXI, of the Code, or for inquiry, for example, under Chaps. VIII, XII or Chap. XVIII of the Code. It is however argued that in view of the terms of s. 204, Criminal P. O., the only Magistrate who has power to issue summons for the attendance of accused persons is the Magistrate who takes cognizance of the offence and that, in this view of the case, the learned Honorary Magistrates had no jurisdiction to issue process against any persons other than those who had been summoned by the Sub-Divisional Magistrates before the cases were transferred by them. It is however clear from the provisions of s. 202 of the Code that the Magistrate who takes cognizance of an offence is not vested with an exclusive jurisdiction as regards the issue of process, as s. 202 provides that a Magistrate to whom a case has been transferred under s. 192

may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against."

It follows therefore by implication that, if such a Magistrate has power to postpone the issue of process against an accused person, he has also power to issue process and that this power is not limited by the terms of s. 204. In this connexion, it was argued that the inquiry for which a case

may be transferred under s. 192 (1) of the Code means an inquiry under s. 202 and that the latter section merely empowers the subordinate Magistrate who has been directed to hold the inquiry to postpone the issue of process by the transferring Magistrate pending the result of the inquiry. The learned Advocate contends that, if a *prima facie* case is made out, the subordinate Magistrate should send the case back to the transferring Magistrate who may then issue process under s. 201 of the Code and it is suggested that, if the superior Magistrate then wishes to transfer a case for trial, he may again transfer it under s. 122 (1) of the Code and at this stage the Magistrate to whom the case is transferred would follow the procedure laid down in Chaps. XX and XXI of the Code.

I am not prepared to accept the above argument. I have already pointed out that the term "inquiry" in s. 192 (1) is used with special reference to such inquiries as are held in connexion with proceedings under Chaps. VIII, XII and XVIII of the Code. The inquiry which is contemplated by s. 202, on the other hand, is merely for the limited purpose of ascertaining the truth or falsehood of a complaint in order to enable the Magistrate to decide whether an accused person should be summoned or the complaint against him should be dismissed under s. 203. The plain meaning of s. 192 (1) of the Code is that a case which is transferred to a subordinate Magistrate under that section is transferred to him in order that he may complete the inquiry or trial to be held in connexion with the case and take all requisite steps to that end. The holding of an inquiry under s. 202 in a suitable case is merely one of such requisite steps to be taken by a Magistrate who has taken cognizance of a case or to whom a case may have been transferred for trial under s. 192 (1). It is clear that a Magistrate who orders an inquiry under s. 202 of the Code does not transfer the case at all. Ordinarily he merely retains the case on his own file and directs some suitable person to hold an inquiry and send the report to him. It follows therefore that an order for an inquiry under s. 202 of the Code cannot operate as a transfer under s. 192 (1). Another step requisite to the completion of the trial is the issue of process against the person or persons whom it is intended to prosecute, and I have already pointed out that the language of s. 209 of the Code shows that a subordinate Magistrate to whom a case has been transferred under

(3) 28 O 709; 5 O W N 749.

(4) 35 O 243; 7 Or. L J 146; 12 O W N 299; 7 O L J 177.

s. 192 (1) has the power to issue such process. It therefore follows that, when once a case has been validly transferred to a subordinate Magistrate under s. 192 (1) of the Code, such Magistrate would have no authority to return the case to the transferring Magistrate in order that the latter might issue process under s. 204 and his duty would be to complete the trial according to law. It is true, as pointed out by the learned Sessions Judge that the usual practice throughout Bengal

"is that the Sub-Divisional Magistrate retains the case in his own file until after the accused summoned by him has appeared, and then transfers it for disposal to a Magistrate subordinate to him."

The learned Judge seems to hold the view that this is not the procedure contemplated by the Code. If, however, ss. 192 (1), 202 and 204 are read together, it is clearly competent for the Sub-Divisional Magistrate to follow this procedure and to transfer the case as soon as the accused has appeared or at any time thereafter when the case becomes ready for the inquiry or the trial. It would be equally competent for the Sub-Divisional Magistrate to transfer the case to a subordinate Magistrate immediately after the complainant had been examined and having regard to the provisions of s. 202 of the Code, it would then be for such subordinate Magistrate to decide whether he would issue process immediately or postpone the issue of such process for the purpose of holding a preliminary investigation under that section for the purpose of ascertaining the truth or falsehood of the complaint. When however a case has been transferred under s. 192 (1) it is transferred for all purposes from the file of the superior Magistrate to that of the subordinate Magistrate and thereafter the superior Magistrate has no jurisdiction to issue any orders connected with the case except such as are contemplated under the provisions of s. 52 or Chap. XXXII of the Code. This was the view adopted by this Court in *Golapdy Sheikh v. Queen-Empress* (5) in which it was held that, where cognizance had been taken of an offence on a Police report and the case had been made over to a subordinate Magistrate, so long as the case connected with that offence remained with the subordinate Magistrate, no other Magistrate was competent to deal with it and applications for warrants against other persons concerned in that offence should be made to the Magistrate to whom the case had been transferred and to no other Magistrate. A

(5) 27 O 979; 4 C W N 827.

similar view was adopted by Stevens and Mitra, JJ. in *Radhabullav Ray v. Benode Behari* (6) in which the learned Judge observed that :

"We think that when once the District Magistrate made the case over for disposal to the Deputy Magistrate, it was out of his hands and he was not competent to pass any order relating to it other than an order such as might have been made by him under Chap. XXXII, of the Code."

It was also pointed out by Chotzner and Gregory, JJ. in *Hemendra Nath Sen v. Emperor* (7), that, in a case in which after issue of process the case had been transferred to another Magistrate who discharged the accused person against whom process had issued and then *suo motu* issued process against another person under s. 191 (c) of the Code, the trying Magistrate stood in the shoes of the Magistrate who had originally issued process and had full authority to deal with the case as if he himself has taken cognizance of it. From the abovementioned cases it follows that, when a case has been transferred to a Magistrate under s. 192 (1), Criminal P.O., that Magistrate has the same authority to deal with the case which has been transferred to him, as regards the issuing of processes and other matters connected with the inquiry or trial, as is vested in the superior Magistrate from whom he received the case or transfer.

It is, however, argued that the only cases which had been transferred were the cases against those persons who had originally been summoned by the Sub-Divisional Magistrate, namely Aminar Rahaman in the cases under ss. 447 and 427, I. P. O., and Asaruddin and Tamijuddin in the case under s. 447 read with s. 426, I. P. O. It is argued that, as a result of the preliminary investigations under ss. 202 of the Code, the Sub-Divisional Magistrate who took cognizance of the cases was satisfied that there was sufficient ground for proceeding against those persons only and as he issued process only against them, it must be taken that he did not wish to proceed against the other accused persons and therefore, transferred to the learned Honorary Magistrate merely the cases of those persons whom he had summoned. In the first two cases the order of transfer was that "the case is transferred to Rai Sahib A. C. Ray for favour of disposal." in the other case the order of transfer was to Babu B. N.

(6) 30 O 449.

(7) 55 O 1274; 114 Ind. Cas. 800; A I R 1929 Cal. 192; 30 Cr. L J 352.

Ghosh, Honorary Magistrate "for disposal." It was, however, held in *Ajab Lal v. Emperor* (8), that orders of this nature mean that the whole case is transferred so that it is competent for the subordinate Magistrate to issue process for the attendance of any persons whom he may consider to have been concerned in the commission of the offence. Henderson, J. pointed out that :

"It is not necessary in a matter of this kind that the entire case should be transferred. Whether such a transfer has been made is a question of fact depending on the intention of the officer making the order, which intention must be gathered from the order itself. Where no reservation is made, as in the case cited and in the case before us, I should certainly conclude that the entire case (in the sense abovementioned) had been transferred."

A similar point came under consideration in *In re Azim Sheikh* (9). In that case a complaint had been lodged against several persons, and the Sub-Divisional Magistrate after examining the complainant issued summons against one of the accused only. He passed no order with regard to the others. He then transferred the case to an Honorary Magistrate who, after taking evidence, acquitted the person who had been summoned, but issued process against one of the other accused persons. The learned Judges held that, as regards the question whether the Honorary Magistrate could take cognizance of the case as against Azim, it appeared that the Sub-Divisional Magistrate took cognizance of the whole case and transferred it under s. 192 to the Honorary Magistrate. They observed that

"the fact, that he did not summon Azim, did not amount to a dismissal of the case as against Azim, nor could it annul the cognizance which he had already taken of the case as a whole. We think that the case must be regarded as having been transferred as a whole to the Honorary Magistrate, and indeed, it appears to us open to considerable doubt whether under the section a case can be transferred piecemeal."

The law with regard to this point seems now to be well-settled and, as pointed out by Macpherson, J. in *Deonarain Singh v. Emperor* (10) :

"Since 1900 when the decision in *Golapdy Shaikh v. Queen-Empress* (5), was given there has been a *curtus curia* that once the Sub-Divisional Magistrate having taken cognizance of an offence on a charge-sheet submitted by the Police in circumstances like the present, has made over to a subordinate Magistrate the charge-sheet and the accused forwarded by the Police in custody or bail

with an order that the transfer is 'for disposal' he has made over the judicial investigation into the offence and not merely the judicial investigation into the offence so far as regards the particular accused.....In the present instance, the order itself appears to show that the whole case was made over. If the whole case was made over, the Deputy Magistrate had full seisin of it."

I myself share the doubts expressed in *Azim Sheikh's case* (9), as to the legality of the piecemeal transfer of a case under s. 192 (1), Criminal P. O. subject to the authority of a Magistrate who takes cognizance of an offence on complaint to dismiss the complaint as against some of the persons whom it is sought to prosecute and to leave the case open as against others. But, it is clear that even if such piecemeal transfer is in certain circumstances valid, that portion of the case which has not been transferred must be clearly indicated in the order of transfer recorded by the transferring Magistrate who acts under s. 192, I. P. O. In the absence of a clear indication as to which part of the case is retained on the file of the transferring Magistrate or some further indication to the effect that such Magistrate intended to dismiss the complaint against those accused persons in respect of whom he did not issue process, it must be taken that the whole case had been transferred to the subordinate Magistrate not only as against the accused persons actually summoned but against all other persons whom the subordinate Magistrate might consider to be implicated in the offence. In the cases with which we are now dealing, it is argued that the learned Honorary Magistrate had no material before them from which it was possible for them to reach an opinion that there was sufficient ground for issuing process. It is not necessary that the opinion to this effect within the meaning of s. 204, Criminal P. O., should be based on evidence in the case nor that the reasons for such an opinion should be recorded. In all the three cases the sworn statements, the reports of the enquiring officers under s. 202 of the Code and the petitions of complaint were before the learned Honorary Magistrates. It must be presumed that they had perused these documents and the other papers on the record and that, after having done so, they were of opinion that there was sufficient ground for proceeding against some of the accused persons, other than those in respect of whom process had originally been issued.

(8) 32 O 783; 2 Cr. L J 524; 9 O W N 810.

(9) 7 O L J 249; 7 Cr. L J 318.

(10) 12 Pat. 341; 147 Ind. Cas. 913; A I R 1933 Pat. 244; 14 P L T 176; (1933) Cr. Cas. 716; 6 R P 384; 35 Cr. L J 533.

Further, I am not prepared to hold that the death of Aminar Rahaman in the cases under ss. 447 and 427, I. P. O., had the effect of terminating the proceedings in those cases. The cases against the other accused persons mentioned in the petitions of complaint remained undecided until the Magistrate to whom the cases had been transferred thought fit to conclude the proceedings against them. There is nothing on the record to indicate that he did so and, in my view, the orders in the two cases (References Nos. 60 and 61 of 1940) which have been referred to this Court by the learned Sessions Judge of Chittagong and the other order which is the subject-matter of Criminal Revision Case No. 437 of 1940 were legal. The entire cases relating to the alleged offences covered by the complaints were transferred to the learned Honorary Magistrate and the proper procedure was adopted by them in all these cases. Finally, as regards the cases which are the subject-matter of the references made by the learned Sessions Judge of Chittagong it has been argued that the references should be accepted having regard to the defects in the judgments to which reference is made in the first part of the learned Judge's letter. As regards the case against Nurul Haque under s. 427, I. P. O., the learned Judge states that there is no finding in the judgment to the effect that the accused intended to cause loss to the complainant. He also refers to the insufficiency of the evidence. I have perused the judgment recorded by the learned Honorary Magistrate and it appears that the main finding is in the following terms:

"I, therefore, hold that the accused party are not in possession of the eastern half of the R. S. plot No. 7323 as claimed by them. As to R. S. plot No. 7334 the defence has no answer to make and it is admittedly in possession of the complainant. The position, therefore, is that the complainant is in possession of both the R. S. plots Nos. 7323 and 7334 in full and upon the evidence adduced by the prosecution I hold that the accused party cut portions of those two plots and included the same in the *khal* as newly opened and thereby caused mischief to the complainant to the extent of about Rs. 60 as alleged by the prosecution."

In my view, this finding is sufficient. It is not necessary in a case of this sort to embody in the judgment the precise expressions which have been used in the section of the I. P. O. which defines the offence of which the accused person is convicted. In this case it is clear that the learned Magistrate applied his mind to

the evidence and in finding that the accused had caused mischief to the complainant he must have been satisfied that the ingredients of the offence defined in s. 425, I. P. O., were present. As regards the case under s. 447, I. P. O., the main ground as regards the merits of the case upon which the learned Judge recommends that the conviction should be set aside is that of inadequate evidence. Admittedly, a ground of this sort is not one on which this Court should interfere in revision. Appreciation of the evidence is a matter for the Courts which deal with the facts of the case. It is clear that there were materials before the learned Magistrate, which if believed would justify the conviction of the accused under s. 447, I. P. O. No appeal lies against this decision and the conviction is one with which I am not prepared to interfere. The result is that References Nos. 60 and 61 of 1940 are rejected and the rule issued in Criminal Revision Case No. 437 of 1940 is discharged.

D.

Order accordingly.

PATNA HIGH COURT

Appeal From Original Order No. 191
of 1939

August 30, 1940

HARRIES, C. J. AND MANOHAR LALL, J.

RAM BEHARI SAHAI AND OTHERS—

APPLICANTS—APPELLANTS.

versus

BINDA PRASAD AND ANOTHER—OPPOSITE

PARTY—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXI, r. 58, s. 47—Transferee of transferee from judgment-debtor is not his representative—Objection by him to attachment falls under O. XXI, r. 58 and not under s. 47—Transfer of Property Act (IV of 1882), s. 53—Colourable gift by judgment-debtor to put obstacle in way of decree-holder—Whether binding on decree-holder.

A transferee of the properties by a sale-deed and *sudbharna* deed executed in his favour by a transferee from the judgment-debtor, is not the representative of the judgment-debtor and hence his objection to the attachment falls to be determined under O. XXI, r. 58, and not under s. 47, Civil P. O.

A judgment-debtor executed a deed of gift which was a colourable transaction, and the judgment-debtor after this deed of gift continued to be in possession of the property so long as he was alive and this transaction was entered into in order to put obstacles in the way of the decree-holder or to defraud him;

Held, that the transfer was void against the decree-holder. *Ishan Chunder Das Sarkar v. Bishu Sardar* (1) and *Harrods, Limited v. Stanton* (2), distinguished.

As from an order of the Subordinate Judge of Muzaffarpur, dated May 26, 1939.

Mr. P. B. Ganguly, for the Appellants.

Mr. M. N. Pail, for the Respondents.

Manohar Lall, J.—This is an appeal by Ram Behari Safai and others who objected to the execution of a decree which was passed against one Kamla Prasad who died on September 2, 1938, the execution having been started on August 27 of the same year. The appellants are the transferees of the properties by a sale-deed and *sudbharna* deed executed in their favour by one Moti Bibi who was also a transferee from the judgment-debtor Kamla Prasad by a deed of gift executed on July 21, 1938. The attachment, which was objected to by the appellants, was effected after their objection was filed on December 12, 1938, the attachment having been actually effected on February 8, 1939.

On the above statement of facts it is clear that the appellants are not the representatives of the judgment-debtor Kamla Prasad, and, therefore, their objection falls to be determined under the provisions of O. XXI, r. 5, Civil P. O. and not under s. 47 of the Code. It follows, therefore, that the appeal is not maintainable and the appellants can succeed only if they can induce us to revise the order passed by the learned Subordinate Judge, dated May 26, 1939, by which he held that although the appellants were in possession of the properties they were in possession without any title.

The learned Advocate for the appellants then requested us to treat the appeal as an application in revision and took us through the entire judgment in order to satisfy us that he ought to be granted relief in revision. The facts found, however, are clear, namely, that the deed of gift, which was executed in favour of Moti Bibi on July 21, 1938, was a colourable transaction, and that the judgment-debtor after this deed of gift continued to be in possession of the property so long as he was alive and that this transaction was entered into in order to put obstacles in the way of the decree holders or to defraud them. It is argued by the learned Advocate for the appellants that inasmuch as they are *bona fide* transferees from Moti Bibi, who was a donee from the judgment-debtor, the appellants are not affected by any decision arrived at by the learned Subordinate Judge to the effect that their transferor had no title in the property in dispute. But there is a fallacy in this argument. The finding of the learned Subordinate

Judge is not that the judgment-debtor did actually execute a real deed of gift in fraud of the creditors but his finding is that the judgment-debtor did not ever intend to pass the property out of his hands and that the deed of gift executed was a mere colourable transaction which was never intended to be acted upon. In the face of these facts the authorities cited by the learned Advocate, namely, *Ishan Chunder Das Sarkar v. Bishu Sardar* (1) and *Harrods, Limited v. Stanton* (2), have no application whatsoever.

Having considered the judgment of the learned Subordinate Judge, it is impossible to interfere in revision. The learned Subordinate Judge was entitled upon the evidence to take the view which he did, and he has not exercised any jurisdiction which he did not possess nor has he failed to exercise any jurisdiction vested in him, nor has he acted in the exercise of his jurisdiction illegally or with material irregularity.

For these reasons the appeal is dismissed with costs.

Harries, C. J.—I agree.

s. Appeal dismissed.

(1) 24 O 825; 1 O WN 665.

(2) (1923) 1 KB 516; 92 L J KB 403; (1923) B & CR 70; 128 LT 685.

RANGOON HIGH COURT

First Appeal No. 117 of 1939

May 13, 1940

MYA BU AND MORELY, JJ.

S. B. DASS—APPELLANT

versus

GHANSHAMDAS AND OTHERS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 73, 47—Order under s. 73 determining question of rateable distribution between rival decree-holders—Judgment-debtor not interested—Order, if falls under s. 47 and whether appealable.

An order under s. 73, Civil P. O., determining the question of rateable distribution as between rival decree-holders in which the judgment-debtor has no interest does not fall under s. 47, Civil P. O., and is not appealable. 169 Ind. Cas. 644 (1), followed.

F. A. from an order of the District Court, Akyab, in Civil Execution Case No. 8 of 1938.

Mr. Doctor, for the Appellant.

Mr. Hay, for the Respondents.

Judgment.—Mr. Hay objects that no appeal lies: *vide* *Aga M. Sherazee v. R. M.*

P. M. Chettyar Firm (1). It was held there that an order under s. 73, Civil P. O., determining the question of rateable distribution as between rival decree-holders in which the judgment-debtor has no interest does not fall under s. 47, Civil P. O., and is not appealable. We are bound by that ruling. The facts here are indistinguishable. This appeal is dismissed with costs, Advocate's fee two gold mohurs in respect of each respondent, six gold mohurs in all.

D. *Appeal dismissed.*

(1) A I R 1937 Rang. 134; 169 Ind. Cas. 644; 10 R Rang. 24.

PATNA HIGH COURT
Civil Revision No. 91 of 1940
September 6, 1940

AGARWALA, J.

Divi BHUNESHWARI KUER AND
ANOTHER—PETITIONERS

versus

Mst. SAMA KUER AND OTHERS—
OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), O. IX, r. 2
—Plaintiff directed to file process fees by certain date—Part of process fees paid—Court fixing certain date for disposal of suit—Full process fees not paid—Court held had no jurisdiction to dismiss suit—Plaintiff not depositing sufficient fees for service on all defendants but wishing Court to issue notice to some of them—He must specify which of them he desires to serve.

A person instituted a suit for rent and was directed to file process fees amounting to Rs. 3/6 by October 7, 1939. There were five defendants in the suit of whom one was a minor. On October 7, the plaintiff filed only Rs. 3. The Court pointed out that annas six was still due and fixed November 16, for the disposal of the suit. On that date the plaintiff applied for the appointment of a guardian *ad litem* for the minor defendant and filed a fee of Rs. 2 for that purpose. The defendants were not present. The balance of six annas due from the plaintiff was not paid and the suit was dismissed for default.

Held, that the Court had no jurisdiction to dismiss the suit. 179 Ind. Cas. 563 (1), distinguished.

Held, further that even if the three rupees which the plaintiff deposited were sufficient at least to pay the process fees for service on the adult defendants, the suit could not proceed as against the adult defendants. 60 Ind. Cas. 377 (2), distinguished.

It is not for the Court to decide which of the defendants are to be served. If the plaintiff does not deposit sufficient fees for service on all the defendants and wishes the Court to issue notice to some of them he must specify which of them he desires to serve otherwise it would be open to him to complain afterwards that the persons whom the Court had served were not substantial defendants while the substantial defendants had not been served and that the Court had exercised an unwise discretion in serving notice on the unsubstantial

defendants and omitting to serve notice on substantial defendants. The plaintiff cannot be allowed to put the Court in such a position.

O. R. against an order of the Munsif, 3rd Court, Gaya, dated December 9, 1940.

Mr. Raj Kishore Prasad, for the Petitioners.

Mr. Naimul Huq, for the Opposite Party.

Order.—This application arises in the following circumstances: The plaintiff instituted a suit for rent for the years 1343 to 1346 *Fasli* and was directed to file process fees amounting to Rs. 3/6 by October 7, 1939. There were five defendants in the suit of whom one was a minor. On October 7, the plaintiff filed only Rs. 3. The Court pointed out that annas six was still due and fixed November 16, for the disposal of the suit. On that date the plaintiff applied for the appointment of a guardian *ad litem* for the minor defendant and filed a fee of Rs. 2 for that purpose. The defendants were not present. The balance of six annas due from the plaintiff was not paid and the suit was dismissed for default. An application for restoration of the suit was filed. The plaintiff now comes in revision and contends, in the first place, that the Court had no jurisdiction to dismiss the suit on November 16, as no date had been fixed for appearance of the defendants. Reliance was placed on the decision in *Sripati Saran Prasad Singh v. Indarjit Mahlon* (1). It was there held that where the Court calls upon the plaintiff to file process fees and copies of the plaint by a certain date but on that date nothing is done, the Court has no jurisdiction to dismiss the suit. The reason given was that the Court acted illegally in calling upon the plaintiff to file process fees before fixing the date for the appearance of the defendant. That case is distinguishable from the present. November 16, was fixed for the disposal of the suit, that is to say, it was the date which the Court fixed for hearing the parties. The reason why the defendants were not present was that the process fees had not been paid.

It is next contended that out of the three rupees which the plaintiff deposited there was sufficient at least to pay the process fees for service on the adult defendants and that the suit should, therefore, not have been dismissed as against them. Reference was made to *Ramanand Singh*

(1) 19 P L T 851; 179 Ind. Cas. 563; A I R 1:33 Pat. 160; 5 B R 244; 11 R P 397 (1).

v. Chandrama Singh (2). The facts of that case, however, are clearly distinguishable. The adult defendants had entered appearance but suit was dismissed because there was no appearance on behalf of the minor defendants owing to the process fees and the costs of the guardian *ad litem* not having been deposited. In these circumstances it was held that the Court acted illegally in dismissing the suit, as against the adult defendants. It is contended that in the present case the Court should have out of the process fees already filed, served notice on the adult members. But it is not for the Court to decide which of the defendants are to be served. If the plaintiff does not deposit sufficient fees for service on all the defendants and wishes the Court to issue notice to some of them he must specify which of them he desires to serve otherwise it would be open to him to complain afterwards that the persons whom the Court had served were not substantial defendants while the substantial defendants had not been served and that the Court had exercised an unwise discretion in serving notice on the unsubstantial defendants and omitting to serve notice on substantial defendants. The plaintiff cannot be allowed to put the Court in such a position.

The last point raised is that as the Court has inherent powers to restore a suit and as the result of this dismissal will be that a part of the claim of the plaintiff will be barred by limitation the Court should have exercised its inherent power to restore the suit. Reference was made to *Ram Narain v. Ramdhan Singh* (3) where it was held that when a suit has been dismissed in the absence of both parties there is no prejudice to the defendants if it is restored and the Court ought to exercise its inherent powers in such a case especially if the claim is a substantial one and would become barred by time if the suit is not restored. The amount of the claim in this case is about Rs. 18 p. a. It could hardly be considered that this was a substantial claim as to require the Court to exercise its inherent powers. In the result the application fails and the rule is discharged. As there is no appearance on behalf of the major defendants and the costs of the guardian *ad litem* having been already deposited there will be no order for costs.

S.

Rule discharged.

(2) 2 P L T 256; 60 Ind. Cas. 377; A I R 1921 Pat 422 (1).

(3) 4 P L T 647; 72 Ind. Cas. 668; A I R 1924 Pat 274; (1924) Pat. 280

BOMBAY HIGH COURT

Appeal No. 28 of 1940

October 11, 1940

BRAUMONT, C. J. AND B. J. WADIA, J.
SARSAWATIBAI SHRIPAD VED—
APPELLANT

versus

SHRIPAD VASANJI VED—RESPONDENT

Guardians and Wards Act (VIII of 1890), ss. 17, 25—Child of tender years—Custody of—Considerations in the matter—Mother preferable to father—Persons interested in minor can apply to Court at any time for change of custody.

The paramount consideration in the matter of a custody of a minor of tender years is the interest of the child, rather than the rights of the parents. Human nature is much the same all the world over, and if the mother is a suitable person to take charge of the child, it is quite impossible to find an adequate substitute for her for the custody of a child of tender years. Hence in such a case the mother is preferable to the father 68 Ind. Cas. 518 (1), relied on.

Orders as to the custody of a child are always of a temporary nature. Those interested in the minor are at liberty to apply to the Court at any time for the change of the minor's custody.

Mr. K. M. Munshi, for the Appellant.

Sir Jamshedji Kanga, for the Respondent.

Beaumont, C. J.—This is an appeal from a decision of Kania, J., on a petition presented by the father of a minor under s. 25, Guardians and Wards Act. Under that section, the Court can return the custody of the minor to his father who is his natural guardian, if it is of opinion that to do so will be for the welfare of the minor ward.

The parents of the minor were married in February 1936 and the minor, a boy, was born in October 1938. After the birth the mother unfortunately contracted tuberculosis, and she had to go away for treatment and the child was taken by the father and kept at his mother's house. The mother of the minor was discharged from the sanatorium at the end of July 1939, but she was advised to remain at hill stations for a time in order to complete her cure, and she came back to Bombay, considering herself to be cured, at the end of May 1940. On May 29 the child was out with a servant in attendance and was taken round to the house of the mother and her parents, and it has been retained by the mother ever since. The circumstances in which the child was taken by the mother are in dispute. The father says that it was virtually kidnapped by an uncle of the wife. The uncle, however, has put in an affidavit denying that he kidnapped the child and saying that it was taken by the servant to the mother's house. As the servant in charge of the child, when it

is alleged to have been kidnapped, has not put in an affidavit, it is probable that the mother's story is true. However, that is not very material. The fact is that from the end of May 1940 the child has been in the custody of the mother and the father now asks to have it returned to him. As I have said, under the Act we have to consider what will be in the best interests of the minor.

I think the law on questions of this sort is the same in this country as in England, though of course social habits may be different. The modern view of Judges in England is that it is impossible, in the case of a young child, to find any adequate substitute for the love and care of the natural mother. If the natural mother is a suitable person, the Courts in England will as a general rule hand over the custody of a child of tender years to the mother. The mother's position is regarded as of much more importance in modern times than it was in former days, when a wife was regarded as little more than the chattel of her husband. The view of society in India as to the position of woman may not have advanced so far or so fast as in England, but at the same time the right of the mother to the custody of her young children is undoubtedly recognized in this country: see for example *Bai Tara v. Mohanlal* (1). However the paramount consideration is the interest of the child, rather than the rights of the parents. Human nature is much the same all the world over, and in my opinion if the mother is a suitable person to take charge of the child, it is quite impossible to find an adequate substitute for her for the custody of a child of tender years.

It is suggested here that the mother's health has not recovered. It might be dangerous to send a child to live in the custody of a woman suffering from tuberculosis. But the evidence before the Court is that the mother has recovered. She was discharged from the sanatorium about a year and a half ago, and the doctor says in his letter, Ex. 1, that she was discharged as an arrested case. The subsequent examination of her sputum has not shown any change, and Dr. Billimoria in Ex. 3 reported on June 13, 1940, that no T. B. was detected. On the evidence before the Court, there is no reason for supposing that the health of the child will suffer if its custody is handed over to the mother. Orders as to the custody of a child are always of a temporary nature. Those interested in the minor are at liberty

to apply to the Court. In this case the father can apply to the Court at any time: and if he thinks that the health of his child is suffering, he can ask the Court to appoint a doctor to examine the child. I do not think that on the evidence before us there is at the moment any necessity to appoint a doctor to examine the state of the mother's health, but if at any time there is any reason for supposing that her ailment has returned, the father can apply to the Court to get her examined by an independent doctor, and submission to such an examination could be made a condition to her retention of the custody of the child. There is no question here of removing the child from the guardianship of the father. The father is the natural guardian, and there is no application to remove him from that position. He remains the natural guardian, but in the interests of the child itself we are satisfied that its custody ought, for the present, to be with the mother.

The parents unfortunately are not living together, and probably will not live together, because the father has contracted marriage with another woman. That under Hindu Law he is entitled to do but it is difficult to suppose, that a step-mother, whose age we are told is about 17, is likely to be a good substitute for the natural mother; whilst the father himself will have other occupations and will have to entrust the actual upbringing and charge of a child of this age to somebody else. In my opinion, there is not the slightest doubt that the natural mother is the proper person to have the custody of the child, and there is no evidence before the Court to justify us in thinking that she is not a proper person to have that custody. Her parents appear to have adequate means to maintain her and the child. The father is, of course, entitled to access to his child. Probably there will be no difficulty in arranging that. If there is, he will have to apply to the Court to arrange the circumstances in which he can see his child. I think the learned Judge in the Court below went wrong in the exercise of his discretion, because he did not recognize that the paramount consideration in a case of this sort is the interest of the minor. He refers to the interest of the minor as being a vague ground for exercising his discretion. That is the paramount ground, and *prima facie* it is in the interest of the child that it should be brought up by the mother. We, therefore, direct that the custody of the child, until further order, be with the mother. The appeal is allowed.

(1) 24 Bom. L R 779; 68 Ind. Cas. 518; A I R 1922 Bom. 405.

B. J. Wadia, J.—I agree with the order proposed by the learned Chief Justice. No doubt it is laid down by their Lordships of the Privy Council in *Annie Basant v. Narayaniah* (2), that among Hindus, as in England, the father is the natural guardian of his children during their minorities and that the guardianship is in the nature of a sacred trust. That natural right of the father has received statutory recognition in s. 19 (b), Guardians and Wards Act, VIII of 1900. But s. 19 is in my opinion controlled by s. 17 of the same Act according to which the paramount consideration is the welfare of the minor. The father of the minor has married again. That in itself may not be a ground for depriving him of the custody of his minor child. But the Court has got to consider all the circumstances of the case, and taking human nature as the same here as elsewhere, a step-mother cannot be expected to be very much interested in the welfare of a minor step-son, nor likely to give him the attention, love and sympathy which the child naturally requires. It is not the welfare of the father, nor the welfare of the mother, that is the paramount consideration for the Court. It is the welfare of the minor and of the minor alone which is the paramount consideration; and I agree with Shab, J., in *Bai Tara v. Mohanlal* (1) where he observed as follows (p 722*):

"The boy is of tender age and I think that at present the personal care of the mother is a paramount consideration."

In that case the boy was seven years old. In this case the boy is just about two years of age and what was urged in *Bai Tara v. Mohanlal* (1) can be applied with even greater force to the boy who is two years old. Taking all these circumstances into consideration, I think that at present the custody of the child should be with the mother. But that will not, as has been pointed out by the learned Chief Justice, prevent the father from making a further application to the Court at any later date, under the liberty reserved to him to apply, when he may be able to satisfy the Court that it will then be in the interest and for the welfare of the minor child on account of the mother's health or the child's health, or on account of want of means for maintenance, or any other just and reasonable

ground, that it should leave the mother's custody and instead live with the father. For these reasons I agree that the appeal should be allowed, and I agree with the order proposed.

Per Curiam—As the wife is not asking for costs, there will be no order as to costs throughout. The notice of motion is discharged. The mother should not remove the child from the jurisdiction of the Court without an order of the Court. The mother should send the child to the father's house twice a week at times convenient to the mother for a couple of hours on each occasion, subject to the consideration of the child's health, the father undertaking to make arrangements for conveying the child back to the mother. Liberty to both parties to apply to the Chamber Judge for further directions.

S.

Appeal allowed.

OUDH CHIEF COURT

Appeal under O. C. Act No. 19 of 1937

February 21, 1941

YAKR AND GHULAM HASAN, JJ.

Syed IQBAL ALI—DEFENDANT—

APPELLANT

versus

S. HUMAYUN QADIR AND OTHERS—

RESPONDENTS

Adverse possession—Question as to, is mixed one of law and fact—Whether proved facts substantiate plea of adverse possession is matter of law—If can be challenged in second appeal—Burden of proof—Permissive possession not set up—Question, how to be approached—Essentials of adverse possession—Onus of establishing essentials—Hostile and notorious possession—Situation, user and nature of property to be considered—Acts of temporary and flimsy character cannot destroy real owner's title.

The question of adverse possession is a mixed question of fact and law. Though the facts found by the Court of first appeal must be accepted as final in second appeal, the question whether the proved facts substantiate the plea of adverse possession is a matter of law which can be challenged in second appeal. *Lachmeswar Singh v. Manowar Hossein* (2), 55 Ind. Cas. 48 (3) and 155 Ind. Cas. 23 (4), referred to. [p. 54, col. 1.]

It is the duty of the plaintiffs claiming title by adverse possession to establish affirmatively that they had acquired statutory title to the property by reason of adverse possession for the requisite period. Where no case of permissive possession has been set up by defendant in the pleadings, and the permissive character of possession has never arisen as an independent issue calling for a decision in the case, it is wholly wrong to approach the question of adverse possession by determining whether the defendant has proved a case of permissive possession or not and hold adverse possession upon the weakness of that case. *Radhamoni Debi v. The Collector of Khulna* (5) and 35 Ind. Cas. 902 (6), relied on: [p. 54, col. 2.]

(2) 41 I A 314; 24 Ind. Cas. 290; A I R 1914 P O 41; 38 M 807; 27 M L J 30; 18 C W N 1089; 1 L W 520; (1914) M W N 85; 1 M L T 165; 20 C L J 253; 16 Bom. L R 23; 12 A L J 155 (P O).

*Page of 24 Bom. L. R.—[Ed.]

The title of the owner must be deemed to carry with it the legal possession and must be deemed to subsist, unless and until there is an open and hostile assertion of title accompanied by exclusive possession of an effective nature to the knowledge of the actual owner. To constitute a plaintiff's title by adverse possession, the possession required to be proved must be adequate in continuity, in publicity, and in extent, and is displaced by evidence of partial possession by the defendant, and the onus of establishing these essential elements is upon the adverse possessor. *Radhamoni Debi v. The Collector of Khulna* (5), followed. [p. 55, col. 1.]

In determining the question whether possession is hostile and notorious so as to charge the real owner with notice of the adverse claim the nature, the situation and the user of the property must be considered. [*ibid.*]

Where a house has fallen in ruins for a long time and the land has presented the appearance of a mere *akhata* with a *dalan* bounded on all sides by the houses of neighbours, such acts of possession as tethering of cattle, using the land as a play ground, cooking food on the occasions of ceremonies and even planting trees by the persons who are no other than the members of the real owner's family, cannot possibly arouse the notice of the real owners even if the real owner has been living in the same town; much less would they constitute adverse possession against him if he has been living away from the land since

very long time, since occasional acts are acts of a temporary and flimsy character which do not destroy the title of the real owner. [p. 55, col. 2.]
(Case-law relied on and distinguished)

A. against the order of Mr. Justice Smith, dated May 8, 1937.

Messrs. *Mohammad Ayub* and *S. Mohammad Husain*, for the Appellant.

Mr. *Ali Zaheer*, for Respondents Nos. 1 and 2.

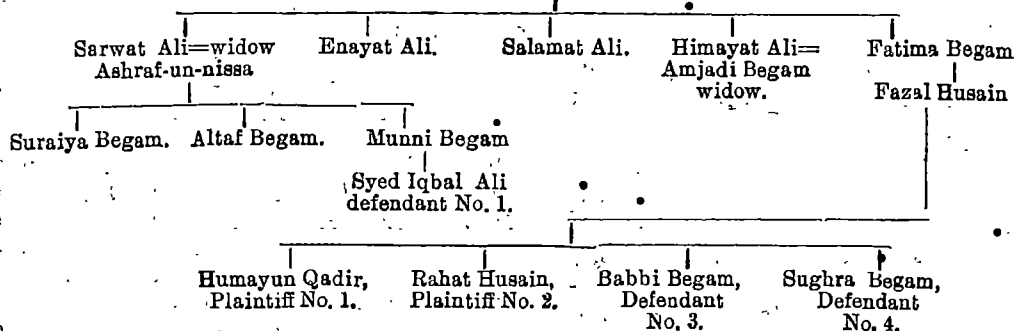
Mr. *Jafar Husain* (absent), for Respondents Nos. 4 and 5.

Mr. *K. N. Tandon*, for the Respondents.

Judgment.—This is an appeal by defendant No. 1 under s. 12 (2) of the Oudh Courts Act against the decision of the late Mr. Justice Smith.

A short pedigree table, in so far as it is material to explain the situation of the parties, is set out below. The pedigree is undisputed:—

QADIR ALI



The facts giving rise to this litigation are fully set forth in the judgments of the two lower Courts and in the judgment of our learned brother, Smith, J.

Briefly they are as follows:—

On July 22, 1891, Sarwat Ali executed a mortgage (Ex. 5) in favour of one Hasan Jafar, the father of defendant No. 2, as *benamidar* for Fazal Husain, the father of the plaintiffs, in respect of three houses in Golaganj, Lucknow, which are now admitted to have been situate on plots Nos. 237, 236 and 237. On March 8, 1893, Sarwat Ali purchased house No. 261 from Amjadi Begam the widow of Himayat Ali. The mortgagee under Ex. 5 obtained a preliminary decree for sale on August 16, 1896. This decree was never made final. Sarwat Ali was a practising lawyer and had shifted to Hyderabad Deccan. He died there some time in 1905. On

January 21, 1927, Sarwat Ali's heirs applied for redemption under the old s. 89 of the T. P. Act, now corresponding to O XXXIV, rr. 5 and 8 of the Civil P. O., against the heirs of Saiyid Hasan Jafar *benamidar* and the heirs of Saiyid Fazal Husain, who was the real mortgagee. The application was allowed by the lower Court but the decision was reversed on appeal by this Court on March 24, 1930, (*vide Humayun Qadar v. Suraiya Begam*, 7 O. W. N. 538) (1). The heirs of Fazal Husain had set up an oral sale of the mortgaged property in their favour after the preliminary decree for sale and had also pleaded adverse possession over the mortgaged property. The plea of oral sale was rejected, but the plea of adverse pos-

(1) 7 O W N 538; 127 Ind. Cas. 252; A I R 1931 Oudh 69; Ind. Rul. (1930) Oudh 476.

session was upheld by this Court. The heirs of Sarwat Ali had obtained possession of the mortgaged property after the decision of the lower Court in their favour but this possession was restored to the plaintiffs after the decision of this Court. In the course of the restitution proceedings a dispute arose as regards the possession over plot No. 261 which the plaintiffs contended was covered by the mortgage deed, but they were resisted by defendant No. 1, and this led to a criminal litigation between the parties. Ultimately, however, the parties came to a provisional settlement under which plot No. 261 was, pending the adjudication of title by Civil Court, put in the possession of defendant No. 1, barring a small portion which went to the other party who in return gave defendant No. 1 a portion of plot No. 236. The plaintiffs instituted the present suit on May 23, 1933, for possession. The number of the plot was not given in the plaint, but it is no longer disputed between the parties that the suit related to plot No. 261 and that part of plot No. 236 which was given to defendant No. 1 under the provisional settlement. In case the plaintiffs succeeded in establishing their claim to plot No. 261, they would be entitled to get back that portion of plot No. 236 which they had surrendered to defendant No. 1 in return for a portion of plot No. 261. Defendant No. 2 is the son of Hasan Jafar, who was admittedly the *benamidar* for Fazal Husain in the mortgage executed in 1891. Defendants Nos. 3 and 4 are the sisters of the plaintiffs and have been impleaded as *pro forma* defendants. The only contesting party in the case therefore is the defendant No. 1. The plaintiffs asserted themselves in the plaint as owners of land along with the building, of which the boundaries were given at the foot of the plaint but which must now be deemed to refer to plot No. 261, since September 14, 1898. The plaint refers to the fact of Sarwat Ali's heirs having taken possession of the said plot in 1928 after their application for redemption was granted by the lower Court, and that the plaintiffs regained possession of the same on May 31, 1930. On July 7, 1930, defendant No. 1 is alleged to have taken unlawful possession of the said plot, and this, according to the plaint a legation, gave rise to the suit for possession against him along with damages to the extent of Rs. 50 for allowing a *dalan*,

in the land in suit to fall into disrepair during the period of his possession.

Defendant No. 1 pleaded that plot No. 261 was not the subject-matter of dispute in the redemption case which he lost in the Chief Court, that he was the owner in possession of the said plot and that the plaintiffs had no title whatsoever to the same. In the oral pleadings before the Court Counsel for the plaintiffs stated on August 26, 1935, as follows :—

"I claim title to the property by virtue of the decree in foreclosure and redemption suit and also on the ground of adverse possession which has been established against defendant No. 1 by the judgment of the Hon'ble Judges of the Chief Court. Defendant No. 1's possession over the property was always permissive."

Counsel for the defendant No. 1 replied that the property in suit was not included either in the foreclosure decree of 1898 or in the redemption suit lost by defendant No. 1 against the plaintiffs in the Chief Court. The property in suit appertains to Ahata No. 261, which originally belonged to Himayat Ali, whose heirs sold it to Sarwat Ali, and after the death of Sarwat Ali his heirs who succeeded to the property transferred the same to defendant No. 1.

On November 25, 1933, the plaintiffs filed a replication in which they stated that they had become owners of the land in suit by adverse possession for a long time. On November 27, 1933, Counsel for the plaintiffs stated that the whole of the land was previously in the possession of the plaintiffs and his predecessors-in-interest since the year 1898 and that with the exception of a *dalan* shown in the Commissioner's map there was no other building in the land in suit since 1898.

The trial Court appointed a Commissioner, who prepared a plan of the land in suit. In an elaborate judgment the trial Court held that plots Nos. 232, 236 and 237 were the only plots in suit in the redemption case, and that plot No. 261 was not included in it. It held that the land in suit so far as it was enclosed by the letters "al bl Cl. Gl d8 el fl" in the map of the Commissioner was included in the redemption case, and the rest of the land in suit was not included. This finding was accepted by the learned Subordinate Judge and was not challenged in the appeal to this Court. Issue No. 2 related to adverse possession and ran as follows :—

"Has the land in suit been in adverse possession of the plaintiffs and their predecessors in interest

since the year 1898, and have they perfected their title to it?"

The trial Court split up the question of adverse possession into two parts, one relating to *deorhi* shown in the Commissioner's map and the other relating to the *ahata*, which included the *dalan* towards the south. It held that the *deorhi* formed part of the house of Mir Himayat Ali which was sold to Sarwat Ali, but that it had been in the possession of the plaintiffs for a long time who had connected it with their own house and had settled a tenant therein. As regards the *ahata* which was coloured red in the Commissioner's map its view was that it had been a vacant land from the year 1909 or 1910. No building existed on the land, and there was a *dalan* which was in a dilapidated condition. The trial Court enumerated the following acts of possession which were alleged to have been exercised by the plaintiffs over the land in suit, namely, that the plaintiffs used to keep their cattle and hens, that singing parties used to be arranged in the *dalan* and the *ahata* occasionally and that plaintiff No. 2 used to fly kites in the *ahata* and that on occasions of ceremonies food used to be cooked in the *ahata*. Its view was that the aforesaid acts did not prove ouster of the owner, much less any adverse possession over the land in suit. It disbelieved the evidence of the plaintiffs who had stated that in the year 1915 the widow of Sarwat Ali wanted to take possession of the *ahata* but was prevented from doing so. Certain post-cards were relied upon on behalf of the defendant No. 1, Exs. A-11 to A-14, which were written by the plaintiff No. 2 and his brother-in-law Afzal Husain to Suraiya Begam in 1906-1908. The trial Court came to the conclusion that these letters show that the plaintiffs were on cordial terms with Suraiya Begam, and consequently there could be no question of any adverse possession till that date. The trial Court further disbelieved and story set up by the plaintiffs that they had been in possession of the entire *ahata* under an oral sale. This latter finding was confirmed in appeal and has not been challenged. The trial Court made an inspection of the spot with a view to better understand and appreciate the evidence recorded by him in the case. This the Court was entitled to do under O. XVIII, r. 18 of the Civil P. C. The trial Court further found that since the year 1905 no relation of Sarwat Ali or his brother resided in the *ahata* in suit, and the walls of the house situate therein had fallen down and

disappeared, and the only structure left was a *dalan* in a dilapidated condition. The *ahata* was now surrounded by the houses of neighbours and the condition of the *ahata* was attributed to the course of nature. There was no defined boundary, and the boundary walls of the *ahata* on three sides belonged to different persons, who are the plaintiffs' neighbours. Three passages led to this *ahata*, one from the *deorhi*, the other from the east of the *ahata* connected with a lane and the third from a window of the plaintiffs' house. Neither of these passages was opened by the plaintiffs or their predecessors, but the position as it stood showed that they were controlled by the plaintiffs. Upon this finding the trial Court decreed the suit for possession of that portion of the land in suit which appertains to plot No. 236 and is enclosed by letters "a1 b1 C1 G1 d1 e1 f1" in the map prepared by the Commissioner and dismissed the rest of the claim.

The learned Subordinate Judge on appeal observed

"When the possession of the appellants over the *deorhi* is adverse and the Hon'ble Chief Court has recognised their title by adverse possession in respect of plot No. 236, when they have purchased the land of the *ahata* towards north (not in suit) from Mst. Bibi Jan in 1905 and 1906 as Exs. 8 and 9 show and when appellants have full control of the three passages leading to the land in suit which is in the shape of one *ahata* and is a vacant land enclosed by walls and it is also admitted that they have been in possession for a long time, I think there can be no other conclusion except that their possession over the land in question is also adverse".

The result was that the learned Subordinate Judge decreed the plaintiffs' suit for possession of the land coloured red in the map prepared by the Commissioner. He did not however decree the claim for damages.

This decision was affirmed in second appeal by our learned brother, Smith, J. The learned Judge observed in his judgment:—

"The sole question at issue between the parties has been whether the plaintiffs and their predecessor have been in adverse possession of this plot and of the buildings standing on it for over twelve years, or whether their possession was simply permissive".

At another place he says that

"the whole question is, however, whether the nature of the possession of the plaintiffs and their predecessor was such as to constitute it adverse possession."

After referring to the evidence of the two plaintiffs and quoting passages from their evidence he came to the conclusion that the evidence given by Saiyid Humayun Qadar was neither consistent nor clear, and he was not prepared to hold on that

evidence that Fazal Husain's possession of the plot No. 261 and the house standing thereon was in the first place permissive. The learned Judge summed up his conclusions in the following passage :—

"Taking into consideration the weakness of the appellant's case on this point, and also the fact that this case of permissive possession on the part of Fazal Husain was not the case originally set up by him, (the learned Subordinate Judge said in his judgment that even before him S. Iqbal Ali did not set this up as a definite case), I think that the case of the appellant based upon permissive possession must be held to have failed, and on the facts as a whole alleged on the side of the plaintiffs-respondents I am of opinion that the learned Subordinate Judge was justified in finding the plaintiffs entitled to succeed on the basis of title by adverse possession".

After having heard arguments at considerable length in this case we regret we are unable to uphold the decision of our learned brother. At the outset it may be pointed out that the question of adverse possession is a mixed question of fact and law. Though the facts found by the Court of first appeal must be accepted as final in second appeal, the question whether the proved facts substantiate the plea of adverse possession is a matter of law which can be challenged in second appeal vide *Lachmeswar Singh v. Manowar Bossain*, (I L R 19 Cal. 253 P O) (2), *Satgur Prasad v. Raj Kishore Lal* (I L R 42 All. 152 P C) (3) and *Mst. Rajana v. Musaheb Ali* (I L R 11 Lucknow, 82) (4).

In the well known case of *Radhamoni Debi v. The Collector of Khulna* (L R 27 I A 136) (5), their Lordships of the Judicial Committee in a case resting firstly on title and secondly on adverse possession observed that it is necessary to remember that the onus is on the appellant (plaintiff), and that what she has to make out is possession adverse to the competitor.

This principle was further confirmed in *Secretary of State for India in Council v. Chelikani Rama Rao*, (L R 43 I A 192) (6), where it was held :—

"Nothing is better settled than that the onus of establishing property by reason of possession for a certain requisite period lies upon the person asserting possession. It is too late in the day to

suggest the contrary of this proposition. If it were not correct, it would be open to the possessor for a year or a day to say I am here; be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions." Such a singular doctrine can be well-illustrated by the case of India, in which the right of the Crown to vast tracts of territory, including not only islands arising from the sea, but great spaces of jungle lands, necessarily not under the close supervision of Govt. Officers, would disappear because there would be no evidence available to establish the state of possession for sixty years past. It would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession."

Having regard to the principle enunciated above regarding the onus in such cases, we are of opinion that the issue framed by the trial Court was perfectly correct, and it was the duty of the plaintiffs to establish affirmatively that they had acquired statutory title to the property by reason of adverse possession for the requisite period. No case of permissive possession was admittedly set up by defendant No. 1 in the pleading, and it seems to us that the permissive character of possession never arose as an independent issue calling for a decision in the case. In these circumstances it was wholly wrong to approach the question of adverse possession by determining whether the defendant No. 1 had proved a case of permissive possession or not and hold adverse possession upon the weakness of that case. Defendant No. 1 never set up the case that the plaintiffs had been in possession of the land in dispute by leave or licence of his predecessor-in-title. The question seems to have agitated the minds of the Courts upon the statement in cross examination made by the plaintiff No. 1 Saiyid Humayun Qadar, which was as follows :—

"While going back to Hyderabad in 1898, Sarwat Ali sent for my father. My father was busy, so he sent his clerk Sardar Husain to Sarwat Ali. Sarwat Ali told Sardar Husain that he was going to Hyderabad, Fazal Husain should come and take possession of the house. When Sardar Husain intimated this to Fazal Husain, the latter replied that the houses of Sarwat Ali were of little value and they may be looked after."

This statement was relied upon by the defendant as indicating permissive possession, but the learned Subordinate Judge did not uphold this contention. We are of opinion that this statement may well have been relied upon as destructive of the case of adverse possession set up by the plaintiffs, but it by no means follows that the defendant No. 1 was setting up a definite and substantive case of permissive

(2) 19 O 253; 19 I A 48; 6 Sar. 133 (P O).

(3) 42 A 152; 51 Ind. Cas. 486; A I R 1919 P O 60; 46 I A 197; 18 A L J 235; 22 Bom. L R 451; 24 C W N 394; 3 M L J 259; 27 M L T 200; 11 L W 384; (1920) M W N 3; 2 U P L R (P O) 55 (P O).

(4) 11 Luck 82; 155 Ind. Cas. 23; A I R 1935 Oudh 387; 135 O W N 423; 7 R O 547.

(5) 27 I A 136; 27 O 943.

(6) 43 I A 192; 35 Ind. Cas. 902; A I R 1916 P O 21; 39 M 617; 14 A L J 1114; 18 Bom. L R 1007; 25 O L J 69; 20 C W N 1311; 31 M L T 435; 4 L W 486; (1916) 2 M W N 224; 31 M L J 324 (P O).

possession which was legally not permissible through the evidence of a plaintiff in the witness box. We do not think it necessary to rest our decision upon the meaning to be attached to the above statement of the plaintiff in order to hold that the possession of the plaintiff was of a permissive character. Having regard to the acts of possession found by the two lower Courts on the land in suit, we are of opinion that these occasional acts in the circumstances of the present case are acts of a temporary and flimsy character which do not destroy the title of the defendant or his predecessor-in-interest. The title of the defendant or his predecessor-in-interest must be deemed to carry with it the legal possession and must be deemed to subsist, unless and until there is an open and hostile assertion of title accompanied by exclusive possession of an effective nature to the knowledge of the actual owner. According to the classical definition of "adverse possession" by Lord Robertson in *Radhamoni Debi v. The Collector of Khulna* (L R 27 I A 136), (5), constitute a plaintiff's title by adverse possession, the possession required to be proved must be adequate in continuity, in publicity, and in extent, and is displaced by evidence of partial possession by the defendant, and the onus of establishing these essential elements is upon the adverse possessor. We are of opinion that the plaintiffs have failed to satisfy the test essential to the proof of adverse possession. In determining the question whether possession is hostile and notorious so as to charge the real owner with notice of the adverse claim the nature, the situation and the user of the property must be considered. "It is impossible", says Lord Halsbury in *Marshall v. Taylor*, (1895, 1 Ch. 641 at 645), (7).

"to speak with exact precision about the degree of possession or dispossession that will do unless you have regard as Lord Justice Cotton said in *Leigh v. Jack* (1879, 5 Exch. D 264) (8) to the nature of the property."

Sarwat Ali never visited Lucknow since 1898, and Suraiya Begam, one of his daughters, stayed with him in Hyderabad. Neither Munni Begam, the mother of defendant No. 1, nor Altaf Begam, who is married in Hardoi District, ever lived in Lucknow. Defendant No. 1 himself did not come to Lucknow till the year 1927. The house which Sarwat Ali acquired in 1893 evi-

dently fell in ruins before 1898 and no permanent structure worth the name has been in existence on the spot at any rate since the year 1898, and the land in suit has presented the appearance of a mere *ahata* with a *dalan* bounded on all sides by the houses of neighbours. Such acts of possession as tethering of cattle, using the land as play ground, cooking food on the occasions of ceremonies and even planting trees could not possibly have aroused the notice of the real owners—who are no other than members of the plaintiffs' own family—even if they had been living in Lucknow, much less would they constitute adverse possession against Sarwat Ali and his family, who have been away from the land in dispute since 1898. Exhibits A-11 to A-14 are post-cards written in the year 1906 to 1908. Exhibit A-11 was written by Afzal Husain, brother-in-law of the plaintiffs, to Suraiya Begam, while Exs. A-12 to A-14 were written by the plaintiff No 2 to Suraiya Begam. We agree with our learned brother that these post-cards do not show that the plaintiffs acknowledged the claims of Sarwat Ali's heirs to the property in dispute, but at the same time we are of opinion that they do show that cordial relations existed between the heirs of Sarwat Ali and the plaintiffs. Plaintiff No. 1 admits in his evidence that he was on good terms with Mst. Suraiya Begam when Exs. A-11 to A-14 were written by him to her. There is no evidence on the record to show that at any time before the application for redemption was filed in 1927 the relations of the parties became hostile. We do not think it will serve any useful purpose to refer to decide cases upon the point, as in our opinion the principles governing the acquisition of prescriptive title have been laid down by their Lordships of the Privy Council, and the only question that arises for consideration before us is whether in view of these principles the plaintiffs have succeeded in discharging the heavy onus which lay upon them to prove the essential elements of adverse possession. We may, however, refer to two cases, *Framji Cursetti v. Goculdas Madhewji* (I. L. R. 16 Bom 338) (9) and *Chokkalinga Naicken v. Muthusami Naicken* (I. L. R. 21 Madras 53) (10), which have frequently been referred to in subsequent decisions of the various High Courts in India.

I. L. R. 16 Bom. 338 (9). In this case a

(7) (1895) 1 Ch. 641 (645); 64 L J Ch. 416; 12 R 310; 72 L T 670.

(8) (1879) 5 Ex. D 264; 49 L J Ex. 220; 42 L T 463; 38 W R 452; 44 J P 468.

(9) 16 B 388.
(10) 21 M 53.

small piece of land being of no present use to its owner and being convenient in many ways to his neighbour, the latter made use of it, in various ways, without objection for more than 12 years. A privy and sheds for cows and goats, fowls, etc. and a hut for a *ghariwallah*—all, however, structures of a flimsy and purely temporary character—were said to have been constructed and maintained for many years on the said piece of land. Such user, it was contended, amounted to adverse possession.

It was held that such user as this was insufficient to give a title to the land by adverse possession. User of this sort, under similar circumstances, is common in this country and excites no particular attention. It is neither intended to denote, or understood as denoting—on the one side or the other—a claim to the ownership of the land, and, where this, and no more, is the case it would be wrong to hold that a claim by adverse possession has been made out.

I. L. R. 21 Madras 53 (10). In this case the defendant had used, as a backyard a small piece of land situated between his house and that of the plaintiff, who was his brother, for a period of more than twelve years. In 1894 the defendant began to build on it, whereupon the plaintiff protested and sued for possession. It was held that the use of the land for the purpose of a backyard would not be sufficient to constitute adverse possession.

Learned Counsel on behalf of the plaintiffs-respondents has cited (*Suna Pana Chena Voona*) *Sevugan Chetty v. Koovanna Kana Nana Kana Kannappa Chetty* (A. I. R. 1931 Madras 282) (11), *U. Maung Gyi v. Maung On Bwin* (A. I. R. 1929 Rangoon 153) (12), *Subramania Pillai v. The Secretary of State for India* (I. L. R. 34 Mad. 353) (13), *Nizam Din v. Ali Mohammad* (A. I. R. 1927 Lahore 753) (14) and *Nageshwar Bux Roy v. Bengal Coal Company, Limited* (L. R. 58 I. A. 29) (15). None of these cases has any application to the facts and circumstances of the present case.

(11) A I R 1931 Mad. 282; 130 Ind. Cas. 855 (2); 60 M L J 430; 33 L W 457; (1932) M W N 299.

(12) A I R 1929 Rang. 153; 117 Ind. Cas. 591; 7 R 85.

(13) 34 M 353; 9 Ind. Cas. 9; 21 M L J 132; 9 M L T 181; (1911) 1 M W N 55.

(14) A I R 1927 Lah. 753; 99 Ind. Cas. 698.

(15) 58 I A 29; 130 Ind. Cas. 315; A I R 1931 P C 186; 60 M L J 183; 33 L W 162; 35 C W N 265; 53 C L J 81; Ind. Rul. (1931) P. C 59; (1931) M W N 121; 33 Bom. L R 425; 12 P L T 251; 15 R D 194; 10 Pat. 407; 53 C L J 487; (1931) A L J 537 (P C).

A. I. R. 1931 Madras 282 (11). The plaintiff not only relied upon the presumption of possession arising from title over waste land in his favour but actually put forward a case of effective possession and adduced evidence in support of it. It was held that he had not succeeded in proving possession within limitation and he was not entitled to fall back upon the presumption of possession in face of the case that he had put forward.

U Maung Gyi v. Maung On Bwin (A. I. R. 1929 Rangoon 153) (12). In this case the plaintiff definitely put forward a case that he himself had given possession to the defendant over the land in suit. This case failed on the other hand it was proved that the defendant had been in possession for the last 15 or 20 years. It was held that it was the duty of the plaintiff to prove his possession within limitation and therefore the suit fell within Art. 142 of the Indian Lim. Act.

Subramania Pillai v. The Secretary of State for India (I. L. R. 34 Madras 353) (13). In this case it was held that acts done on parts of a tract of land will only be evidence of possession of the whole where the said tract of land possesses a defined boundry. As we have already held that is not the case here.

Nizam Din v. Ali Mohammad (A. I. R. 1927 Lahore 753) (14). It was held that though ordinarily speaking the doctrine of constructive possession cannot be used in favour of the trespasser, nevertheless, in a case where the plot in dispute forms part of a larger plot with defined boundaries over which larger plot there have been physical acts of ownership in portions and where there has been an assertion of title over the whole plot throughout, such circumstances are relevant evidence as to the possession of the waste land. In this case the plot had lain waste, and the predecessors of the plaintiffs purported to mortgage the whole of the plots and purported to sell portions of the whole plot, and therefore it could fairly be held that they had an *animus possidendi* even over the plots now in dispute and consequently they had acquired title by adverse possession over the plots now in dispute.

Nageshwar Bux Roy v. Bengal Coal Company, Limited (L. R. 58 I. A., 29) (15). In this case a coal company, who held a *mukarrari* lease of a village and believed that they were entitled to the subjacent minerals, openly carried on for twelve years mining operations in various parts of the

village by working pits and making trial bore-holes; it was not clear whether any one pit had been worked continually for twelve years. The zamindar sued the coal company claiming the minerals under the village. It was held that the company had been in adverse possession of the minerals under the whole village for more than 12 years and the right of the zamindar was, therefore, barred. It was further observed that as a general rule where title is founded on adverse possession the title will be limited to that area of which actual possession had been enjoyed. But the extent of possession enjoyed may be an inference of fact, and in applying the rule to the case of a mineral field regard is to be had to the nature of the subject and the possession to which it is susceptible.

Having given our best consideration to the facts and circumstances of the present case, we are satisfied that the plaintiffs have failed to establish the plea of adverse possession set up by them over plot No. 261 except with regard to the *deorhi* over which the trial Court upheld the adverse possession of the plaintiffs.

We, therefore, allow the appeal, set aside the decree passed by our learned brother unholding the decree of the lower Appellate Court and restore the decree of the trial Court. As regards costs, we maintain the order passed by the trial Court but we allow costs to the defendant-appellant in all the other Courts on the ground that he has substantially succeeded.

s.

Appeal allowed.

ALLAHABAD HIGH COURT

Application in Second Appeal No. 391
of 1939

November 13, 1940

BRAUND, J.

RAWAT RAJ KUMAR SINGH AND OTHERS
—APPELLANTS

versus

BENARES BANK LTD., BENARES

(IN LIQUIDATION) AND OTHERS—RESPONDENTS
Companies Act (VII of 1913), s. 171—Decree in favour of company—Appeal by judgment-debtor—Company wound up—Appeal proceeded with—Judgment-debtor, if proceeding with legal proceeding against company—Leave of Court, if necessary.

Where a decree has been passed in favour of a company and the judgment-debtor has appealed from the decree and goes on with his appeal at the date of the winding up of the company, he should be regarded as proceeding with legal proceedings against

the company and this he cannot do without the leave of the Court. *Humber & Co. v. John Griffiths Cycle Co.* (3), explained, 47 Ind. Cas. 392 (2), disapproved. 36 Ind. Cas. 618 (1), approved.

Mr. Nanak Chand, for the Appellants.

Mr. J. Swarup, for the Respondent.

Order.—This is a little application in the matter of the Benares Bank Ltd., (in liquidation). It is a very usual form of application, under s. 171, Companies Act. The facts, so far as they are material, are that in August 1939 the company obtained a decree—it does not matter what kind of a decree—against the applicant. On December 13, 1939 the applicant filed an appeal to this Court against that decree, making the company, of course, a respondent. On March 1, 1940 the company was ordered to be wound up by the Court and an official liquidator was appointed. The present application is an application by the appellant to the appeal for the leave of the Court to proceed with his appeal. That involves a consideration of s. 171, Companies Act. Section 171 of the Act is in these terms :

"When a winding up order has been made or a provisional liquidator has been appointed no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose."

"I confess that I should myself have little doubt, upon the ordinary use of language, as to the meaning of this section, had it not been for a decision of a Full Bench Court at Lahore to which my attention had been drawn and to which I shall refer more particularly in a moment. It would have appeared to me to be beyond controversy that an appeal from a decree was a "legal proceeding." And I should have thought that it was equally plain that it was in this case a legal proceeding "against the company." Moreover, when an appellant goes on with his appeal at the date of the winding up order, I think he must be said to be "proceeding" with it. Upon the language of the section, therefore, I should have thought that it was plain that the prosecution of an appeal to which the company was a respondent and which was pending at the date of the winding up order was a proceeding for the prosecution of which the leave of the winding up Court was necessary under the section. That appears to have been the view which was taken in a case in 1916 in the Chief Court in

Milawa Ram v. People's Bank of India. (1), at p. 278. That case has reference to a revision proceedings, but there is, I think, no distinction to be drawn between a revision proceeding and an appeal for the present purpose. The learned Judges in that case say :

"In this case the suit was by the company : the revision however is against the company and we hold that it was a proceeding against the company within the meaning of the action."

It is a proceeding intended to wrest from the company the decree obtained by it in the Courts below, a decree which but for the present revision would establish the company's title in the property in dispute. The present revision is a proceeding against the company to defeat that title."

Two years later, however, the matter was reconsidered by a Full Bench of the Punjab Chief Court *Kisan Singh v. Industrial Bank of India* (2), which included the Hon'ble Shadi Lal J., as he then was. This Bench, the judgment of which is of course, entitled to the greatest respect, took the view that the earlier case to which I have already referred was wrongly decided, although they make a concession to it by admitting that there is *prima facie* considerable force in the view taken by it. The Full Bench were, however, greatly influenced by a decision in the House of Lords in England in *Humber & Co. v John Griffiths Cycle Co.* (3), and, founding themselves, as I think, upon that case, they came to the conclusion that no leave of the winding up Court was necessary for the prosecution of an appeal or a revision pending at the date of the winding up order and arising out of a suit in which the plaintiff was the company. With the greatest respect, and I need hardly say only with great diffidence, I think that the learned Judges who composed that Full Bench have misunderstood the case in the House of Lords upon which they relied. To understand it, it is necessary, I think, to look closely at its facts. A company, John Griffiths Cycle Co., had in the first place brought an action against the defendant prior to the winding up in which they (the company) had been unsuccessful. The company then appealed to the Court of Appeal and it was during the pendency of that appeal that the winding up order against the company was passed. In that appeal the defendant to the suit, who was the

(1) 91 P R 1916 (278); 36 Ind. Cas. 618; A I R 1916 Lah. 24; 80 P L R 1917.

(2) A I R 1918 Lah. 181; 47 Ind. Cas. 392; 62 P L R 1918; 32 F L R 1918 (F B).

(3) (1901) 85 L T 141.

respondent to the appeal, appealed to the House of Lords and it was in respect of the appeal to the House of Lords that the question arose whether the leave of the winding up Court was necessary. Now, in my view, the thing to observe about this case is that at the date of the winding up order the "proceeding" which was then on foot was a proceeding, not against, but by the company and was one for the further prosecution of which no leave of the company Court, whatever was required. The proceeding on foot at the date of the winding up order was the appeal by the company and it was open to the company to go on with that appeal without the leave of the Court. With that introduction it is possible to see what it was that Lord Davey in his speech actually said. He said this :

"... "The respondents, that is to say the company, "now" object that the present appellant cannot proceed with their appeal without the leave of the Court in Ireland. I am of opinion that the objection cannot be maintained. It was the respondents who themselves proceeded with the action after the winding up order, by prosecuting their appeal in the Court of Appeal, and *when once an action by the company itself has been proceeded with*, there is necessity for the defendants in the action to obtain leave for any defensive proceeding on their part. ... "

The italics are, of course, my own, but, in my view, the words they cover afford the clue to what it was that the House of Lords really said in this case. His Lordship, as it seems to me, said no more than that when you find that at the date of the winding up order there is a proceeding already on foot, which proceeding requires no leave of the Court to prosecute it, then that proceeding may go on to its logical conclusion without leave of the Court. In other words, he said that, inasmuch as the appeal which was pending at the date of the winding up order in that case was an appeal by the company itself and, as such, was one which needed no leave to prosecute it, it was a proceeding which might go on to its ultimate conclusion—including an appeal to the House of Lord—notwithstanding s. 87, Companies Act of 1862, which was the Act then in force. Now reverting to the Full Bench case of the Punjab Chief Court it appears to me with great respect that the learned Judges have overlooked that the decision in *Kishan Singh v. Industrial Bank of India* (2), was limited in the way I have pointed out. It is not, I think, an authority which decides, in general terms, that wherever you find an appeal from a suit in which the company itself

was the plaintiffs, that appeal may be either proceeded with or commenced without the leave of the Court. In the case before me, at the date of the winding up order, a proceeding was pending. But, unlike *Kishan Singh v. Industrial Bank of India* (2), it was a proceeding by the defendant against the company and it was, therefore, a proceeding which, according to what I conceive to be the plain meaning of the language used in s. 171, Companies Act, could not go on without the leave of the Court. For these reasons, in my view, the present case is one in which the leave of the winding up Court is necessary to the prosecution of the appeal and I give that leave accordingly.

s. *Order accordingly.*

CALCUTTA HIGH COURT

Applications in Suit No. 36 of 1939

April 22, 1940

L. RT. WILLIAMS, J.

In re EAST BENGAL SUGAR MILLS

(IN LIQUIDATION)

Company—Articles of association—Persons consenting to become share-holders on condition of their suggestions being included in memorandum and articles—Despite non-fulfilment of conditions, usual application for shares and for becoming share-holders signed—Proper time for objecting to become share-holder—Companies Act (VII of 1913), s. 156—New liability under, when arises—Previous calls made and becoming time-barred—Effect of.

Where persons consented to become share-holders on condition that their suggestions were included in the memorandum and articles of association, but subsequently it was found that the memorandum and articles of association were different to the draft memorandum and articles of association which had been shown to them, and did not embody their suggestions and despite this, they signed the usual application for shares and became share-holders:

Held, that it was not open to them subsequently to object to their being share-holders on the ground of the condition as to alteration of the memorandum and articles of association, not having been fulfilled. The proper time to object was at the time of incorporation of the company.

New liability to contribute under s. 156, Companies Act arises for the first time upon the winding up and is unaffected by the fact that previous calls have been made by the Company and have become barred by limitation. *In re Whitehouse & Co.* (1), relied on, 142 Ind. Cas. 7(3), distinguished.

Mr. J. C. Moitra, for the Official Liquidator.

Mr. S. K. Basu, for two Contributories, Applicants.

Order.—These are two applications on behalf of Kazi Abdul Rashid Khan Bahadur and Barada Kanta Ganguli Bahadur respectively who have been in-

cluded in the list of contributories made by the Official Liquidator in the matter of the East Bengal Sugar Mills Ltd., (in liquidation). They are numbered 27 and 28 in that list. They object to their inclusion in the list on somewhat similar grounds, namely the representations were made to them by Ramanath Das, who was the promoter of this company, and that they were induced by those representations to become share-holders, the allegation being that prior to the incorporation of the company Ramanath Das showed each of them a draft memorandum and articles of association with regard to which they made various suggestions for amendment. They consented to become share-holders on condition that these suggestions were included in the memorandum and articles of association, but subsequently found that the memorandum and articles of association eventually filed were different to the draft memorandum and articles of association which had been shown to them, and did not embody their suggestions. The answer to all this is that whatever happened, happened prior to the incorporation of the company. At the time of incorporation it was the duty of these two gentlemen to satisfy themselves that the memorandum and articles of association were in accordance with their views. There was the time to object to become share-holders. Instead of that, both of them signed the usual application for shares which were allotted to them and both of them became share-holders of this company. Kazi Abdul Rashid Khan Bahadur, in a letter written by his Pleader on his behalf dated July 16, 1935, set up entirely different objections to the demand then made upon him for payment of Rs. 1,841-14-11. In this he said that he had never agreed to purchase 200 shares in the company. That Ramanath Das had asked him to be a signatory to the memorandum and articles of association saying that a Muhammadan gentleman's name should be on it. That Ramanath Das gave him a distinct assurance that he would not have to purchase any share or shares or pay any money out of his own pocket and on account of his importunities he signed the memorandum and articles telling Ramanath he would on no account purchase more than one share. These allegations have been answered by Ramanath Das in two affidavits in which he gives a complete denial to each and all of the allegations made by Kazi Abdul Rashid (Khan

Bahadur) and Rai Barada Kanta Ganguly. Bahadur and I accept his version of what happened.

Earned Counsel on behalf of these two shareholders, in addition to relying upon the facts stated in the affidavits, has raised a point of law, namely that a number of calls had been made from time to time by the company prior to the winding up and had not been paid by either of these shareholders and had become barred by limitation. Therefore, he argued that it would not be proper to put their names upon the list of contributories because they were no longer liable to subscribe anything to the assets of the company in respect of calls or otherwise. The answer to this is that s. 156, Companies Act, creates a new liability which provides that in the event of a company being wound up, every member shall be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding up, etc., with the qualification *inrer alia* that in the case of a company limited by shares no contribution shall be required from any member exceeding the amount unpaid on his shares in respect of which he is liable as a member. This new liability arises for the first time upon the winding up and in my opinion unaffected by the fact that previous calls have been made by the company and have become barred by limitation. That this is the correct interpretation of the section is confirmed by the judgment of Jessel, M. R. in *In re Whitehouse & Co.* (1), in which he said at p. 599 as follows:

"First of all, it must be remembered that the 38th section of the Act, which directs what is to be paid in the case of a winding up by the shareholders of a limited company, creates new rights, and rights which did not exist before the passing of the Companies Act, 1862, and rights which do not exist till there is a winding up. That point was decided by the House of Lords in *Webb v. Whiffen* (2), that it was in fact a new right or rather a new liability as regards the shareholders; and that section alone, for this purpose, regulates their liability."

The section to which he referred is as follows:

"In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient, for payment of the debts and liabilities of the company"

the terms for all practical purposes being (1) (1878) 9 Ch. D 595 (599); 47 L J Ch. 801; 39 L T 415; 27 W R 181.

(2) (1873) L R 5 H L 711; 42 L J Ch. 161.

the same as in s. 156, Companies Act. The learned Master of the Rolls went on to say as follows:

"That is a new liability he is to contribute; it is a new contribution. It is a mistake to call that a debt due to the company. It is no such thing. It is not as has been supposed in any shape or way a debt due to the company, but it is a liability to contribute to the assets of the company; and when we look further into the Act, it will be seen that it, is a liability to contribution to be enforced by the liquidator. It is quite true that a call made before the winding up is a debt due to the company, but that does not affect this new liability to contribution. But there are certain limits to the liability. This being a limited company the only limit which it is necessary to refer to is that stated in the 4th subsection of the 38th section. 'In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount unpaid on the shares in respect of which he is liable as a present or past member.' Now, first of all as regards the calls made in the winding up they being calls for something unpaid on the shares that is a contribution due by the member under the Act and is not a debt due to the company. The contribution also under this section applies to the unpaid calls made before the winding up, because, though that is a debt due to the company it is not the less an amount unpaid on the shares in respect of which he is liable and therefore he must be liable to contribute all that is unpaid on his shares. As I said before, it is as much unpaid if he had not paid the calls made before the winding up, as it is in respect of the amount unpaid on the shares in respect of which no call has been made before the winding up. It seems to me that the contributories' liability created by the 38th section being only limited to the amount unpaid, it is immaterial for the purpose of this section, whether the call was made before or after the winding up, provided the amount is unpaid."

The case in *Hansraj Gupta v. Dehra Dun and Mussorie Electric Tramways Co. Ltd.* (3), is not in any way inconsistent with the judgment to which I have just referred. Their Lordships of the Privy Council were therein dealing with a case under s. 156 of the Act, and Lord Russell of Killowen on p. 300* specifically distinguished and excluded from his judgment questions arising out of the statutory liability created under s. 156. The result is that these objections must be disallowed and the names of these two shareholders must be included in the list of contributories. The liquidator is entitled to costs against both the shareholders, the taxing officer will bear in mind that there has been only one hearing with regard to both the applications.

D.

Applications dismissed.

(3) 37 O W N 379; 142 Ind. Cas. 7; A I R 1933 P O 63; 54 A 1067; 60 I A 13; Ind. Rul. (1933) P O 43; (1933) M W N 190; (1933) A L J 175; 35 Bom. L R 319; 37 L W 445; 64 M L J 403; 57 O L J 166 (P O).

*Page of 37 O. W. N.—[Ed.]

OUDH CHIEF COURT

First Civil Appeal No. 55 of 1937

February 26, 1941

YORKE AND AGARWAL, JJ.

Pt. MOHAN LAL AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

Pt. RAM DAYAL AND OTHERS—

DEFENDANTS—RESPONDENTS

Hindu Law—Ancestral property—Property inherited from maternal grandmother, if ancestral—Joint family—Presumption as to—Burden of proof—There can be joint family without joint family property—Brothers having separate earnings but living house for family—House, whether joint family property—Separation—Proof of—Two brothers keeping their earnings separately, if proof of separation—Brothers in service living separately—Effect—Res judicata—Hindu Law—Joint family—Previous decision that family was not joint at particular time, whether res judicata in subsequent suit where question is whether family was joint before such time.

Property inherited by two Hindu brothers from their maternal grandmother is not ancestral property and the brothers get it as tenants-in-common and not as joint tenants.

There can be a joint family without any joint family property and there is a presumption of joint family though there may not be a presumption of joint family property without a nucleus. The burden of proof is on those who allege that the joint family terminated, to establish it. 112 Ind. Cas. 387 (4) and 154 Ind. Cas. 634 (5), referred to [p. 63, col. 1.]

Where two brothers of a joint Hindu family who were in service and had separate earnings built a house for the family, both thinking it to be a family house without regard to the amount contributed by each, the house is joint family property and the brothers are not sharers in it according to their contribution.

[Case-law referred to.]

The members of a joint family can have separate property and the fact that two brothers used to keep their earnings separately is not enough to show that they had separated. [p. 65, col. 1.]

Where two brothers are in service and hence they have to be at the places where they are posted, their living separately affords very little evidence of separation. [p. 65, col. 2.]

The previous decision that a Hindu family was not joint at a particular time, cannot operate as *res judicata* in a subsequent suit in which the question is as to whether the family was joint or not before such time.

F. C. A. against the order of the Civil Judge of Kheri, dated January 15, 1937.

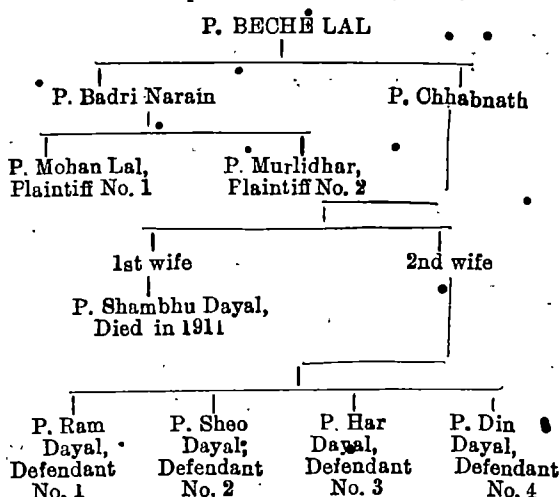
Mr. L. S. Misra, for the Appellants.

Mr. H. S. Gupta, for the Respondents.

Judgment.—This appeal arises out of a suit brought by the plaintiffs appellants for partition of a house in Lakhimpur. They claimed that they and their father had contributed Rs. 6,780-13-0 and the defendants' father Rs. 2,493 in its construction and the shares in the house were in proportion to the amounts contributed by them.

The lower Court held that the plaintiffs' share was one-half only.

The following genealogical table shows the relationship of the parties:



Beche Lal was a resident of village Kutahar in the Shabjehanpur district. He married *Mst. Munni*, daughter of *Kanhai* and *Mst. Maina*, in Lakhimpur and went to live there. One *Makhan* had made a gift of *kachcha* house in Lakhimpur to his sister *Mst. Maina*. Beche Lal lived in that house and died about the year 1880 leaving two sons, *Badri Narain* who was then in service in *Bhinga* estate, and *Chhabnath* who was at that time six years old. These two brothers inherited the *kachcha* house of *Mst. Maina* their maternal grandmother. *Chhabnath* entered service in 1895 in the education department and went to *Ghazipur*. *Badri Narain* was also in Govt. service. *Chhabnath* died on October 21, 1913, and *Badri Narain* in July 1914. *Chhabnath's* son *Shambhu Dayal* from his first wife had predeceased him in 1911. The plaintiffs' case is that *Badri Narain* and *Chhabnath* were separate and not members of a joint Hindu family after 1895 when *Chhabnath* entered service, that there was no ancestral property and each brother was separate owner of his earnings, that in 1903, the major portion of the house in question was built on the site of the old *kachcha* house and some other land taken from the *Mahewa* estate, that *Badri Narain* spent Rs. 3,415 and *Chhabnath* Rs. 2,493 on the construction and that further constructions were made in 1912 and 1913 by the plaintiffs at a cost of Rs. 3,365 13-0. The plaintiffs claim that as their father and the defen-

dants' father were separate each was owner in proportion to the amount contributed by him over the construction of the house.

The defendants' case is that Badri Narain and Ohhabnath were both members of a joint Hindu family and the house was built in 1908 with joint capital and even if Badri Narain spent more than half the money, it was never his intention that the house be not considered to be joint family property, that after the death of Ohhabnath, Badri Narain realized Rs. 4,000, the insurance money and provident fund of Ohhabnath and so even if he had spent more than half over the house he had been paid off and that if the plaintiffs' father had spent more money, the defendants' father and their deceased brother Shambhu Dayal spent more time over the supervision and, on that ground, also the plaintiffs were not entitled to more than a half-share. The plaintiffs' allegation that the constructions in 1912 and 1913 were made by them with their own money was not admitted by the defendants and it was said that the defendants' father had also contributed towards those constructions.

The learned Civil Judge framed six issues—

1. Were Badri Narain and Ohhabnath members of a separated Hindu family?
2. If it be found that the family was joint, then was it the intention of the parties that the property in suit should belong to the members in proportion to their contributions?
3. If it be found that the family was separate then are the plaintiffs entitled to a share in the house according to their contributions?
4. What is the amount of contribution made by the plaintiffs' father and the plaintiffs in the house in suit?
5. Can the plaintiffs not claim a share of the house equal to their contributions for reasons alleged?
6. To what relief are the plaintiffs entitled?

He held that Badri Narain and Ohhabnath were members of a joint Hindu family. He decided Issues Nos. 2 and 3 in favour of the defendants and held that it was not proved that excepting the amount of Rs. 3,415 spent by Badri Narain, anything more was spent on the house by Murlidhar himself. These findings are challenged in appeal.

The first point which arises for our

decision is whether Badri Narain and Ohhabnath were members of a joint Hindu family when the house in question was built, that is from 1908 to 1913. The learned Counsel for the appellants took pains to show that there was no ancestral property and Beche Lal was in straitened circumstances when he died but it does appear from Exs. A-51 and A-52 the *Wajib-ul-arz* of village Naurangabad and extract from the *khasra kishtwar* of that village respectively that Beche Lal and one Lala Kurmi got three *kathal* trees and a grove under an order dated July 20, 1869. It was also contended on behalf of the respondents that the house received by Badri Narain and Ohhabnath from Mst. Maina their maternal grandmother was ancestral property. Reliance was placed on *Venkayamma Garu v. Venkataramanayamma Bahadur Garu*, (I. L. R. 25 Mad., 678) (1) for the proposition that two brothers who inherited property from their maternal grandfather took it as joint tenants with benefit of survivorship and not as tenants-in-common. That case was distinguished by the Privy Council in *Muhammad Husain v. Bibu Kishva Nandan Sahai*, (A. I. R. 1937 P. O., 233) (2), and it was held that the estate which is inherited by a father from his maternal grandfather cannot be held to be ancestral property in which his son has an interest jointly with him. The above is discussed in Mulla's Hindu Law, 9th edn. at pp. 240 and 241—

"It is submitted that the decision in the earlier case must be confined to its own facts, and it was not necessary thereto to decide, nor was any opinion expressed on the precise question whether the property which a Hindu inherits from his maternal grandfather is ancestral property in the technical sense. Should this question arise hereafter, it will have to be answered in accordance with the decision in the later case."

In this case the property was inherited from a maternal grandmother and not from a maternal grandfather. Mulla at p. 241 has observed—

"Excluding the doubtful case of property inherited from a maternal grandfather, it may be said that the only property that can be called ancestral property is property inherited by a person from his father, father's father or father's father's father."

We are of opinion that the old *kachcha*

(1) 25 M 678; 29 I A 156; 4 Bom. L R 657; 7 O W N 1; 12 M L J 299; 8 Sar. 286 (P O).

(2) A I R 1937 P O 233; 169 Ind. Cas. 1; 46 L W 1; (1937) M W N 623; 41 O W N 1029; 18 P L T 495; 39 Bom. L R 979; 1937 O W N 573; 1937 A L R 52; 61 O L J 438; (1937) 2 M L J 151; 1937 O L R 369; I L R (1937) All 655; 39 P L R 698; (1937) A L J 1032; 61 I A 250; 31 S L R 590; 3 B R 605; 10 R P O 1 (P O).

house inherited by the two brothers from *Mst. Maina* was not ancestral property and the two brothers got it as tenants-in-common and not as joint tenants. We therefore hold that the only immovable property which can be called ancestral in the possession of the two brothers was that obtained under the order dated July 20, 1869, that is a share in three *kathal* trees and a grove. The point whether the two brothers had any joint property or not is not of any importance because it is not necessary for a joint family to have joint family property also. *Mulla's Hindu Law* s. 212 cl. 2 runs as follows—

"The joint undivided family is the normal condition of Hindu society. An undivided family is ordinarily joint not only in estate but also in food and worship. The existence of joint estate is not an essential requisite to constitute a joint family and a family which does not own any property may nevertheless be joint."

It was held in *Janakiram Chettu v. Nagamony Mudaliar*, (I. L. R. 49 Mad., 98) (3) that under the Hindu Law, possession of joint family property is not a necessary requisite for the constitution of a joint family.

Dr. Gour in his *Hindu Code*, 3rd Edn. Art. 1174 p 590 says—

"The strength of the family lies in the joint family property. Without such property a joint family is conceivable but then this jointness would have no meaning, since such families may possess certain personal rights in common but they are comparatively of little account. The importance of a joint family therefore lies in the fact that it possesses all its property in common. As such, members have mutual rights and obligations with reference to it. But while Hindu Law postulates and presumes the existence of joint family, it does not either postulate or presume the existence of joint family property."

We are of opinion that there can be a joint family without any joint family property and there is a presumption of joint family though there may not be a presumption of joint family property without a nucleus. The burden of proof was on the plaintiffs to establish that the joint family of *Badri Narain* and *Ohhabnath* terminated in 1895 when *Ohhabnath* entered service. The plaintiffs' Counsel stated in the trial Court that he alleged separation on the ground that there was no ancestral property in the family and *Badri Narain* had his own earnings and he simply brought up *Ohhabnath* and got him educated and employed and after employment *Ohhabnath* remained separate from *Badri Narain* with his wife and children and never contributed anything towards the funds of *Badri Narain*.

(3) 49 M 98; 93 Ind. Cas. 662; A I R 1926 Mad. 273; 22 L W 801; 50 M L J 413.

It was admitted that there was no occasion for partition and so no partition was ever effected. There was admittedly no partition even of the small joint property, the *kathal* trees and the grove, which the two brothers had. The plaintiffs have relied on some oral and documentary evidence to prove that the two brothers were separate. *Murlidhar* plaintiff stated that there was partition of the family movable property between *Badri Narain* and *Ohhabnath*. He further stated that his father handed over all the property belonging to his uncle *Ohhabnath* and aunt at the time of the latter's departure to *Ghazipur* where he was posted in the year 1895 and later on when they came back to *Lakshmipur* they kept their belongings with them and that was the only partition which was effected between his father and uncle. He admitted that there was never any division between his father and uncle in the way that the property was divided half and half between them and that his father gave away the ornaments which he had given to his aunt at the time of her marriage and also the utensils which his uncle had got in his first marriage at *Kheri*, when he left for *Ghazipur*. If *Ohhabnath* took away the ornaments of his wife and the utensils which he had got in his first marriage when he left for service it cannot be said that he became separate from his elder brother. He took away his own property and even if he had taken some joint family property when he went to take up service in another district, it cannot be said that he had separated. The plaintiff *Murlidhar* also stated that if two members of a family live at different places and earn their own independent livelihood and if they do not mix their incomes, they form a separate family in spite of the fact that before they began to earn, they lived together and formed a joint family and it was only in this sense that he said that his father and the latter's brother were separate. This statement of the plaintiff does not show that the two brothers had separated.

One *Mst. Lachhmin* was also examined on behalf of the plaintiffs. She admitted in cross-examination that when the house was built, there was common mess of those persons residing in the house at the time and that during the lifetime of *Pandit Badri Narain* and *Pandit Ohhabnath*, one "Baina" used to be sent to their house and she used to treat them as one family. She also admitted that she joined the

marriages of two sons and one daughter of Badri Narain and the marriage ceremonies of all the sons of Ohhabnath and all these ceremonies were performed by the family as one and undivided and further that she never saw anything in the lifetime of Badri Narain and Ohhabnath which would go to show that they were living separately. She stated that the mess of all the inmates of the house was common till about eight years after the death of Ohhabnath and till then she and other members of the *biradri* treated the family as one. The statement of this lady shows that the family was joint rather than separate.

Another lady Ganga Dei examined on behalf of the plaintiffs admitted that so long as Badri Narain was alive, she treated the family as one with common business, that Badri Narain was considered to be the *karta* and *mukhia* during his lifetime, that there was common mess and ceremonies were performed jointly and that the family was joint in mess for about ten years after the death of Ohhabnath. She admitted that she used to understand the family as one and it was treated in like manner by relations and *biradri* as long as the mess was joint.

Nand Kishore another witness produced by the plaintiffs states that as long as Ohhabnath was a minor, he was joint with Badri Narain but when he attained majority he became separate. In cross-examination, he stated that one reason for his saying that Badri Narain and Ohhabnath were separate was that they lived in separate places during service.

'Badri, plaintiffs' witness admitted that he always understood Badri Narain and Ohhabnath and their children as constituting a joint family.

Mohanlal plaintiff has stated that it was a fact that as long as Pandit Ohhabnath and Pandit Badri Narain lived in Lakhimpur before joining service they formed a joint Hindu family and the only reason for his saying that his father and uncle became separate was that they went to different places after taking up service. The other reason which he gives for thinking of Ohhabnath as being separate is that Badri Narain had given away the things which he had got in his marriage but he admits that he is not positive that Badri Narain's idea was to separate from Ohhabnath.

This evidence utterly fails to prove that the two brothers were separate.

It is admitted that Ohhabnath's son

Ram Dayal's *janeo* ceremony was performed on May 5, 1912 and invitations were issued in the names of Badri Narain Ohhabnath and Marlidhar, plaintiff. It is argued on behalf of the plaintiffs that the invitations were issued in the names of Badri Narain and his son because Badri Narain was the elder brother but Marlidhar himself stated that he could not deny that they were issued in the name of all the three persons because they were members of a joint Hindu family.

There was a joint mortgage-deed dated August 2, 1909 in the name of Badri Narain and Ohhabnath. A suit was brought by the present plaintiffs on foot of this deed on July 25, 1918 and a decree was obtained on September 6, 1918. Some property was sold in execution of the decree and was purchased by the plaintiffs. The defendants then brought a suit in 1926 for possession of half of the property. As issue was framed in that case whether Ohhabnath and Badri Nath were members of a joint Hindu family. This issue was decided in the negative but the suit was decreed as it was admitted that Ohhabnath had advanced half of the money. Reliance is placed on that finding but admittedly it does not operate as *res judicata*. The present defendants got half of the property on condition of their paying costs of the suit and something spent by the present plaintiffs over the preservation of the grove. The point whether Badri Narain and Ohhabnath were joint or separate in 1909 had lost much of its importance by reason of the admission of one of the defendants in that case that Ohhabnath had a half share in the mortgage money. The only material point was whether the family was joint or not in 1918 when the suit was brought because if the family was then joint, the plaintiffs were not entitled to recover half of the money spent by them as costs. We are concerned here only upto the period 1913. This evidence is not very important and does not outweigh the other evidence on the record.

After the death of Ohhabnath, Badri Narain made an application on November 11, 1913, to withdraw the insurance policy money. He based his claim on his being the brother of Ohhabnath and the eldest member of the undivided Hindu family. Reliance is placed in this connection on a letter dated December 5, 1913, (Ex 52) written by Badri Narain to his son Mohanlal and the following portion of the letter is

relevant—

"The Insurance Company which had insured Ohhabnath has written to me. 'If you want to take the money due to Ohhabnath then you should first obtain a certificate of your rights from the District Judge and send it to me. So I will do it.' 'I do not know whether stamp duty will be required on the application or not. If I will see any difficulty I will declare Ram Dayal to be his heir as he is provided the application on his behalf will require no stamp duty.'"

It is argued that the application was made by Badri Narain to avoid stamp duty but we do not see how he could do it. If the Company could insist on a succession certificate it could ask the same from the claimant whether it was Badri Narain or the sons of Ohhabnath. We think there is no sufficient explanation of Badri Narain claiming the money as a member of the undivided family if he was separate from Ohhabnath.

Reliance is placed on several letters of Ohhabnath to show that the two brothers kept their money separately. The members of a joint family can have separate property and the fact that these two brothers used to keep their earnings separately is not enough to show that they had separated. Murlidhar plaintiff himself admits that the second marriage of Ohhabnath was performed by Badri Narain from the place where he was posted at the time. The statement of *Mst. Mullo* mother of the defendants (and second wife of Ohhabnath) shows that after marriage she went to live with Badri Narain and after living for four months there went to Ohhabnath. This shows that the marriage was after Ohhabnath had joined service. Reliance is placed on the statement of *Mst. Mullo* that the crop of the grove used to be divided and the sale proceeds of the *kathal* trees used to be divided half and half. She states that she came to know of the grove only since the *janeo* ceremony of Ram Dayal that is since 1912. It does not appear from her statement that the crop of the grove of the *kathal* trees used to be divided in the lifetime of Badri Narain and Ohhabnath. Reliance is placed on the case of *Durga v. Lal Bahadur*, (5 O. W. N. 992) (4). In that case it was held that if persons belonging to a Hindu family have been living for a long time separate from one another and their property has also been separately dealt with, it would not be necessary to ask for evidence of separation. Each case must be decided according to its circumstances. In the present case the two brothers were both Deputy Inspectors of Schools and hence

they had to be at the places where they were posted. Under these circumstances their living separately affords very little evidence of separation. The other case relied on by the learned Counsel for the appellants is that of *Kanshi Ram v. Dunt Chand*, (A. I. R. 1934 Lah. 707) (5). In that case it was held that if it is proved that some family property is divided, the presumption would be that the entire family property was partitioned. This case has no bearing because it is not proved that there was any division of any family property.

After considering all the evidence and the circumstances we are of opinion that the finding of the lower Court that Badri Narain and Ohhabnath were members of a joint Hindu family is correct.

The second point which we have to consider is whether the house in question was the joint family property of Badri Narain and Ohhabnath or they were owners of it in proportion to the amount contributed by each. The defendants' case is that the two brothers Badri Narain and Ohhabnath had blended their separate incomes for constructing the house in question and, therefore, it was joint family property. It is laid down in *Mulla's Hindu Law* para. 227 that property which was originally separate or self-acquired property of a member of a joint family may become family property if it has been voluntarily thrown by him into the common stock with the intention of abandoning all separate claims upon it. It appears from the evidence of Murlidhar himself that the relations between his father, and Ohhabnath were more than human and Badri Narain was ready to sacrifice his son for the sake of his brother and there was no hitch in spending money by his father over his brother. Correspondence between Badri Narain and Ohhabnath and other evidence to which we will refer also shows that the relations between the two brothers were cordial.

The first letter which we have is Ex. 26 dated January 17, 1908, written by Ohhabnath to Badri Narain. Ohhabnath wrote to his brother that the probable cost of the house would be between Rs. 3,500 and Rs. 4,000 out of which he had Rs. 1,800 in his own and Rs. 700 in two other pass books and he would be able to spare Rs. 400 more. It thus appears that out of Rs. 4,000 he thought being able to provide Rs. 2,900. This letter shows that Ohhabnath was to spend more than one-half on the house and

(4) 5 O W N 992; 112 Ind. Cas. 387; A I R 1928 Oudh 509.

(5) A I R 1934 Lah. 707; 154 Ind. Cas. 684; 7 R L 595.

this would not have been the case had the intention of the parties been to be tenants-in-common in the house. In that case each would have thought of spending only one-half.

There is another letter Ex. 27 dated March 23, 1908, in which Ohhabnath informs his brother that the work was going on. He also said that there was no need of money and that he had brought Rs. 225 with him and had realized Rs. 650 and was going to realize Rs. 250 more. It appears that Ohhabnath had spent some money but he did not ask his brother to contribute.

Ohhabnath wrote to his brother again on March 31, 1908, (Ex. 28) that he had received Rs. 600 sent by him but that he was not in need of money and he asked him not to send any money till asked for. The total expenses incurred till that time was Rs. 1,090-14-0.

Ohhabnath was on leave from March 7, till June 6, 1908, and was supervising the construction of the house. He wrote a letter Ex. 29 to his brother on May 6, 1908 in which he informed him that he had written to Mohan Lal plaintiff to take leave from June 1, 1908, because his leave would then expire and work could not be carried on without the supervision of some one of the family. In his letter he intimated to his brother that there would be need for money in that month. Ohhabnath then wrote a letter Ex. 30 on June 4, 1908 in which he informed him that he had received currency notes of Rs. 500 sent by him and that he was going to join service leaving Mohanlal in charge of the work. There is another important letter dated August 16, 1908 (Ex. 31) written by Ohhabnath to Mohanlal. He wrote to Mohanlal that he had learnt from him (Mohanlal) that Rs. 5,000 had already been spent on the house and Rs. 1,000 more would be required but that he could not spare any money and would be able to give Rs. 100 or Rs. 150 a month only. He also wrote to him that it was not proper to put a heavy load on Badri Narain and that the remaining construction be postponed for the future or might be built slowly from the monthly payments to be made by him out of his pay. If the two brothers were to be owners of the house according to the contribution of each, Ohhabnath would not have written that a heavy load should not be put on Badri Narain.

Ohhabnath's letter clearly shows that he wanted to spend as much over the house as he possibly could. Badri Narain was also anxious to spend over the house.

Exhibit 32 is a letter written by Badri Narain to Mohanlal on September 28, 1908. In it Badri Narain states that Ohhabnath had no money and he should not demand any from him and that he would bring Rs. 100 and if necessary would send more.

Ohhabnath wrote a letter Ex. 17 on January 5, 1909, to Mohanlal, plaintiff in which he informed him that out of the total amount of Rs. 5,908 spent on the house, Badri Narain had sent Rs. 3,415 and this amount exceeded his by about Rs. 1,000 and he was sorry that he could not spend more than that though he had withdrawn the entire money from his two pass books. This letter clearly shows that there was no agreement between the parties to spend the money in any proportion. Had each brother been owner of the house in proportion to the amount spent by him, there was no reason for Ohhabnath being sorry for having spent Rs. 1,000 less than his brother. It appears that Ohhabnath wanted to take as little help as possible from Badri Narain but more money than was expected was incurred over the house and he could not supply it.

This correspondence goes to show that the house was built for the family and both brothers thought it to be a family house without regard to the amount contributed by each.

Mst. Ganga Dei admits that the house was built by the joint efforts of the two brothers. She stated that there was no account between the two brothers as to who should build the house and that everybody spent what time they could over it. She also admitted that this was due to the fact that the house was built jointly. Murlidhar admits that in the building there cannot be two separate blocks and the house cannot be occupied by several people unless they live jointly. This also goes to show that the two brothers wanted to have a house in which they could live jointly. He further stated that his father and uncle had not blended their incomes and spent them towards the construction of this house. The reasons given by him were that the contributions were separate, were written separately in the accounts and were received separately but he admitted that he could not suggest any other method in which the accounts could be written if two persons had sub-

scribed and blended their money. Nand Kishore plaintiffs' witness states that he took the house to belong to both the brothers. Bansidhar and Damodar Din plaintiffs' witnesses also stated the same. Mohanlal plaintiff states that the idea was to construct such a house in Lakhimpur in which the two brothers and their children could live permanently and he could not say whether there was any agreement between the two brothers that they would have a share in the house according to their contributions. He also stated that he did not claim any separate share in the house on the basis of his contribution because it was the joint property of his father and uncle and that he never made any contribution with a view to having his own share separated on the basis of his contribution.

All this evidence goes to show that the two brothers wanted to build a family house with their separate earnings which they blended together for that purpose.

Reference was also made to a tablet Ex. 48 fixed on the house by Badri Narain, in which it was stated that Ohhabnath built the house with the help of his maternal grandmother, Mohan and Murlidhar, plaintiffs, and Shambhu his deceased son and with the consent of his mother Munni and his brother Pandit Badri Narain. This tablet was put on the house by Badri Narain himself with the knowledge of the present plaintiffs and if Badri Narain's share in it would have been more than half he would not have allowed it to be put up. The tablet would go to show rather that Ohhabnath alone was the owner than that the parties owned it in proportion to their contributions.

The major portion of the house was built in 1908. It is marked red in the map attached to the plaint. Badri Narain contributed 3415 and Ohhabnath 2493 towards its construction. The green portion was built in 1912 and 1913 but the construction on the ground floor in it existed before 1912 and a room on the upper story was built in 1913. This ground floor construction was a stable. The plaintiffs' case is that they alone contributed towards the cost of the constructions made in 1912 and 1913. It is said that the roof of the stable was also built in 1913 but it does not seem probable that there should have been a stable from before without a roof. Anyhow the point is not material for our finding is that the con-

structions made in 1912 and 1913 were also joint.

It is admitted on behalf of the plaintiffs that they had an account of the constructions made in 1912 and 1913. Very clear accounts were made of the constructions put up in 1908 and so there was no reason for not keeping accounts of these constructions also. The plaintiffs' case however is that those accounts were stolen. We are not prepared to believe this story. Murlidhar was before the trial Court and that Court was not well impressed with his evidence. It has not been satisfactorily proved that these constructions of 1912 and 1913 were made by the plaintiffs with their own money. *Mst. Mulloo* who appeared to the lower Court to be a truthful and straightforward witness stated that she learnt from her husband that he used to contribute money for those constructions also. It is true that Pandit Ohhabnath was ill for about eight months before his death which took place in October 1913, but it does not appear that he was on leave for any appreciable time before his death. He was posted in Kumaon as Assistant Inspector of Schools and was being treated there.

Badri Narain got Rs. 2,050 and odd the insurance money and arrears of pay of Ohhabnath. The sum of Rs. 1,300 out of this amount was deposited in the account books of Sheo Dayal and *Mst. Mulloo*. Rs. 750 were deposited in the account of Ram Dayal in 1917, i. e. after four years and so it cannot be said that the latter amount was out of the amount of Rs. 2,050. It does not appear what became of the remaining amount. Reliance is placed on the statement of Har Dayal that he learnt that the insurance money of his father was deposited in the names of those persons who had accounts already in the post office but he was only a boy when his father died and he could not know anything from his personal knowledge. Badri Narain was the manager after the death of Ohhabnath and the latter's children were also looked after by Murlidhar. We do not know what became of Ohhabnath's provident fund. The circumstances are that it is quite possible that Badri Narain might have got some money of Ohhabnath with him. Anyhow we are not satisfied that the constructions in 1912 and 1913 were made with the money belonging to the plaintiffs alone. Even if the money was that of the plaintiffs alone, their intentions in making the additions to the family

house in the circumstances of this case were not to treat those additions as their separate property. The subsequent conduct of the parties also shows the same. There was a rupture in the family in 1926 when the defendants brought a suit against the plaintiffs for recovery of their share in the property which they had purchased. The defendants have been in possession of the building over the stable since 1928 and the present suit was not instituted till August 27, 1936.

Exhibits A-62 and A-63 show that the total municipal tax assessed on the house is Rs. 5-8-0 out of which 2-12-0 were paid by the defendants and Rs. 2-12-0 by the plaintiffs in the year 1936-37 in respect of the big house. The same appears from Exs. A-64 and A-65 to have been paid in respect of the stable and the building over it. Reliance is placed on *Lala Muddun Gopal Lal v. Khikhind Koer*, (I. L. R. 18 Cal., 341) (6), but that case is quite distinguishable. In that case one of two brothers of a Mitakehara family had been born deaf and dumb and the elder brother's action was such for some years as to recognize that his brother had a joint interest in the family property. It was held that the elder brother did not thereby waive his rights which accrued to him in consequence of his brother's disqualification. The inference which their Lordships of the Privy Council drew was that the elder brother treated the younger as a member of the family and entitled to equal rights until it had become clear that his disqualification would never be removed by his being cured. The learned Counsel for the appellants has referred to *Gauri Shankar v. Gopal Das*, (A. I. R. 1934 All., 701) (7), *Jot Singh v. Jangu Singh*, (10 O. W. N., 1021) (8), *Kali Prasad v. Chandika Prasad*, (4 O. W. N., 667) (9), *Periakaruppan Chetty v. Arunachalam Chetty*, (I. L. R. 50 Mad., 582) (10), *Narendra Bahadur Singh v. Haji Abdul Haq*, (2 O. L. J., 237) (11) and *Thanesher Pershad v. Ram Chand*, (A. I. R. 1929 Lahore, 468) (12). In the Allahabad (6) 18 C 341; 18 I A 9; 5 Sar. 676; 15 Ind. Jur. 93 (P.C.).

(7) A I R 1934 All. 701; 151 Ind. Cas. 388; (1934) A L R 550; 7 R A 161.

(8) 10 O W N 1021; 146 Ind. Cas. 1005; 17 R D 943; A I R 1933 Oudh 482; 6 R O 205.

(9) 4 O W N 667; 103 Ind. Cas. 746; A I R 1927 Oudh 335.

(10) 50 M 582; 102 Ind. Cas. 290; A I R 1927 Mad. 676; 52 M L J 571; 25 L W 668; (1927) M W N 287.

(11) 2 O L J 237; 30 Ind. Cas. 216; A I R 1915 Oudh 24.

(12) A I R 1929 Lah. 468; 119 Ind. Cas. 239; 11 L L J 85; Ind. Rul. (1929) Lah. 647.

case it was held that to make the acquisition of two brothers joint, it must be proved that they had thrown them into a joint stock. In the present case we held that the two brothers and the plaintiffs threw their earnings in a joint house intending to make it a joint family property. In 10 O. W. N., 1021 (8), it was held that if it is shown that property has been acquired as a separate estate by a member of a joint family and if it was alleged that he had chosen thereafter to amalgamate that separate estate with the joint estate, it was for the person so alleging to show that there was an unequivocal intention on the part of the person who acquired the property to amalgamate it with the joint estate and the question is one which depends upon intention and that intention must be inferred from all the evidence which is adduced. We accept the principle of that case and are of opinion that the intention of the parties in this case was to amalgamate their joint income and convert it into a joint family property. In the case reported in 4 O. W. N., 667 (9), superstructures were raised by a member of a joint Hindu family on a site belonging to the joint family. It was held that in the absence of evidence to the effect that the joint family funds contributed to the money with which the superstructures were raised and in the absence of evidence to the effect that the member in question deliberately made a gift of his self-acquisitions in favour of the joint family as a whole, the principle of self-acquisitions becoming joint family property when the member who made the acquisitions has thrown them into the common stock is not applicable. It does appear in this case that all the members had made gifts of their money in favour of the joint family. The case of 50 Madras, 582 (10), is similar to the last case mentioned above. The principle laid down in 2 O. L. J., 237 (11), is the same as in the Allahabad case. In A. I. R. 1929 Lahore, 468 (12), the father was in Govt. service and the son a petition writer and there was no nucleus. The father built a house and it was held that the son had no interest in it. That case is distinguishable because it was found in that case that the father and son had no common fund and had not pooled their incomes. We are of opinion, that the house in question which was built partly in 1908 and partly in 1912 and 1913 was joint family property and the members were not sharers in it according to their contributions. The

plaintiffs have only one-half share in it.

We think the judgment of the lower Court is correct and we dismiss this appeal with costs.

s.

Appeal dismissed.

ALLAHABAD HIGH COURT

Execution First Appeal No. 309 of 1940

October 24, 1940

IQBAL AHMAD AND VERMA, JJ.

Mirza INAYAT BEG—APPELLANT

versus

Mirza ABDUL RAHMAN BEG AND OTHERS

—RESPONDENTS

U. P. Encumbered Estates Act (XXV of 1934). ss. 7 (1) (a), 7, 45—S. 7 (1) (a), scope of—When comes into play—If subject to s. 52, Transfer of Property Act (IV of 1882)—Held, that applicant could not invoke s. 7 (1) (a)—Order of Civil Court refusing to stay execution under s. 7—Not appealable under s. 45.

Section 7 (1) (a), U. P. Encum. Estates Act is confined in its operation to proceedings in respect of a debt (1) to which the landlord applicant is subject, or (2) with which his immovable property is encumbered. If neither of these conditions is satisfied cl. (a) does not come into play. The provisions of cl. (a) are subject to the rule of law enacted by s. 52, T. P. Act, and a purchaser *pendente lite* is not entitled to invoke that clause to his aid.

One *U* brought a mortgage suit against *F* and *H* who was then a minor and obtained a decree for sale. Subsequently *H* attained majority, and sold a portion of his property covered by the decree for sale to *I*. Thereafter both *H* and *I* filed a suit for a declaration that the decree for sale obtained by *U* was not binding on *H* and was not enforceable against his properties, as *H* was not represented by a duly appointed guardian in the suit filed by *U*. This suit was ultimately decreed and, as a result of the decree passed in the suit, the original suit filed by *U* was reopened so far as *H* was concerned. *I* was also impleaded as a defendant in *U*'s suit when that suit was reopened against *H*. The suit was again decreed against *H* and a preliminary decree under O. XXXIV, r. 4, Civil P. C., was passed. Though in this preliminary decree *I*'s name figured as one of the defendants, the decree was solely against *H* and there was no liability cast on *I* by that decree. The decree was made final in due course. But in the final decree the name of *I* did not appear as a judgment-debtor and the decree was only against *H*. After the passing of the final decree, *I* filed an application under s. 4, Encum. Estates Act and sought to invoke the provisions of s. 7 (1) (a);

Held, that in view of the facts, *I*, not being under the obligation to satisfy the decree could not invoke the provisions of s. 7 (1) (a). He was also debarred from further seeking the aid of those provisions by reason of his being a purchaser *pendente lite*.

An order of a Civil Court refusing to stay execution proceedings under s. 7, U. P. Encum. Estates Act is not appealable under s. 45.

Ex. F. A. from the decision of the Civil Judge, Agra, dated March 26, 1938.

Mr. M. L. Chaturvedi, for the Appellant.

Mr. N. P. Asthana, for the Respondents.

Iqbal Ahmad, J.—This is an appeal by Mirza Inayat Beg against an order of a Civil Judge refusing to stay further proceedings in execution of a decree for sale. The facts giving rise to the appeal are as follows: One Umrao Beg, the ancestor of the contesting respondent brought a suit for recovery of Rs. 17,000 odd by sale of mortgaged property against Fayazi Begum, Hakim Beg and certain other persons. Hakim Beg was minor on the date of the institution of the suit. Umrao Beg obtained a preliminary decree for sale in 1922 and that decree was made final in 1923. By the beginning of the year 1926, Hakim Beg attained majority, and he sold a portion of his property covered by the decree for sale to Inayat Beg appellant. Thereafter both Hakim Beg and Inayat Beg filed a suit for a declaration that the decree for sale obtained by Umrao Beg was not binding on Hakim Beg and was not enforceable against his properties, as Hakim Beg was not represented by a duly appointed guardian in the suit filed by Umrao Beg. This suit was ultimately decreed and, as a result of the decree passed in the suit, the original suit filed by Umrao Beg was reopened so far as Hakim Beg was concerned. It appears that Inayat Beg was also impleaded as a defendant in Umrao Beg's suit when that suit was reopened against Hakim Beg. The suit was again decreed against Hakim Beg and a preliminary decree under O. XXXIV, r. 4, Civil P. C., was passed on December 5, 1933. Though in this preliminary decree Inayat Beg's name figured as one of the defendants, the decree was solely against Hakim Beg and there was no liability cast on Inayat Beg by that decree. The decree was made final in due course. But in the final decree the name of Inayat Beg did not appear as a judgment-debtor and the decree was only against Hakim Beg.

After the passing of the final decree, last mentioned Inayat Beg filed an application under s. 4, Encum. Estates Act (XXV of 1934), and his application was forwarded by the Collector to the Special Judge in accordance with the provisions of s. 6 of the Act. In the meantime, the respondents had taken out execution of their decree for sale against Hakim Beg. Inayat Beg then filed an application before the Civil Judge praying that the execution proceedings initiated by the respondents be stayed in view of the provisions of s. 7, Encum.

Estates Act. The learned Judge rejected the application and, in our judgment, rightly. Clause (a) of sub-s. (1) of s. 7 runs as follows:

"When the Collector has passed an order under s. 6 the following consequences shall ensue:

all proceedings pending at the date of the said order in any Civil or Revenue Court in respect of any public or private debt to which the landlord is subject, or with which his immovable property is encumbered.....shall be stayed....."

It is clear from this provision that cl. (a) is confined in its operation to proceedings in respect of a debt (1) to which the landlord applicant is subject, or (2) with which his immovable property is encumbered. If neither of these conditions is satisfied cl. (a) does not come into play. In the present case Inayat Beg is not subject to the decretal debt which the respondents are seeking to realize by execution of their decree. Even though Inayat Beg was a party to the preliminary decree, no pecuniary liability was cast on him by that decree. To the final decree Inayat Beg is not even a party and is therefore not under an obligation to satisfy that decree. The first condition is therefore not satisfied in the present case.

But, as already stated, Inayat Beg has purchased a portion of the mortgaged property covered by the decree for sale. "His immovable property," in one sense, is therefore at present "encumbered" with the decretal debt. This fact however in our judgment does not, in the circumstances of the present case, entitle Inayat Beg to the benefit conferred by cl. (a). Inayat Beg is a purchaser *pendente lite*. The purchase made by him cannot therefore in view of the provisions of s. 52, T. P. Act, adversely affect the rights of the respondents under the decree obtained by them. The respondents are entitled, as against Hakim Beg to sell the property covered by the final decree in order to realize the decretal amount. This right of the respondents cannot be affected by the *pendente lite* purchase made by Inayat Beg. Hakim Beg not having applied under the Encum. Estates Act, could not invoke to his aid the provisions of cl. (a) of sub-s. (1) of s. 7. The right of the respondents to put their decree into execution therefore remained untrammelled so far as Hakim Beg was concerned. To allow the stay of execution proceedings would therefore affect the undoubted rights of the respondents under the decree held by them, and this would amount to a violation of the provisions of s. 52, T. P. Act. In our opinion the pro-

visions of cl. (a) are subject to the rule of law enacted by s. 52, T. P. Act, and a purchaser *pendente lite* is not entitled to invoke that clause to his aid. The respondents in the present case are entitled to say that, as between them and Inayat Beg, the purchase made by Inayat Beg must be ignored in view of the provisions of s. 52. In other words, having regard to the rule of *lis pendens*, Inayat Beg, cannot, as between him and the respondents, be regarded as the owner of the property covered by the decree for sale. His (Inayat Beg's) "immovable property" is not therefore "encumbered" with the decretal debt within the meaning of cl. (a) of sub-s. (1) of s. 7. It follows that the Court below was right in refusing to stay the execution proceedings at the instance of Inayat Beg. The appeal therefore fails and is dismissed with costs.

We may note that this appeal was originally filed as a first appeal from order. But it was conceded by the learned Counsel for the appellant that, as the order appealed against was passed not by a Special Judge exercising jurisdiction under the Encum. Estates Act but by a Civil Judge in the course of execution proceedings, no appeal lay to this Court in accordance with s. 45, Encum. Estates Act. The learned Counsel therefore prayed that this appeal be treated as an execution first appeal and this prayer was granted by us. The deficiency in the court-fee was made good by the appellant and then the hearing of the appeal proceeded. As we are dismissing the appeal on the merits it is not necessary to enter into a discussion of the question as to whether the order appealed against was appealable under s. 47, Civil P. O.

s.

Appeal dismissed.

RANGOON HIGH COURT

Court-fees Reference arising out of Civil

Revision No. 155 of 1940

August 23, 1940

BA U, J.

U KYAW ZAN—APPLICANT

versus

U TUN HLA U AND OTHERS—RESPONDENTS

Court Fees Act (VII of 1870), Sch. I, Art. 14—
Suit under s. 9, Specific Relief Act (I of 1877)—
Revision—Court-fee payable is same as paid on
plaint—Interpretation of statutes—Fiscal statutes.

Article 14, Sch. I, Court Fees Act, really means that on an application for revision the same amount of court-fee is payable as has been paid on the plaint in a case where the subject-matter in dispute is the

same both in the suit and in revision. Consequently on an application for revision arising out of a suit under s. 9, Specific Relief Act, the court-fee payable is the same as has been paid on the plaint, 68 Ind. Cas. 444 (1), referred to.

A fiscal statute should be construed strictly and where there is a doubt, the doubt should be resolved in favour of the subject.

Mr. U Sein Tun Aung, for the Applicant.

Mr. U Tun Byu, (Govt. Advocate), for the Crown.

Order.—The Applicant in this case filed a suit under s. 9, Specific Relief Act in the Sub-Divisional Court of Kyauktaw, Akyab District, against the respondents for possession of a mill and its site. He paid court-fee on half the value of the mill and site which he valued at Rs. 4,500. The suit was contested and it was eventually dismissed. The applicant has therefore brought the case up to this Court in revision and paid the same amount of court-fee on his application as he paid on his plaint. The Taxing Master takes objection to this and directs the applicant to pay court-fee according to Art. 14 of Sch. I, Court Fees Act. I do not agree with the learned Taxing Master. Under Art. 14, Sch. I, Court Fees Act, an application for revision must be stamped with a Rs. 2-stamp if the value of the subject-matter in dispute does not exceed Rs. 25 but where the value of the subject-matter in dispute exceeds Rs. 25 the court-fee payable on an application for revision is the same as the court fee payable on a memorandum of appeal. The question as to what court-fee is payable on a memorandum of appeal depends upon what the value of the subject-matter in dispute in appeal is. If the subject-matter in dispute in appeal is the same as the subject-matter in dispute in the suit, then the same fee must be paid on the memorandum of appeal as has been paid on the plaint. The fee payable on a plaint is to be calculated according to the scale as laid down in s. 7 read with Sch. I, Art. 1, Court Fees Act. If the subject-matter in dispute in appeal is not the same as the subject-matter in the suit then the payment of the court-fee depends upon what the value of the subject-matter in dispute in appeal is. If the value of the subject-matter in dispute in appeal is less than the value of the subject-matter in the suit, then the court-fee payable on the memorandum of appeal will be less than the fee paid on the plaint: *In re Porkodi Achi* (1).

Therefore, the decision of the question

(1) 45 M 246; 68 Ind. Cas. 444; A I R 1922 Mad. 211; 41 M L J 587; 14 LW 624; (1921) M W N 854; 30 M L T 88.

now involved in this case will depend on what the subject-matter in dispute in a suit under s. 9, Specific Relief Act, is. The subject-matter in such a suit is immovable property but the relief claimed is possession only. The question of title, if necessary, must be adjudicated upon in a separate suit. If such a suit is instituted as is sometimes done, it means that court-fee has to be paid twice in respect of the same subject-matter though not necessarily by the same party. It therefore appears to my mind that the Legislature has advisedly laid it down in Art. 2, Sch. I, Court Fees Act, that the court-fee payable on a plaint in a suit under s. 9, Specific Relief Act, should be half the value of the subject-matter in dispute. If an appeal were to lie from a decree or order passed in such a suit, the same amount of court-fee would have to be paid on the memorandum of appeal as has been paid on the plaint for the subject-matter in dispute and the relief claimed both in the appeal and in the suit will be the same. In fact, that was what was in the mind of the Legislature when they passed the Court Fees Act (Act VII of 1870), for Art. 2, Sch. I, provided that the same amount of court-fee was payable both on the plaint and on the memorandum of appeal in a suit instituted under s. 9, Specific Relief Act. Only when it was discovered later that no appeal lay from a decree or order passed in a suit under s. 9, Specific Relief Act, the words "memorandum of appeal" was deleted from the said article by Act XX of 1870.

Therefore, what in my opinion Art. 14, Sch. I, Court Fees Act, really means is that on an application for revision the same amount of court-fee is payable as has been paid on the plaint in a case where the subject-matter in dispute is the same both in the suit and in revision. It would be against every principle of justice, equity and good conscience if more court-fee is to be paid on an application for revision than on a plaint in case where the subject-matter in dispute is the same both in revision and in the suit. Besides it is a well-known and well settled principle of interpretation that a fiscal statute should be construed strictly and that where there is a doubt the doubt should be resolved in favour of the subject. Therefore I hold that, on an application for revision arising out of a suit instituted under s. 9, Specific Relief Act, the court-fee payable is the same as has been paid on the plaint.

b.

Order accordingly.

ALLAHABAD HIGH COURT

Second Appeal No. 2103 of 1938

October 18, 1940

THOM, C. J. AND GANGA NATH, J.
BANWARI RAM AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

MUHAMMAD YAR KHAN—PLAINTIFF.

AND ANOTHER—DEFENDANT—RESPONDENTS

Agra Pre-emption Act (XI of 1922), s. 4—Co-sharer executing waqf and divesting himself of entire property ceases to be co-sharer—Pleadings—Amendment—Plaintiff knowing plaint to be defective—Opportunity to amend given—Defect not removed—Further application to amend beyond limitation, held could not be allowed.

A co-sharer who executes a *waqf* deed and divests himself of his entire property, ceases to be a co-sharer as defined in s. 4, Agra Pre-emption Act and hence is not entitled to maintain a suit for pre-emption. 171 Ind. Cas. 367 (1), relied on, 147 Ind. Cas. 926 (2), referred to.

The plaintiff knew at an early stage of the proceedings that his plaint was defective. He was given an opportunity to amend his plaint. His amendment did not, however, remove the defect. He subsequently applied for further amendment:

Held, that in all the circumstances, and especially since the application for amendment was made well beyond the period of limitation, no further indulgence could be granted to the plaintiff.

S. A. from the decision of the Civil Judge, Ghazipur, dated August 31, 1937.

Mr. A. P. Pandey, for the Appellants.

Messrs. M. L. Chaturvedi, S. M. Salman and K. N. Gupta, for the Respondents.

Thom, C. J.—This is a defendants' appeal arising out of a suit for pre-emption. The suit was filed by Mohammad Yar Khan. He made a *waqf alalaulad* of his entire property. He sued, however, first of all in his private capacity. During the course of the proceedings in the trial Court he filed an application for the amendment of plaint. This application was allowed and by his amendment the plaintiff described himself as *mutwalli*. Both the Courts below have granted decree for pre-emption.

In appeal it was urged for the appellants that inasmuch as the plaintiff was not a co-sharer within the meaning of s. 4, Agra Pre-emption Act, he was not entitled to maintain a suit for pre-emption. This contention in our judgment is sound. A co-sharer is defined in s. 4, Agra Pre-emption Act, as a person

"other than a petty proprietor, entitled as proprietor to any share or part in a *mahal* or village whether his name is or is not recorded in the register of proprietors."

Now the plaintiff having divested himself of his entire property and that property having vested in the Almighty, the plaintiff

was not a person entitled to any share or part in the *mahal* or village in which the property sought to be pre-empted is situated. He is not therefore entitled to maintain a suit for pre-emption. In this connexion we refer to the case in *Muhammad Baksh v. Ram Prasad* (1). In that case a Bench of this Court held that a person who had divested himself of his entire property by means of a *waqf* deed was not entitled to resist a claim for pre-emption upon the precise ground that he was no longer a co-sharer in the village in which the property sought to be pre-empted was situated. The respondents relied on the case in *Mohammad Pamar Shah Khan v. Mohammad Salamat Ali Khan* (2). In that case a Bench of this Court held that if a person is liable for the payment of the land revenue along with other co-sharers in the village, then he must be deemed to be a co-sharer in spite of the fact that the estate in the share may not vest in him. No doubt for the purposes of the Agra Pre-emption Act the person who is liable in respect of land revenue is regarded as a co-sharer. "Co-sharer" is not defined in the Agra Ten. Act but is defined in the Agra Pre-emption Act. The plaintiff having executed a *waqf* deed under which he divested himself of his entire property is no longer a co-sharer as defined in the latter Act. He is not therefore entitled to maintain a suit for pre-emption.

Learned Counsel for the plaintiff requested the Court to allow him to amend his plaint so as to substitute the Almighty for himself as the plaintiff. The plaintiff, however, knew at an early stage of the proceedings that his plaint was defective. He was given an opportunity to amend his plaint. His amendment has not removed the defect and in all the circumstances, and especially since the application for amendment is made well beyond the period of limitation, we do not consider that any further indulgence should be granted to be plaintiff. In the result the appeal is allowed the order of the lower appellate Court is set aside and the suit is dismissed with costs. The costs will be payable out of the assets of the plaintiff who is deceased.

S.

Appeal allowed.

(1) (1937) A L J 726; 171 Ind. Cas. 367; A I R 1937 All. 581; 1937 A L R 827; 10 R A 258.

(2) A I R 1933 All. 407; 147 Ind. Cas. 926; 55 A 512; (1933) A L J 685; L R 14 A 450 Rev.; 17 R D 593; 6 R A 583.

OUDH CHIEF COURT

Second Civil Appeal No. 91 of 1939

February 25, 1941

GHULAM HASAN, J.

GANESH PRASAD AND OTHERS—

DEFENDANTS—APPELLANTS

versus

BASDEO—PLAINTIFF—RESPONDENT

Specific Relief Act (I of 1877), s. 54—Defendant opening doors on his own land—No interference with plaintiff's rights—Mere apprehension that defendant may acquire easement of air and light, if justification for ordering defendant to close doors.

The grant of an absolute injunction restraining a person from enjoying his own land is wholly illegal. [p. 75, col. 1.]

The defendants who have opened doors upon their own land which they are entitled to do in the exercise of their right of possession and enjoyment of their own property, cannot be ordered to close these doors merely because, the plaintiff who is their neighbour apprehends that the defendants might acquire a right of easement to light and air after the lapse of twenty years if the doors are allowed to stand. 166 Ind. Cas. 777 (1), *Kasim Ali Khan v. Brij Kishore* (2) and 152 Ind. Cas. 66 (3), relied on, 138 Ind. Cas. 193 (4), *Bindu Bisini Chowdhurani v. Jahnabi Chowdhurani* (5) and *Lakshmi Narain Banerjee v. Tara Prosanna Banerjee* (6), distinguished. [p. 74, cols. 1 & 2; p. 75, col. 1.]

S. C. A. against the order of the Additional Civil Judge of Unao, dated January 4, 1939.

Messrs. Ali Zaheer and S. P. Awasthi, for the Applicants.

Messrs. R. B. Lal and R. N. Shukla, for the Opposite Party.

Judgment.—This is a defendants' appeal arising out of a suit for possession by demolition of certain constructions and for perpetual injunction.

The plaintiff-respondent is admittedly the owner of plots Nos. 111 and 113/1 in the *abadi* of *patti Basudeo Mauza Tajpur*, and District Unao. According to the plaintiff allegations the defendants-appellants are alleged to have dispossessed the plaintiff-respondent from the above plots in the end of 1937 by erecting two walls on plot No. 111 and three walls on plot No. 113/1 as shown in the sketch plan annexed with the plaint, thus encroaching upon the plaintiff's land. The defendants further built a *chabutra* on plot No. 113/1 and fixed three doors in their wall towards the north of their house on plot No. 110. These doors open on the plaintiff's land. The defendants further stored bricks, bullock-carts, tied cattle, prepared cow-dung cakes etc. etc. on plot No. 113/1 and exercised similar acts on a portion of plot No. 111 as marked in the sketch plan. There was a partition of the

village four or five years ago. As a result of the partition *abadi* plots Nos. 113/1 and 111 fell to the share of the plaintiff while plots Nos. 110 and 109 were allotted to another co-sharer, whose rights now vest in the defendants. The defendants constructed a hall and side rooms on No. 110 just abutting upon No. 113/1 after the partition. The plaintiff sued the defendants for closing the three doors opening towards the plaintiff's land, restraining them from using Nos. 111 and 113/1 as their *sahan* and for demolition of the *chabutra* which they had constructed upon plot No. 113/1.

Before the trial Court the defendants disclaimed any interest in plot No. 111 with the result that the controversy was thus narrowed down to plot No. 113/1 only.

In defence the defendants pleaded that they had been using plot No. 119/1 as their *sahan* for a long time and admittedly exercising acts upon that plot as alleged by the plaintiff. They denied the plaintiff's possession within limitation and asserted that the defendants had acquired rights of easement over plot No. 113/1. The encroachments alleged by the plaintiff to have been made on plots Nos. 111 and 113/1 by the defendants were denied.

The trial Court appointed a Commissioner to prepare a plan of the land in dispute showing the constructions as well as the alleged encroachments. This plan is no longer in dispute and forms part of the decree. The trial Court held that plot No. 113/1 had not been used by the defendants as their *sahan* and that they had acquired no right of easement over that plot. It further held that the plaintiff had been in possession within limitation. According to the Commissioner's plan the constructions complained of were found to exist on plot No. 110 alone which belonged to the defendants and not on any portion of the *abadi* plots belonging to the plaintiff. In the result the plaintiff's claim for possession over Nos. 111 and 113/1 was decreed. His claim in respect of demolition of the walls and enclosure as alleged by him was dismissed. The *chabutra* shown as A G H I J in the Commissioner's plan on plot No. 113/1 ordered to be demolished and the materials thereof to be removed by the defendants at their costs within one month. The defendants were further ordered to remove their cart, cattle, cowdung cakes etc. from the plot in suit and not to use the said plots as their *sahan* in future nor to exercise any acts of enjoyment or of possession on the said plots. The relief as regards the clos-

ing of the three doors in the wall A B as shown in the Commissioner's plan was, however, refused and it was ordered that they shall remain fixed.

Both parties were aggrieved by the decision of the trial Court. The defendants filed an appeal challenging the decree of the trial Court on the points which had been decided against them while the plaintiff filed a cross-objection in respect of the claim for closing the three doors. The defendants' appeal was dismissed while the plaintiff's cross-objection was allowed and the three doors towards the north of the defendants' house were ordered to be closed.

The defendants have preferred a second appeal to this Court.

The only question that has been urged before me in support of the appeal relates to the relief for the closing of the three doors, which was granted to the plaintiff-respondent against the defendants-appellants. It has been contended that the decision of the lower Appellate Court ordering the closing of the doors is not legally sustainable. I am of opinion that this contention must prevail.

The lower Appellate Court remarks that in view of the finding that the defendants had not succeeded in establishing that they used plot No. 113/1 towards the north as their *sahan*, they had no right to fix their doors towards the north unless they proved that these doors originally were opened on this side. The lower Appellate Court held that the defendants were not entitled to open new door ways towards the plaintiff's land and acquire a fresh right of light and air from the plaintiff's land. It was remarked in this connection that if these doors are allowed to stand for over twenty years, the defendants will acquire a right of light and air from his land.

The trial Court found, and this finding has not been dissented from by the lower Appellate Court, that plot No. 113/1 is a *parti* land and that part of it at any rate has been under cultivation. This fact is also borne out by the evidence of the plaintiff's own witnesses (*vide* P. Ws. Nos. 2, 3 and 5). The reasoning of the lower Appellate Court to the effect that as the plea about the use of plot No. 113/1 as a *sahan* by the defendants has not been established they have no right to open the doors, does not commend itself to me. The defendants have opened doors admittedly upon their own land and this they are entitled to do in the exercise of their right

of possession and enjoyment of their own property unless they are prevented from doing so by any rule of law or by any right acquired by the plaintiff authorising him to have the said doors closed. Having regard to the finding arrived at by both the lower Courts it is not now open to the defendants to use any portion of plot No. 113/1 for the purpose of a *sahan* or for any other purpose. They cannot claim the right of egress and ingress upon plot No. 113/1 and it is not pretended on their behalf that they have any such right. There is no legal justification, however, for preventing the defendants from enjoying their property by opening doors in a wall of their house as they have done in the present case unless the plaintiff is able to prove that the existence of these doors interferes with the right of enjoyment by the plaintiff of his own property. In *T. Syed Pitchai Rowther v. K. Devaji Rao*, (A. I. R. 1937 Madras, 21) (1), it was laid down that an owner cannot be restrained from enjoying his own property when it is not impossible for him and others to enjoy their rights. A person is entitled to enjoy his own property in any way he pleases provided that he does not create a nuisance or interfere with the rights of others. In this case the plaintiffs sought to restrain the defendants from interfering with the worship and in particular from opening doors on the southern side of the plot recently purchased by them. The first injunction was granted by the trial Court and the second injunction was granted by the Subordinate Judge in appeal. Reference was made to *Kasim Ali Khan v. Brij Kishore*, (1870, 2 N. W. P. H. C. R. 182) (2), where it was observed:

"Parties are at liberty to build what structure they please upon their own land; but if they interfere with the free enjoyment of their neighbour's property, they may become liable in damages for the injury that they do."

It was held by the Madras High Court that the opening of the doors on the southern side can in no way interfere with the rights of the plaintiffs.

In *Mohammad Zahadur Rahim v. Satyendra Narayan Mookhopaphya* (A. I. R. 1934 Calcutta 752) (3), it was observed that an act which is not unlawful in itself does not become unlawful merely because it interferes with other people's business or merely be-

(1) A I R 1937 Mad. 21; 166 Ind. Cas. 477; 71 M L J 611; 9 R M 404.

(2) (1870) 2 N W P 182.

(3) A I R 1934 Cal. 752; 152 Ind. Cas. 66; 61 O 543; 59 C L J 383; 7 R O 229.

cause the motive of the act is bad. The holding of a rival *mela* by defendant on his own land is not unlawful merely because it interferes with the plaintiff's *mela* or merely because the defendant in holding his *mela* had a bad motive for his act. But such an act is actionable wrong if he exercises his right of using his land by the employment of illegal means. The grant of an absolute injunction restraining defendant from enjoying his own land is therefore wholly illegal.

Learned Counsel on behalf of the plaintiff-respondent has failed to satisfy me in what way the existence of these three doors amounts to a violation of the plaintiff's rights. He takes his stand upon the reasoning employed by the lower Appellate Court that there is an apprehension of the defendants' acquiring a right of easement to light and air after the lapse of twenty years if the doors are allowed to stand. It appears to me that this apprehension cannot afford any justification for preventing the defendants from enjoying their property without interfering with the rights of the enjoyment by the plaintiff of his own property. It is perfectly open to the plaintiff to prevent the acquisition of the rights of easement to light and air by the defendants by putting up structure on his own land if he so desires. According to s. 54 of the Specific Relief Act a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the plaintiff, whether expressly or by implication. In the present case there is no obligation in favour of the plaintiff as to restrain the defendants from opening the doors and enjoying their property. The existence of these doors in my opinion involves no invasion of the plaintiff's right on the contrary the order of demolition is tantamount to an encroachment upon the defendants' legitimate rights to enjoy their property.

Learned Counsel for the plaintiff-respondent has referred to certain cases but neither of these cases has any application to the facts and circumstances of the present case. The case of *Jateendramohan Mitra v. Prabodhkumar Datta*, (I. L. R. 59 Calcutta 260) (4), has no bearing whatever upon the present case. The case in *Bindu Basini Chowdhrani v. Jahnabi*

Chowdhrani, (I. L. R. XXIV Calcutta 260) (5), is distinguishable upon the facts. There the defendants want only and with the intention of causing injury to the plaintiff dug a trench on the verge of the boundary of her tenure resulting in the subsidence of the plaintiff's land. The plaintiff sought perpetual injunction prohibiting them from digging earth within a certain distance of the plaintiff's tenement, the filling up of the excavation, or in default a certain sum of money as the costs of filling it up. The Munsif dismissed the suit holding that no cause of action accrued until actual damage occurred. During the prosecution of the suit the plaintiff's land subsided in consequence of the excavation and this fact was brought to the notice of the Court. The plaint was ordered to be amended in appeal by the lower Appellate Court and the Munsif was ordered to try the suit afresh. The Calcutta High Court held in appeal that the Munsif was wrong in his view of the law. They observed that the suit for injunction will lie when the threatened act is of such a character that it must result in injury. There can be no question whatever in the present case that any injury to the plaintiff's right of enjoyment of his own land is inevitable from the action of the defendants in opening these doors on their own land.

The case in *Lakshmi Narain Banerjee v. Tara Prosanna Banerjee*, (I. L. R. 31 Cal. 944) (6), is clearly inapplicable. There it was held that as every owner of land is under an obligation not to allow the branches of his tree to grow so as to overhang, or the roots of his tree to extend so as to penetrate, his neighbour's land to the detriment of the latter, in case of breach of such an obligation it is open to the Court to grant a mandatory injunction for the removal of the nuisance under s. 55 of the Specific Relief Act.

Reference has been made on behalf of both parties to certain cases bearing on the question of the right of privacy existing in the United Provinces. It is not necessary to refer to any of these cases as in my opinion they have got no bearing upon the present case. It cannot be pretended with any show of reason that any right of privacy exists in respect of the open piece of land and that any such right has been invaded by the setting up

(4) 59 C 260; 138 Ind. Cas. 193; A I R 1932 Cal. 249; 35 C W N 963; Ind. Rul. (1932) Cal. 431.

(5) 24 C 230.

(6) 31 C 944; 8 C W N 710.

of the three doors by the defendants on their own land.

The result is that I allow the appeal, set aside the judgment and decree of the lower Appellate Court in so far as it decrees the plaintiff's suit for the closing of the three northern doors on the defendants' land. In other respects the decree of the lower Appellate Court will stand. Parties shall bear their own costs in all the Courts.

8.

Appeal allowed.

MADRAS HIGH COURT

Special Bench

Original Petition No. 203 1939

September 24, 1940

LEACH, C. J., KING AND PATANJALI SASTRI, JJ.

S. V. P. SUDALAIMANI NADAR—

PETITIONER

versus

COMMISSIONER OF INCOME-TAX,

MADRAS—RESPONDENT

Income-tax—Assessable income—Animals purchased in British India and sold at profit in foreign country—Profits arise at place of sale—Profits not brought into British India are not assessable to income-tax.

An assessee did business of exporting goats and sheep from India to Colombo and of selling them there at a profit:

Held, that the profit made by the assessee could only be calculated on what the goats and sheep actually cost him and the amounts at which they were actually sold in Colombo. The figures in the invoices, whether inflated or deflated, would not matter.

Held, also that the profit arose in the place of sale and that the profits derived from the sale in a foreign country of animals purchased in British India were not assessable to income-tax when the profits had not been received or brought into British India. 71 Ind. Cas. 758 (1) and 117 Ind. Cas. 657 (2), relied on, 176 Ind. Cas. 15 (3), explained.

Mr. K. Bhashyam Ayyangar, for the Petitioner.

Mr. K. V. Sessa Ayyangar, for the Respondent.

Leach, C. J.—The assessee in this case is the manager of a joint Hindu family which exports goats and sheep from this country to Colombo and sells them there at a profit. For the year 1936-37, the assessee was assessed to income-tax by the Income-tax Officer, Tuticorin Circle, on a total income of Rs. 16,412 which included a sum of Rs. 15,139 found to be the profits made in Colombo and remitted to British India. The Income-tax Officer's order of assessment was revised by the Commissioner of Income-tax, who assessed the income at Rs. 31,384. Included in this amount was the figure of Rs. 9,000

which the Commissioner said was the amount of profit which had accrued to the assessee in British India from this business. The Commissioner considered that the assessee had bought the animals at lower prices than those disclosed in his invoices when shipping them to Colombo. The assessee objected to an assessment on this basis and asked the Commissioner to state a case to this Court. The Commissioner refused, but was compelled to do so by an order of this Court, dated October 17, 1939. In pursuance of this Court's direction the Commissioner has referred the following question:

"Are the income-tax authorities entitled in law to increase the petitioner's assessment by Rs. 9,000 as being profits made in British India for the year 1936-37?"

In his order revising the assessment the Commissioner gave the following reasons for holding that the assessee had made profits in British India: (i) the assessee had agents for the purchase of goats and sheep within the presidency but he himself had exercised "a certain amount of supervision" and this had its value; and (ii) there was usually an element of profit involved in F. O. B. prices and in this case the profit had not been included in the profit shown by the Colombo books. These are the only two reasons which the Commissioner gave for holding that the assessee had made a profit of Rs. 9,000 in British India in the year of assessment. The reasons for the inclusion of this sum of Rs. 9,000 given by the Commissioner in making the reference are of a nebulous character and what it comes to is, that the Commissioner considered that the assessee had made more profit than he had shown and he formed in his own mind an estimate of what that profit was. The Commissioner was not called upon in this case to exercise his best judgment within the meaning of s. 23 (4). To say that the goats and sheep shipped from this country to Colombo left it with an increased value because the assessee had supervised his agents is going too far. The second reason given by the Commissioner is also fallacious. Because exporters, when they sell at F. O. B. prices, include in those prices their profit does not mean that in a case like the present one profit is included. When this case is examined it is manifest that the prices at which the animals were invoiced to Colombo would make no difference in the calculation of the profits made by the assessee. There is no evidence for the year of assessment that the assessee

charged his Colombo office greater amounts than the costs to put the animals on board the steamers, but assuming that the invoices had been inflated that would not make any difference. The profit made by the assessee could only be calculated on what the goats and sheep actually cost him and the amounts at which they were actually sold in Colombo. The figures in the invoices, whether inflated or deflated, would not matter. We can see no justification whatsoever for the Commissioner for increasing the assessment by this figure of Rs. 9,000, or by any figure as estimated profits made in British India.

When a business of this simple nature—the business we have here is the buying in one place of animals for human consumption and the selling of them in another place—the profit arises only at the place of sale. This was the effect of the decision in *Secretary, Board of Revenue (Income-tax), Madras v. Madras Export Co.* (1) and there is an express ruling by the Lahore High Court in *Jiwan Das v. Commissioner of Income-tax, Lahore* (2) that profits derived from the sale in a foreign country of goods purchased in British India are not assessable to income-tax when the profits have not been received or brought into British India. Mr. Sesha Ayyangar, on behalf of the Commissioner of Income-tax, has suggested that this can no longer be regarded as the true position in law by reason of the decision of the Privy Council in *Commissioner of Income-tax, Bombay Presidency & Aden v. Chunnilal B. Mehta* (3) but it is clear that this is not the effect of the judgment of the Judicial Committee. There the question was whether a person who was carrying on business in Bombay and dealing in cotton in Europe and America could be assessed to income-tax on his profits made abroad. There is a vast difference between that case and the case now before us, and the cases which do apply are *Secretary, Board of Revenue (Income-tax) Madras v. Madras Export Co.* (1) and *Jiwan Das v. Commissioner of Income-tax, Lahore* (2). For these reasons I would answer the question referred in the negative and award costs to the assessee in

the sum of Rs. 250. The assessee is also entitled to the refund of his deposit.

It is necessary to draw attention to another matter connected with this reference. When the case came before this Court on the question whether the Commissioner should be compelled to state a case it appeared that the income-tax authorities were contending that the assessee's assessment might be increased by the Rs. 9,000 on the ground that it represented profits remitted to British India as well as on the ground that the amount represented profits which had accrued in British India. The figure at which the assessee had been assessed included the profits remitted from Colombo, and the Court asked Mr. Sesha Ayyangar to make it clear whether his real contention was that the Rs. 9,000 should be included as profit made in British India. He said that this was his contention and as the Court was not prepared in the circumstances of this case to allow the alternative argument to be put forward it directed that the statement of the case should be confined to that question alone. Instead of obeying the direction of the Court, which he was bound to do, the Commissioner in the last paragraph of the reference has said that the main question to be decided is whether the amount was assessable to tax or not and the question whether it comes under the one basis or the other is really of no consequence so long as it comes under one of them. Consequently he asked the Court to consider the other ground. Although we agree with Mr. Sesha Ayyangar that the Commissioner meant no disrespect, his failure to follow the directions of this Court can only be described as improper.

King, J.—I agree.

Patanjali Sastri, J.—I agree.

s,

Answer in negative.

LAHORE HIGH COURT

First Appeal No. 136 of 1939

February 26 1940

DALIP SINGH AND SALE, JJ.

Mst. SAKINA BEGUM—DEFENDANT—

APPELLANT

versus

Khalifa HAFIZ-UD-DIN AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Gift — Marz-ul-maut—Gift during death illness, when valid—Death illness, what is—Death bed gift amongst Sunnis to an heir without consent of others, validity.

(1) 46 M 360, 71 Ind. Cas. 756; A I R 1923 Mad 422; 44 M L J 290; 1 I T O 194.

(2) 10 L 658; 117 Ind. Cas. 657; A I R 1929 Lah. 609; 30 P L R 489; 4 I T O 40; Ind. Rul. (1929) Lah. 673 (F B).

(3) 6 I T R 521; 176 Ind. Cas. 15; A I R 1938 P O 232; I L R (1938) Bom. 752; 65 I A 332; 32 S L R 862; 1938 O L R 337; 1938 A L R 651; 11 R P O 41; 48 L W 204; 4 B R 756; 67 O L J 551; 42 O W N 1070; (1938) M W N 848; 1938 O W N 848; 40 Bom L R 916 (P O).

In order to invalidate a death bed gift it must be shown (1) that at the time of the execution of the deed of gift, the donor was suffering from a serious disease which it was known would in all probability terminate fatally, (2) that the disease was such as to engender in the patient the apprehension of death, and (3) that the illness incapacitated him from the pursuit of his ordinary avocations. It is not necessary to come to a definite finding that the disease was the immediate cause of death. 132 Ind. Cas. 391 (1), *Ibrahim Goolam Ariff v. Saiboo* (2) and *Fatima Bibi v. Sheikh Ahmad Buksh* (3), explained, *Hafiz Karim Bakhsh v. Bejam Jan* (5), relied on. [p. 80, col. 2.]

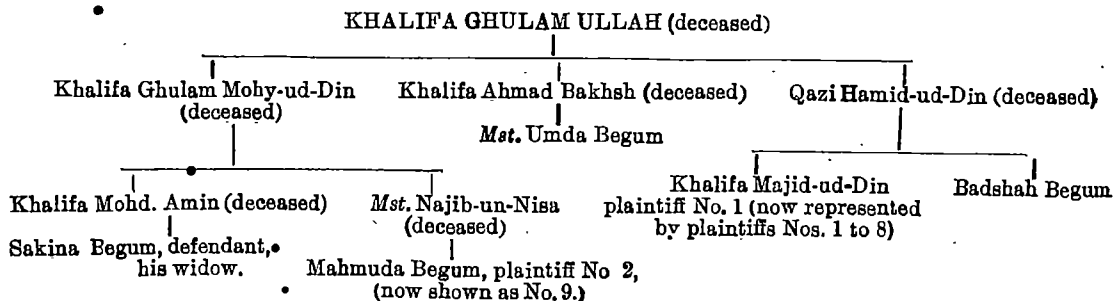
So far as Sunni Law is concerned a death-bed gift to an heir is void *in toto* in the absence of consent by the other heirs. 51 Ind. Cas. 638 (7) and 163 Ind. Cas. 626 (8), relied on. [p. 81, col. 1.]

F. A. from the decree of the Sub-Judge First Class, Lahore, dated March 4, 1939.

Messrs. *Mela Ram and Farukh Hussain* for the Appellant.

Messrs. *M. C. Mahajan and Akbar Ali*, for the Respondents.

Sale, J.—This is an appeal from a preliminary decree granting the plaintiffs possession by partition of a $\frac{3}{4}$ th share of the property in dispute. The sub-joined pedigree table is necessary in this case to illustrate the relationship of the parties:



The suit for partition relates to two properties, one a three-storied building situate in Gowalmandi, Lahore specified as A in the plaint and the other $2\frac{1}{2}$ storied house at Mochi Gate, Lahore, specified as B in the plaint, both the properties of Khalifa Mohammad Amin who died on May 24, 1934. It is not disputed that the heirs of Khalifa Mohammad Amin deceased are *Mst. Sakina Begum*, his widow, *Mst. Mahmuda Begum*, the deceased's sister's daughter plaintiff No. 2 and the eight children of Khalifa Majid-ud-Din deceased, his cousin and that their shares as heirs under Muhammadan Law would be $\frac{1}{4}$ th to the widow, $\frac{1}{2}$ to the sister's daughter and $\frac{1}{4}$ th to the children of the cousin. The suit for possession by partition was instituted by the sister's daughter and the cousin (since deceased, now represented by eight children) who claimed jointly $\frac{3}{4}$ th share in the property which they asked should be separated from the $\frac{1}{4}$ th share due to the widow *Mst. Sakina Begum*. The claim was contested by *Mst. Sakina Begum* on the ground that her husband shortly before his death had transferred to her by gift dated May 7, 1934 the three storied house in Gowalmandi (A in the plaint), and that by reason of this gift, this house was her own personal property and should be excluded from partition. In their plaint, the plaintiffs pleaded that this gift was

void under Muhammadan Law as made during *marz-ul-maut*; and they asked that the gift should be ignored and the house included in the property in partition. The trial Court found that the gift was void for the reasons alleged by the plaintiffs and granted them a decree for the $\frac{3}{4}$ th share in both the properties in suit. From this decision *Mst. Sakina Begum* has preferred this appeal. The decision of the trial Court in regard to property B is not questioned in appeal. The sole point for determination in this appeal is the question of the validity of the gift which is embodied in issues Nos. 4 and 5 framed by the trial Court which read as follows: "Was the gift in suit a death-bed gift? and if so, what is the effect?"

The facts material for the decision of this appeal are that Khalifa Mohammad Amin, while admittedly seriously ill, executed a deed of gift on May 7, 1934 transferring the house 'A' to his wife *Mst. Sakina Begum*. This deed was attested on May 8, 1934 by (amongst others) Dr. Yar Mohammad Khan, K. S., M. D. who was attending Khalifa Mohammad Din during his illness. On May 10, 1934, this deed of gift was registered by the Sub-Registrar who came to Khalifa Mohammad Din's house for the purpose. On May 24, 1934 the donor died. On May 6, 1937, this suit was instituted. In deciding that the gift in question was void as having

been made during *marz-ul-maut*, the learned Subordinate Judge held, following *Abdul Ahad Khan v. Ahmad Nawaz Khan* (1), that the following conditions had been satisfied: (1) that the donor was suffering at the time of the disposition from a disease which was the immediate cause of his death; (2) that the disease was such as to engender in him the apprehension of death; and (3) that the illness incapacitated him from the pursuits of his ordinary avocations and prevented him from saying his prayers while standing. It is admitted before us by the learned Counsel for the appellants that at the time of the execution of this deed Khalifa Mohammad Amin was ill with an abdominal complaint accompanied with fever and a enlargement of the liver. It is not denied that at the time when the gift was made Khalifa Mohammad Amin deceased may have been under the apprehension of death; but it is urged that the mere apprehension of death in the circumstances is insufficient, that the illness from which the patient was then suffering is not proved to have been the immediate cause of death, and that it is not proved that to quote the words of their Lordships of the Privy Council in *Ibrahim Goolam Ariff v. Saiboo* (2) the gift was made under pressure of the sense of the imminence of death. In these circumstances, it was contended that the gift in question was not a death-bed gift such as would be rendered void under Muhammadan Law; and that in any case even assuming that it was a death-bed gift, it would still take effect in regard to a one-third share in the property in question.

In reply to these arguments it was contended by Mr. Mehr Chand Mahajan that in order to invalidate the gift it is not necessary to establish that the illness in question was the immediate cause of death. It is only necessary, he argued, to show that the patient at the time was gravely ill, that he was incapacitated and was under a misapprehension of death; and that if the gift is shown to be invalid as a death-bed gift, the whole gift is inoperative, having regard to the fact that the donee in this case was an heir, and the other heirs did not consent. Before considering the provisions of Muhammadan Law applicable to this case, it will first be necessary to examine the evidence bearing on (1) the nature of the

donor's illness at the time of the execution of the deed of gift, (2) the state of mind of the donor at that time, and (3) the cause of donor's death. (His Lordship then discussed evidence and proceeded). The conclusion, I would draw from the medical evidence is that, at the time the deed was executed the donor was suffering from a serious abdominal illness which may have been, as stated by Dr. Yar Mohammad, either cancer of the liver or liver abscess; and that the patient gradually sank until he died on May 24, 1934. It is impossible to state definitely what was the cause of death, or that the patient died of the disease diagnosed by Dr. Yar Mohammad but it seems clear that the affection of the liver (whether it was due to abscess or whether it was due to cancer) was the probable cause of death; also that it was highly probable from Dr. Yar Mohammad Khan's diagnosis, that the disease would end fatally.

The next points for determination are whether at the time of the execution of this deed the donor was under an apprehension of death and whether his condition was such as to incapacitate him from attending to his ordinary avocations. It is stated by Mst. Sakina Begum that her husband had been suffering from indigestion for a year or 1½ year before his death. It is true that the lady, whose evidence seems coloured by her natural desire to have the gift maintained, states in her evidence that her husband did not entertain any fear of death at the time when the deed was executed. But the fact, as is admitted by her that it was necessary to call in a doctor of the standing of Dr. Yar Mohammad Khan, before the execution of the deed of gift, indicates that the condition of the patient by this time must have been becoming serious. Dr. Yar Mohammad Khan in his evidence says that when he first examined the patient, the latter stated that he had been suffering from 'this trouble for the last five or six weeks'. It is not specified in the evidence what 'this trouble' was, but it may be assumed to be the abdominal disease, which caused the enlargement of the liver. We do not know whether Dr. Yar Mohammad Khan communicated to Khalifa Mohammad Amin his diagnosis that the enlargement of the liver was due to liver abscess or cancer; but it seems clear from Dr. Yar Mohammad Khan's evidence that Khalifa Mohammad Amin must have realised that he was seriously ill. The plaintiffs relied on the evidence of a number of witnesses, mostly friends and

(1) 12 L 683; 132 Ind. Cas. 391; A I R 1932 Lah. 229; 32 P L R 942; Ind. Rud. (1931) Lah. 583.

(2) 35 O I; 34 I A 167; 6 O L J 695; 11 O W N 973; 4 L B R 154 (P O).

relations of the family, who stated that they visited Khalifa Mohammad Amin during his illness and found that he himself entertained little hope of his recovery. For example, *Mst. Badshah Begum*, a cousin, (P. W. No. 4) stated that she visited him during his illness and that "His condition was very bad. He himself had got despaired of his life. We too had no hope of his recovery." Again *Mst. Begum*, widow of Khalifa, Ghulam Mohy-ud-Din and step-mother of the donor, says that she used to visit the sick man and that he used to say that he had no hope of recovery. Similar is the evidence of Dr. Mohammad Afzal, Lecturer in the Tibbia College, Aligarh, a distant relation, who says that he attended the deceased in a medical capacity. He deposes that Khalifa Mohammad Amin had absolutely no hope of recovery. "In fact, when we consoled him he asked us to forgive him if he had said anything against us" (see his evidence at p. 26 of the paper book). The same evidence is given by *Maqlwi Najam-ud-Din*, another relation of the family, (on p. 29 of the paper book); by *Khalifa Niamat Ullah* (P. W. No. 1) who is the husband of *Mst. Badshah Begum*, and by *Nuin-ud-Din* (P. W. No. 2), nephew of *Khan Sahib Mohammad Amin*. This latter witness even says that the condition of his uncle was very precarious and

"in despair of his life he wanted to give something in charity and at the same time, hear recitation of the Quran, especially the *Sughara-i-Yasin*" which, according to the witness, "is only read when the patient's condition is hopeless," (see pp. 35 and 36 of the paper book).

There is no rebuttal of this evidence. Even the defendant's own witness *Khalifa Atta Ullah* (D. W. No. 1) admits that the patient 'had some liver trouble' and was looking 'sickly' and 'pale.' It is urged on behalf of the appellants that the evidence of these relations cannot be relied on, as being interested. Even allowing for this fact, it is impossible to avoid the conclusion from the cumulative effect of this evidence that, at the time when the deed was executed, the patient knew that he was seriously ill, and he himself thought the probability of his recovery was unlikely, so that he certainly was under the apprehension of death. Although, there is no evidence on the question whether the illness was such as to prevent the patient from saying his prayers while standing, it is clear from all the evidence that at the time of the execution of the deed, the illness incapacitated the patient from the pursuit of his

ordinary avocations; and from the evidence it may be inferred that the patient was incapacitated from visiting a mosque for the purpose of saying his prayers or from saying his prayers while standing. I would, therefore find (1) that at the time of the execution of the deed of gift, the donor was suffering from a serious disease which it was known would in all probability terminate fatally, (2) that the disease was such as to engender in the patient the apprehension of death, and (3) that the illness incapacitated him from the pursuit of his ordinary avocations.

The question now remains for decision whether according to Muhammadan Law these conditions are sufficient to invalidate the gift or whether it is necessary to find as a fact that the disease was the immediate cause of death. It is true that this is one of the conditions mentioned in para. 114 of *Mulla's Principles of Muhammadan Law* as necessary to invalidate a gift; and it has been so held in *Abdul Ahad Khan v. Ahmad Nawaz Khan* (1), *Ibrahim Goolam Ariff v. Saiboo* (2), and *Fatima Bibi v. Sheikh Ahmad Bukhsh* (3). It may be observed, however, that in none of these authorities was it necessary for the determination of the case to find that the disease from which the donor was suffering was in fact the immediate cause of death. These authorities merely recite this condition, following apparently the observations made in *Hassarat Bibi v. Golam Jaffar* (4). This requirement is not mentioned by *Baillie* in his discussion on death-bed gifts, on p. 552 of his *Digest of Muhammad Law*. He says:

"As to the definition of a death-illness, it has been said, and this is approved by the *fatwa*, that when the illness is such that it is highly probable that death will be the result, it is a death illness....."

This question is dealt with in a Division Bench ruling of this Court cited as *Hafiz Karim Bakhsh v. Begam Jan* (5), which on p. 259 approves the correct definition of a death-bed illness as one "when the illness is such that it is highly probable that death will be the result." From this consideration of the authorities I would hold that it is not necessary to come to a definite finding that the disease was the immediate cause of death. Indeed the necessity of such a finding would, in certain circum-

(3) 35 O 271; 35 I A 67; 7 O L J 122; 12 O W N 214 (P O).

(4) 3 O W N 57.

(5) 52 PR 1895.

stances, lead to strange results. Suppose, a man is seriously ill with cancer (a disease which must be so far as we know prove fatal) and makes a gift of his property. Shortly after making the gift, an earthquake ruins his house and the patient is killed by the roof falling. Would the gift made by this patient be valid, because the immediate cause of the patient's death was the earthquake and not cancer? But even if it were necessary to come to a finding as to the actual cause of death in the present case, I should be prepared to infer from the evidence of Dr. Yar Mohammad, that the cause of the patient's death was in fact the liver disease which in Dr. Yar Mohammad's opinion was either cancer of the liver or abscess of the liver. It has thus been established in this case (1) that at the time of making the gift the donor was suffering from a serious abdominal illness which was either cancer of the liver or abscess of the liver, and that he died, in all probability of this illness, 17 days later, (2) that he was at the time of the gift under an apprehension of death and (3) that the patient at the time of the gift was prevented from pursuing his ordinary avocations. In these circumstances, I would hold that the trial Court has rightly found the gift to be invalid and I would affirm the decision on this point.

As regards the effect of this decision, the trial Court was in my view right in invalidating the whole gift and not merely the excess over one-third. It is apparent from such authorities, as Mulla (p. 113 read with p. 122) that a death-bed gift stands on the same footing as a bequest. In the present case, we are concerned with a gift to an heir. Now as regards the bequest to an heir, the law as given by Mulla, para. 103 at p. 113, is that a bequest to an heir is invalid unless the other heirs consent. Similarly, in regard to a gift, in s. 114 on p. 122 of his work, Mulla says that a death-bed gift cannot take effect if made in favour of an heir, unless the other heirs consent thereto. It is unnecessary for us to consider the effect of the distinction between a gift to an heir and a gift to a stranger which has been drawn in certain authorities: *vide Wazir Jan v. Sayyid Attaf Ali* (6), at p. 361. There is ample authority for the proposition so far as Sunni Law is concerned that a death-bed gift to an heir is void *in toto* in the absence of consent by the other

(6) 9 A 357 (361); A W N 1887, 32.

heirs: *vide Fazal Ahmad v. Rahim Bibi* (7), and *Sharof Ali Abdul Ali v. Safiaboo* (8). I would therefore affirm the finding of the lower Court. For these reasons, the appeal fails and is dismissed with costs.

Dalip Singh, J.—I agree.

D. Appeal dismissed.

(7) 40 A 238; 51 Ind. Cas. 638; A I R 1919 All. 148; 16 A L J 158.

(8) A I R 1936 Mad. 432; 163 Ind. Cas. 626; 71 M L J 247; 9 R M 41; 44 L W 346, (1936) MW N 968.

SIND CHIEF COURT

First Appeal No. 22 of 1936

August 5, 1940

DAVIS, C. J. AND LOBO, J.

VASUMAL VALIRAM—APPELLANT

versus

KARAMOHAND MANGHANMAL

AND OTHERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XVII, r. 1; O. X, rr. 1, 2, O. XVIII, O. VIII, r. 3, O. IX, r. 6, O. XXXVII, r. 2—Defendant summoning no evidence and applying for adjournment on sham pretext—Court's discretion in refusing adjournment held properly exercised—Court recording statement of Pleader after framing issues—Statement held fell under O. X, r. 1 and not under r. 2—But even under O. X, r. 1 it could not be recorded—O. X, r. 2 ought not to be utilized to supersede procedure for trial prescribed by O. XVIII—Procedure followed held illegal—Even against ex parte defendant, claim must be proved—Injunction—Prayer for perpetual injunction restraining mortgagor from dealing with mortgaged property—Interim injunction issued to mortgagor—Order allowing relief for injunction to be dropped at hearing held not justified.

Where the defendant who is present in Court summons no evidence and applies for adjournment on the pretext of being ill, the Court uses its discretion properly if it refuses the adjournment on the ground that the defendant is shamming and this discretion cannot be interfered with.

In a suit against the mortgagor and the mortgagee for a declaration that the mortgagor had no interest in the mortgaged property and that the plaintiff was absolutely entitled to the same, the Court framed the issues and examined the mortgagee's Counsel and recorded his statement to the effect that he did not know how the mortgagor acquired title to the mortgaged property;

Held, that the statement of the Counsel fell not under O. X, r. 2 but under r. 1 and that the same could not be recorded even under r. 1.

The power given by O. X, r. 2, Civil P. C., to examine any party present in Court is to be used by the Judge only when he finds it necessary to obtain from such party information on any material questions relating to the suit. It ought not to be employed so as to supersede the ordinary procedure at a trial as prescribed in O. XVIII, Civil P. C. [p. 85, col. 1.]

The plaintiff sued for a declaration that he was entitled to the last male-holder's estate as the next reversioner. On the date fixed for hearing the Judge adopted extraordinary procedure in supersession of the provisions of O. XVIII, of examining

the defendant (widow) and recording his admission as to the plaintiff's relation with the last male-holder with a view to obviate the recording of evidence and thus to expedite the disposal of the suit. Then both the parties closed their case without adducing any evidence and the Court decreed the suit.

Held, that the procedure amounted to a misuse of r. 2, O. X, since the examination of the defendant could not be said to be necessary in order to obtain information on any material question relating to the suit. The burden was on the plaintiff to establish by evidence that the estate of the last male-holder, their uncle, had vested in him, that he was the reversioner after the widow's death entitled to sue, and this burden could not be said to have been discharged by the statement. The fact that it was nobody's case that there existed any reversioner nearer than the plaintiff was no answer. The plaintiff was bound to go into the witness box and prove his title as the next reversioner after the death of the widow. 134 Ind. Cas. 869 (1) and 102 Ind. Cas. 167 (2), relied on. [p. 85, col. 2; p. 86, col. 1.]

Even when a defendant is *ex parte* the claim against him must be proved before there can be a decree. 34 Ind. Cas. 235 (8), relied on. [p. 87, col. 1.]

In a suit against the mortgagor and the mortgagee, on the basis of the prayer for a perpetual injunction in the plaint restraining the mortgagor from dealing with the mortgaged property, an *interim* injunction had been issued and the relief for injunction was allowed to be dropped at the hearing.

Held, that the order permitting relief for injunction to be dropped at the hearing was not justified.

F. A. against the judgment and decree of the First Class Sub-Judge, Hyderabad, dated February 7, 1938.

Mr. Khanchand Gopaldas, for the Appellant (Defendant No. 2.)

Messrs. Javhermal Villoitrai and Fatehchand Asudomal, for Respondents Nos. 3 and 1 and 2 (Defendant No. 1 and Plaintiffs Nos. 1 and 2) respectively.

Lobo, J.—This is a first appeal against the judgment and decree of the First Class Subordinate Judge of Hyderabad who decreed suit No. 76 of 1937 of that Court filed by respondents Nos. 1 and 2 against the appellant and respondent No. 3. The facts giving rise to this litigation and the course of proceedings in the suit need to be set out in some detail for a proper understanding of the points involved. Manghanmal and Rochiram, sons of Sajanmal, were separated Hindu brothers. Rochiram died in 1903, leaving no issue but two widows, Pabulbai and Manghulbai. He left a considerable amount of property movable and immovable and a business. All this property came into the hands of the widows. Pabulbai died in 1913. On October 25, 1926 Manghulbai executed a document, Ex. 53, in the case headed

"*anjamnama*" wherein *inter alia* it was provided;

"After I die whatever property remains at that time shall be inherited by Bhai Karamchand and Bhai Naraindas sons of Manghanmal, and their children (except Harchandrai, son of Karamchand half to half)."

Manghulbai died in February 1937. The two plaintiffs in the suit are the sons of Manghanmal, brother of Rochiram, referred to in Ex. 53; defendant No. 1 Narsingdas is the son of plaintiff Karamchand. It appears that in June 1937, some months after the death of Manghulbai mutation of names in respect of some immovable properties belonging to Rochiram was effected in the revenue records. Exhibits 2, 3 and 4 in the case are extracts from the revenue records of the Shahdadpur taluqa of the Nawabshah District and show that six city survey numbers were transferred to the names of "Karamchand Manghanmal, manager, joint family and Naraindas Manghanmal, manager, joint family." In the column "Nature and origin of title" are inserted the words "By inheritance from Manghulbai deceased." In the "Remarks" column the mutation is shown to have been the result of a statement made to the city survey officer on July 4, 1937. By a document dated August 12, 1937, Ex. 52, in the case Naraindas, defendant No. 1 mortgaged with defendant No. 2 for a sum of Rs. 1,000 a As. 2-8 share in five immovable properties belonging originally to Rochiram deceased. His title to this As. 2-8 share and his right to mortgage it is thus set out in Ex. 52:

"According to the will dated October 25, 1926 made by the deceased Manghulbai, widow of Seth Rochiram, resident of Tando Adam, and registered in the office of the Sub-Registrar Shahdadpur on November 16, 1926 in Book No. Karamchand, son of Manghanmal, and his heirs have eight annas share in the entire property. In accordance with that, my share is As. 2-8 (two annas eight pies)."

It appears again from Exs. 2 to 4 extracts from the record of rights of the Shahdadpur taluqa, that this mortgage was noted in the "Remarks" column on October 1, 1937. In October 1937 plaintiffs filed the present suit for declaration and injunction. The plaint recites the death of Rochiram and of his two widows, refers to and specifies a fairly large estate movable and immovable as being left by Rochiram to which the plaintiffs state they are entitled after the death of Pabulbai and Manghulbai as next reversioners; it refers to the mortgage effected by defen-

dant No. 1 on the basis of the document, Ex. 53, executed by Manghubai which document it states "does not create any rights in favour of defendant No. 1 and is not in any way binding on the plaintiffs." The prayer clause in the suit includes a prayer for a declaration (a) that the plaintiffs are full and exclusive owners of the properties mentioned in Schs. A and B attached to the plaint and that defendant No. 1 has no right or interest in the same; (b) a prayer for a declaration that "the mortgage executed by defendant No. 1 in favour of defendant No. 2 is illegal and not binding upon the plaintiffs in any way" and (c) a prayer for "perpetual injunction to defendant No. 1 restraining him from alienating, dealing with or in any way interfering or intermeddling with the properties in suit."

The learned Advocate for the appellant stated from the bar that the plaintiffs also applied under O. XXXIX, rr. 1 and 2 for an *interim* injunction against defendant No. 1 that their prayer was granted and defendant No. 1 was restrained by a temporary injunction during the pendency of the suit from alienating, dealing with or in any way interfering or intermeddling with the properties in suit. We do not find anything in the paper book relating to this *interim* injunction, but the statement of the learned Advocate for the appellant has not been controverted and we have every reason to believe therefore that the plaintiff did obtain during the pendency of the suit an *interim* injunction against defendant No. 1. Defendant No. 1 put in no appearance and no written statement; defendant No. 2 the mortgagee, however, filed a written statement wherein he denied almost every allegation put forward by the plaintiffs. Some paragraphs of this written statement must be set out *in extenso*. Paragraph 5 of the written statement reads thus:

"As regards paras. 2 and 3 it is submitted that this defendant has no knowledge of the statements contained therein and the same are accordingly denied and plaintiffs put to the proof thereof.

In paras. 2 and 3 of the plaint the connection between the deceased Kochiram and the plaintiffs in the suit is set out. Paragraph 6 of the written statement reads:

"As regards para. 4 it is submitted that so far as this defendant is aware and (has) learnt on enquiries, the property mortgaged with this defendant had been allotted exclusively to defendant No. 1, in pursuance of some family arrangement between the plaintiffs and defendant No. 1's brother; and it was with the knowledge and acquies-

cence of the plaintiffs and the brother of defendant No. 1 that the defendant took mortgage of a share in the property from defendant No. 1....

Paragraph 7 of the written statement states:

"The defendant is not aware of the property left by Manghubai and the plaintiffs are therefore put to proof of it. The defendant further repudiates the plaintiffs alleged claim regarding the property mortgaged with this defendant by defendant No. 1. It is further submitted that this defendant is a *bona fide* mortgagee for value without notice of any defect in the title to it of defendant No. 1. The plaintiffs never objected to the mortgage by defendant No. 1 and it was due to their conduct and representations that the defendant was induced to take the property in mortgage; the plaintiffs therefore are estopped from questioning the defendant's mortgage."

Paragraph 9 of the written statement is important and reads:

"As regards para. 8 it is submitted that this defendant is not aware that the plaintiffs are the reversioners or that they are the only reversioners; the plaintiffs' claim as such is therefore denied. In any event, it is submitted that the plaintiffs have no reversionary or other right or interest in the property mortgaged with this defendant. It is further denied that the plaintiffs are entitled to any declaration or any other relief in respect of the property mortgaged with the defendant."

Paragraph 8 of the plaint to which para. 9 above is a reply sets out the plaintiffs' title to the property in suit which is the foundation of their prayer for a declaration. In para. 10 of the written statement, defendant No. 2 states: "All other paragraphs are denied" The following issues were framed on December 17, 1937:

"1. Is defendant No. 2 a *bona fide* mortgagee for value without notice as alleged in para. 7 of the written statement?

2. Are plaintiffs estopped from questioning the defendants' mortgage as alleged in para. 7 of the written statement?

3. Is the mortgage deed binding upon the plaintiffs?

4. Whether plaintiffs are reversionary heirs of Manghubai's husband?

5. Whether defendant No. 1 has any legal title to the property?

6. What should the decree be?"

On the same date the learned Judge examined Mr. Tilokchand, Advocate for defendant No. 2, and the following statement was recorded: "I cannot say how defendant No. 1 acquired title to the property mortgaged by him with defendant No. 2." The suit came on for hearing on January 19, 1938. It does not appear from the record whether the plaintiffs were present. But defendant No. 1 was absent and defendant No. 2 though in Court presented an application for adjournment signed by his Advocate which reads thus:

"It is submitted on behalf of the defendant, Vassumal that since the last hearing the defendant was

lying ill and was under the treatment of Dr. Parmanand at Tando Adam, for the last fortnight. He was therefore unable to summon evidence. He is feeling feverish even now. Accordingly, it is prayed that this Hon'ble Court will be pleased to adjourn the hearing of the case to some other date to enable the defendant to summon evidence through the Court and proceed with the case."

With the following order the learned Judge rejected the application: "The defendant has summoned no evidence. Mr. Santdas objects, and rightly too. The defendant is probably shamming." It would appear that the next thing that the learned Judge did was to examine defendant No. 2, for it appears the following statement was recorded: "Statement of Vassumal: Karamchand and Naraindas are sons of Manghanmal. Manghanmal and Rochiram are brothers." This statement has been signed by Vassumal, defendant No. 2. The diary of the case shows that the plaintiffs' Advocate offered no evidence and closed his case. Defendant No. 2 did not go into the witness box and his Advocate also stated that he closed his case. The matter was adjourned for arguments to January 24, 1938. On that date an Advocate filed a *rakalatnama* for defendant No. 1. The learned Judge however refused to hear him. He heard arguments of the Advocates for the plaintiffs and defendant No. 2 and on February 7, 1938 delivered judgment granting the plaintiffs "the declaration prayed for" with costs. In the judgment it is stated that at the trial of the case the Advocate for the plaintiffs gave up the relief of injunction which he had sought against defendant No. 1.

The learned Advocate who appears for the appellants before us has urged several points. He has contended that the learned Judge erred in refusing the application, Ex. 44 for adjournment presented on behalf of defendant No. 2 on January 19, 1938, the date of trial. The refusal of this application, argued the learned Advocate, was arbitrary and harsh and resulted in a denial of justice to defendant No. 2, the only contesting defendant. He has argued further that the procedure adopted by the learned Judge in recording the statement of defendant No. 2 and in failing to record any evidence on behalf of the plaintiffs was not only extraordinary but unwarranted by law. He argued, thirdly, that an examination of the record as it stood made it manifest that the plaintiffs had failed to prove their case; that there was an entire want of evidence; that there was no proof that the plaintiffs were the next reversioners

after the death of Manghulbai entitled to the estate left by the deceased Rochiram; there was no proof that the plaintiffs were in possession of that estate and in absence of proof on these points the learned Judge could not in law grant the plaintiffs the declaration decreed in their favour.

The learned Advocate for respondent No. 3, the original defendant No. 1, further argued that as against respondent No. 3 the decree was *ex parte* and that this *ex parte* decree had been passed against respondent No. 3 without any proof of the plaintiffs' claim. We do not think that there is any substance whatever in the first contention raised by the learned Advocate for the appellant and our experience of the artifices adopted by defendants in the *moffusil* to obtain adjournments of cases which they are not in a position to proceed with is sufficient to deter us from interfering in this case with the discretion exercised by the learned Judge; for we feel no doubt that if the learned Judge who had all the facts before him felt that there was any good faith in the application Ex. 44, he would not have failed to grant a short adjournment to the learned Advocate for the appellant. But it appears to us that the remaining contentions of the learned Advocate for the appellant are sound and that the procedure adopted by the learned Judge was unusual and unwarranted by law and has resulted in a miscarriage of Justice which calls for interference on our part. Order X, Civil P. O. provides for the examination of the parties by the Court, r. 1 provides:

"At the first hearing of the suit the Court shall ascertain from each party or his Pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials."

Rule 2 of O. X, Civil P. O provides:

"At the first hearing of the suit or at any subsequent hearing, any party appearing in person or present in Court or any person able to answer any material questions relating to the suit by whom such party or his Pleader is accompanied, may be examined orally by the Court and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party."

The statement, Ex. 35, of the learned Advocate for defendant No. 2 recorded by the learned Judge on December 17, 1937 obviously does not fall under r. 2; it can only fall under r. 1 and it appears to us that even under r. 1 that statement should not have been recorded. The

learned Advocate for defendant No. 2 was asked the nature of the title of defendant No. 1 who had executed a mortgage in favour of defendant No. 2. The rule however refers only to admissions or denials of allegations of fact made in the plaint or written statement of the opposite party which have not expressly or by necessary implication been admitted or denied by the party against whom they are made. We cannot therefore see what justification the learned Judge had for recording Ex. 35. The procedure adopted by the learned Judge on January 19, 1938 in recording the statement Ex. 48 was in our opinion even more objectionable and a procedure which has been condemned by their Lordships of the Privy Council. January 19, 1938 was the date fixed for the trial of the suit and in the ordinary course the learned Advocate for the plaintiffs would open his case and lead his evidence. In the present case defendant No. 2 had denied almost every allegation made by the plaintiffs in their plaint and the issues in the suit clearly indicate that the burden of proof in the case was primarily at least upon the plaintiffs, for Issues No. 4 which reads "whether plaintiffs are reversioners of Manghulbai's husband?" goes to the very root of the plaintiffs' case.

In the case in *Manmohandas v. Ramdai* (1) their Lordships of the Privy Council have held that the power given by O. X, r. 2, Civil P. O. to examine any party present in Court is to be used by the Judge only when he finds it necessary to obtain from such party information on any material questions relating to the suit. It ought not to be employed so as to supersede the ordinary procedure at a trial as prescribed in O. XVIII, Civil P. O. In the case before their Lordships the proceedings at the trial had been opened by the Court calling upon one of the defendants to give evidence not on any specific points but on the whole case, and the witness was then cross-examined by the parties. The ground put forward by the learned Judge for adopting this procedure was that the defendant knew "most of the affair" which the Court had to investigate. Nevertheless, their Lordships held that this deviation from the normal and proper procedure was not

justified in the absence of more cogent reasons.

It may be that in the case before us the learned Judge has not departed quite to the same extent from the normal and proper procedure, but we have no doubt whatever that he has misused the provisions of O. X, r. 2, Civil P. O. and for this there is no justification. It was not a case where the examination of defendant No. 2 was necessary in order to obtain information on any material question relating to the suit. It would appear that the learned Judge adopted this extraordinary procedure to obviate the recording of evidence thus to expedite the disposal of the suit. As we have said before, the suit was set down for trial on January 19. The learned Advocate for the plaintiffs was present. There is no reason to believe that the plaintiffs themselves were not present; the learned Advocate for defendant No. 2 was present and so was defendant No. 2 and we can see no reason why the learned Judge should not have followed the ordinary procedure laid down for the hearing of a suit and examination of witnesses in O. XVIII, Civil P. O. The learned Judge in his judgment states:

"The statement recorded by me Ex. 48 is not a statement under O. XII, r. 5, nor have I on that basis decreed the suit."

That may be so, but whether the statement Ex. 48 is or is not excluded from consideration, it cannot in our opinion be said that the plaintiffs have proved their case. The learned Judge states:

"Relationship being admitted the question who the preferential heir is or is not, is a matter to be decided on legal authority. Therefore, in my opinion there is no necessity that the plaintiffs should have proved effectively by coming into the box that they were the preferential heirs."

We cannot agree. The burden of proving Issue No. 4 lay on the plaintiffs. It was for them to establish by evidence that the estate of Rochiram, their uncle, had vested in them, that they were the reversioners after Manghulbai's death entitled to sue, and this burden cannot be said to have been discharged by the statement Ex. 48, by a reference to the document Ex. 53 and by reference to Mulla's Hindu Law, s. 43. In the case in *Jivtri v. Gendan Singh* (2), it was held by a Bench of the Allahabad High Court that

"it is incumbent on a plaintiff seeking to succeed to property as reversioners to establish affirmatively the particular relationship which he puts forward."

(2) 49 A 779; 102 Ind. Cas. 167; A I R 1927 All 767 (2); 25 A L J 500.

(1) 35 O W N 925; 134 Ind. Cas. 689; A I R 1931 P O 175; (1931) A L J 550; 34 L W 7; 8 O W N 936; (1931) M W N 931; 33 Bom. L R 1251; Ind. Rul. (1931) P O 317 (P.O.).

He is also bound to satisfy the Court that to the best of his knowledge there are no nearer heirs."

The learned Judge states that it was nobody's case that there existed any reversioners nearer than the plaintiffs, but this is no answer. The plaintiffs were bound to go into the witness box and prove their title as next reversioners after the death of Manghulbai, Rochiram's widow. We think that in these circumstances there is much to say for the argument of the learned Advocate for the appellant that this unusual procedure adopted by the learned Judge has not only deprived defendant No. 2 of the right of cross-examining the plaintiffs, a right which he would have had and of which he would have effectively availed himself had the plaintiffs or either of them stepped into the witness-box, but that as a consequence the case of the plaintiffs remains unproved.

We do not feel that the plaintiffs kept out of the witness-box merely because on the recording of Ex. 48 their learned Advocate felt that no evidence was called for on behalf of the plaintiffs. We are far more inclined to think that the plaintiffs had other reasons for not entering the witness-box. The learned Advocate for the appellant has taken us through the document Ex. 53 and the extracts from the record of rights Exs. 2, 3 and 4 and we think that there is some substance in his argument that these documents read in combination indicate some family arrangement as a result of which Ex. 53 was executed by Manghulbai and that the plaintiffs apprehending that defendant No. 2 might be able in his cross-examination of the plaintiffs on the documents Exs. 2 to 4 and Ex. 53 to establish a legal title in defendant No. 1 on the basis of which the mortgage to defendant No. 2 could be upheld, adopted the ruse of keeping themselves out of the witness box. It is true no issue had been framed as to any family arrangement, but some reference to a family arrangement is to be found in para. 6 of the written statement of defendant No. 2. But whether our suspicions in this matter are well founded or not, the fact remains that on the record as it stands, the plaintiffs have failed to prove the necessary title to obtain the declaration which has been decreed in their favour.

They have equally failed to prove that they were in possession of the property in suit so as to entitle them to the declaration prayed for under s. 42, Specific Relief Act. This is clearly covered by Issue No. 6. "What should the decree be?" In the plaint the plaintiffs have alleged that they were in

possession. The allegation has been denied in the written statement both specifically and generally and it was for the plaintiffs to prove that they were in possession and on their failing to do so they were clearly not entitled to a declaration such as has been decreed in their favour. Lastly, in regard to the arguments placed before us by the learned Advocate for the appellant it appears to us that the learned Judge failed to exercise a judicial discretion in permitting the learned Advocate for the plaintiffs at the hearing of the suit, to give up the relief of injunction which had been sought against defendant No. 1. On the basis of the prayer for a perpetual injunction in the plaint, an *interim* injunction had been issued to defendant No. 1 and we can see no justification in these circumstances for the action of the learned Judge in permitting this relief to be dropped at the hearing of the suit, and we have every reason to believe that this was yet another means adopted by the learned Judge to expedite disposal of this suit and avoid troublesome questions of court-fees which might have necessitated an adjournment of the case. With reference to defendant No. 1 the learned Judge states in his judgment:

"Before I close I must touch one point and that is the appearance of defendant No. 1 through a Pleadar on the date of arguments. He has, I have already shown, not filed any written statement and not appeared on the date on which the case was fixed for final hearing, but on the day of arguments, his Counsel appeared and wanted to argue the case. I cannot understand that an *ex parte* defendant, who filed no written statement and who did not appear on the date of final hearing, could argue in the case. The Counsel for defendant No. 1 has cited various rulings to show that he could appear and take up and argue the case at the stage he chose to appear. No attempt was made to get the *ex parte* order set aside... In this case, I have not fixed any case for *ex parte* hearing. All that I have done is that I have not allowed the Counsel for the defendants to argue the case. In my opinion, arguments can only be based on facts or on legal points raised in the defence or brought out in evidence. In this case, there has been no evidence recorded and the Counsel for defendant No. 2 has already argued the case both for himself and defendant No. 1 because the interests of the two are identical."

The learned Advocate for defendant No. 1 respondent No. 3, has referred us to O. IX, r. 7, Civil P. O., and has cited several rulings in support of his argument that the learned Judge was bound in law to permit the Advocate for defendant No. 1 to argue the case on the date fixed for arguments, although there had been no appearance by defendant No. 1 prior to that date. He has cited before us the

cases referred to in *Pattanna Neeli Chetty* (3), *Kala Gella & Co. v. Shivji* (4), *Venkata Subbiah v. Lakshminarasimham* (5) and *Satyendra Nath v. Narendru Nath* (6) and the learned Advocate for respondents No. 1 and 2 has pointed out that the decision of a single Judge of this Court in *Kala Gella & Co. v. Shivji* (4), has been dissented from by another single Judge of this Court in the case *Gangaram Samandas v. Deomal Nihalchand* (7). But, however interesting this argument may be, it is quite unnecessary for the purposes of this appeal to pursue it, because it appears to us that as in the case of defendant No. 2, so in the case of defendant No. 1 who was *ex parte* the plaintiffs have been given a decree without any proof of their claim. Even when a defendant is *ex parte*, the claim against him must be proved before there can be a decree. The case reported in *J. B. Ross & Co. v. C. R. Seriven* (8) is very much in point. In that case the plaintiffs sued the defendants on a contract for damages for failure on the part of the defendants to take delivery of certain goods, the damages being claimed on the basis of the difference between the contract price of the goods and the marked price thereof. The defendants did not appear or file any written statement. On the date of hearing the defendants appeared and applied for leave to defend the suit on the ground that there had been some misunderstanding. The Court refused the application and without hearing any evidence whatever decreed the plaintiffs suit *ex parte*. It was held that the procedure adopted was illegal and that the decree must be reversed and the case remanded to the lower Court for retrial. The learned Judges held that a verification of the plaint was not evidence on which the suit could be decreed whether the adversary did or did not appear. It was further held that there was no legal evidence on the record on which the decree made in favour of the plaintiffs might be supported and that the plaintiffs were not entitled to succeed on the basis of an implied admission of their claim by the defendants. Sir Lancelot Sanderson, O. J. held that "the fundamental principle is that the plaintiff when he comes to Court must prove his case and must prove it to the satisfaction of the Court."

(3) 51 M 597; 108 Ind. Cas. 297; A I R 1927 Mad. 1197; 27 L W 361; (1928) M W N 103.
 (4) A I R 1926 Sind 181; 92 Ind. Cas. 493.
 (5) A I R 1925 Mad. 1274; 91 Ind. Cas. 545; 49 M L J 273; (1925) M W N 647.
 (6) A I R 1924 Cal. 806; 81 Ind. Cas. 867; 39 O L J 279.
 (7) A I R 1929 Sind 46; 115 Ind. Cas. 310.
 (8) 43 O 1001; 34 Ind. Cas. 235; A I R 1917 Cal. 269; 20 O W N 1192.

Woodroffe, J. held that "no decree can be legally made in any case without any evidence except in cases of suits governed by the provisions of O. XXXVII, Civil P. O."

Speaking of the procedure in the Calcutta High Court this learned Judge added :

"In this Court it has always been the practice in undefended cases to take evidence as defined in the Evi. Act, namely oral statements of witnesses and documents proved before the Court" and Mukerjee, J., the third Judge in this case, has said : "Great caution should be exercised when suits are heard *ex parte*." This observation, he said, was a universal application, but applied with special force to cases where unliquidated damages were claimed. For these reasons we think that the judgment and decree of the learned First Class Subordinate Judge must be reversed. Ordinarily, we should have allowed this appeal with costs and made no further order thus dismissing the plaintiffs' suit. But as we feel that the conduct of the plaintiff-respondents and of their Advocate might to some extent have been influenced in this case by the attitude of the learned Judge who was trying, we think the proper order will be to allow this appeal with costs, reverse the decree and direct that the record of this suit be returned to the Court of the First Class Subordinate Judge of Hyderabad in order that the suit be proceeded with and disposed of according to law. We order accordingly.

Order accordingly.

*D.

OUDH CHIEF COURT

Second Civil Appeal No. 455 of 1937

February 26, 1941

GHULAM HASAN, J.

Mirza MOHAMMAD KAZIM HUSAIN

—PLAINTIFF—APPELLANT

versus

Mst. NADRI BEGAM AND ANOTHER—

DEPENDANTS—RESPONDENT

Registration Act (XVI of 1908), s. 28—*Fraud on registration—Criterion is intention of parties—Absence of collusion between donor and donee—Registration of gift deed cannot be challenged—Muhammadan Law—Gift—Hiba-bil-iwaz—Essentials—Actual delivery of possession, if necessary—Declaration as to, in deed—Whether binding.*

In determining whether the requirements of the law as to registration have been complied with, the intention of the parties is the criterion by which the matter must be decided. Where the donor intended to vest the property in the donee, the inclusion of the property in a gift deed cannot be held to be a device to evade the Registration Act. 161 Ind. Cas. 29 (1), followed. [p 90, col. 1.]

In the absence of any collusion between the donor and the donee the registration of the deed cannot be challenged as being defective in law. 77 Ind. Cas.

464 (2) and *Biswanath Prasad v. Chandra Narayan Chowdhuri* (3), relied on. [p. 90, col. 2.]

In the case of a *hiba-bil-iwaz*, only two conditions are necessary to establish the validity of such a transaction, (1) actual payment of consideration (*iwaz*), and (2) a *bona fide* intention on the part of the donor to divest himself in *praesenti* of the property and to confer it upon the donee. The adequacy of consideration is not material; but whatever its amount, it must be actually and *bona fide* paid. As regards the second condition, the circumstances that no mutation was either claimed or obtained by the donee in the lifetime of the donor and that possession remained with the donor till his death, are wholly irrelevant. Delivery of possession, is not at all necessary in the case of a *hiba-bil-iwaz*. The declaration in the deed by the donor as regards the delivery of possession to the donee is binding upon the heirs and representatives of the donor and is quite sufficient to establish delivery of possession even if it is necessary to do so, *Sheikh Muhammad Mumtaz Ahmad v. Zubaida Jan* (4) and 136 Ind. Cas. 385 (5), relied on. [p. 90, col. 2; p. 91, col. 1.]

S. C. A. against the order of the Civil Judge of Fyzabad, dated September 15, 1937.

Mr. H. Husain, for the Appellant.

Mr. Akhlaque Husain, for the Respondent.

Judgment.—This is a plaintiff's appeal arising out of the dismissal of his suit by the lower Appellate Court.

The facts giving rise to this appeal may be briefly stated. One Mirza Dilawar Husain had two wives, Ahmadi Begam and Nadri Begam. From his first wife he had three sons, one of whom is the present plaintiff-appellant and the other is defendant No. 2 in the case, the third son having predeceased his father. From his second wife, who is defendant No. 1 in the case, he had several children, whom it is not necessary to mention for the purposes of the present appeal. The plaintiff's allegation was that his mother, Ahmadi Begam, was the original owner of the property in dispute. Ahmadi Begam died in 1914 leaving her husband and three sons, named Jafar Husain, Kazim Husain and Abid Husain. The husband succeeded to the one-fourth share and the three sons to equal shares in the remainder of the inheritance under the Muhammadan Law. On June 27, 1924, Mirza Dilawar Husain executed a deed of gift (Ex. 3) of two annas share out of the sixteen annas in favour of his three sons from Ahmadi Begam and delivered possession to them. On the same date he executed another deed of gift (Ex. A-5) in favour of his second wife, Mst. Nadri Begam, defendant No. 1 in lieu of her dower debt, in respect of the remaining two annas share inherited by him. Mirza

Dilawar Husain died on January 24, 1935. The plaintiff challenged the deed of gift executed in favour of the defendant No. 1 as being invalid on the ground that it was neither followed by possession nor was it properly registered. It was further challenged on the ground that it was not meant to transfer the property to defendant No. 1 and that it was fictitiously executed in order to defeat and defraud the creditors to whom Mirza Dilawar Husain was deeply indebted. The plaintiff, therefore, claimed that the defendant No. 1 had no right in the property conveyed to her by the gift and consequently all the heirs of Mirza Dilawar Husain were entitled to legal shares therein. The plaintiff tried to obtain mutation of names in respect of his share in the said property on the death of Mirza Dilawar Husain but the Revenue Court ordered mutation in favour of defendant No. 1, who set up the deed of gift in her favour. The plaintiff thereupon brought the suit out which the present appeal arises for possession of a 1-24th share claiming 1-48th share by inheritance and 1-48th share of defendant No. 2 which he claimed on the basis of an oral gift from him.

Defendant No. 2 supported the plaintiff's claim.

Defendant No. 1 defended her title to the two annas share in the property in suit as a donee from Mirza Dilawar Husain. She further put the alternative case that she was entitled to retain possession of the property in lieu of her dower debt of Rs. 14,000. She denied the oral gift by defendant No. 2 in favour of the plaintiff and pleaded an estoppel.

The trial Court decreed the suit holding that the execution of the alleged deed of gift (Ex. A-5) was not proved and that its genuineness and validity had not been established. It, however, held that the plaintiff had not established that the deed of gift was executed in order to defraud the creditors. The oral gift by defendant No. 2 in favour of the plaintiff was held established. Upon the question of dower the finding of the trial Court was that the dower of defendant No. 1 was fixed at Rs. 105 only and that she was in possession of the property left by Mirza Dilawar Husain and that she was entitled to remain in possession of this property till this dower debt was paid off. The plaintiff's suit

for possession was decreed on condition of the plaintiff's paying to the defendant No. 1 the proportionate amount of dower due.

The defendant No. 1 appealed and the lower Appellate Court held that the deed of gift executed in her favour was satisfactorily proved and it was genuine and valid. It further held that the amount of dower of defendant No. 1 was Rs. 14,000 as stated in the deed of gift and not Rs. 105 as held by the trial Court. The finding on the question of the oral gift by defendant No. 2 in favour of the plaintiff was also set aside for the reason that possession did not accompany the oral gift. The result of the findings was that the plaintiff's suit was dismissed.

The plaintiff has preferred this second appeal against the aforesaid dismissal of his suit.

The first question that has been argued before me on behalf of the appellant is that the lower Appellate Court was not justified in stating that the execution of the deed of gift (Ex. A-5) was not disputed by the plaintiff. It is contended that the finding of fact of the trial Court upon the point of execution being in favour of the plaintiff, it was the duty of the defendant No. 1, who had filed the appeal before the lower Appellate Court, to get that finding set aside and there was no occasion for the plaintiff to concede the point of execution. The lower Appellate Court appears to have referred to the two deeds of gift, namely, Exs. 3 and A-5. The execution of Ex. 3 had not been questioned in the trial Court, and as both the deeds of gift were executed and registered on the same day by the same executant and attested by the same witnesses, it is not in the slightest degree unlikely that the execution of Ex. A-5 may also have been conceded before the lower Appellate Court. There is nothing whatever to show that the above statement of fact in the judgment of the lower Appellate Court is wrong. I am quite prepared, however, to determine this question and record a fresh finding under the powers vested in this Court by s. 103 of the Civil P. C. I have heard learned Counsel for the appellant on this point and have carefully considered the evidence of D. W. No. 3, Saiyid Raza Husain, who was produced to prove the execution of Ex. A-5. D. W. No. 3 is one of the

attesting witnesses to the deed and swears that Mirza Dilawar Husain executed the deed of gift (Ex. A-5) and signed it in his presence. I do not see any reason whatever for not believing the evidence of this witness. In my opinion the evidence of this witness fully establishes the execution of the deed of gift (Ex. A-5).

The second point that has been raised before me on behalf of the plaintiff-appellant is that the deed of gift was not properly registered within the meaning of ss. 17 and 28 of the Indian Regis. Act. It is contended that the entire property, with the exception of plot No. 885, which was the subject-matter of the deed of gift, was situate in Tahsil Bikapur and plot No. 885 was fictitiously inserted in the deed so as to obtain registration in Fyzabad. It is urged that plot No. 885 did not belong to Mirza Dilawar Husain and the inclusion of this plot in the deed of gift was a fraud upon registration. I am of opinion that this contention is devoid of substance. It appears that one Mirza Fazal Husain originally obtained a lease of plot No. 885 for building a house from the Nazul under a deed of lease dated November 19, 1901, (Ex. 1). Fazal Husain transferred this plot by a sale deed (Ex. 2) on November 5, 1909, in favour of Ahmadi Begam for Rs. 25. This deed recites that the transferor sold a house which had fallen down along with the right of occupancy in the land. A perusal of Ex. 1 will show that the rights of the lessee under the lease were heritable inasmuch as it is clearly stated therein that the right of Govt. to resume the land arose only if the owner died heirless. It is further provided in the lease that the owner of the building situate on the land will have the right to transfer the materials of the building as well as the right of occupancy in the land, but he shall not be entitled to transfer the land itself. In other words what was prohibited by the lease was the transfer of ownership of land which undoubtedly vested in the lessor but not in the lessee. As I have already stated Fazal Husain did not purport to transfer anything more than what he was entitled to do under the strict terms of the lease granted to him. He did not transfer any rights of ownership in the land. What was transferred was a mere right of occupancy in the land along with the house which had fallen down. There can

be no question therefore that Ahmadi Begam acquired the same rights under the sale which the original lessee Fazal Husain himself possessed, and it cannot be said by any stretch of reasoning that Mirza Fazal Husain violated any of the essential conditions of the lease in executing the sale deed in favour of Ahmadi Begam.

It is urged on behalf of the appellant that, according to the terms of the lease, land along with the building was liable to resumption by the Govt. if the building fell down or was allowed to fall in a state of disrepair by the owner or his transferee or in case no new building was constructed within a period of three years from the date of the demolition of the first building. The house must be deemed to have fallen down in 1903 as the sale deed (Ex. 2) undoubtedly shows. It is clear, however, that the Govt. has not chosen to exercise a right of resumption up to this time and that the land is still in the possession of the lessee's representatives. In any view of the case, whether the lessee possessed the right of transfer or not, it is a matter on which there may be a reasonable doubt. It does not follow that parties to the deed of gift were prompted by any motives of fraud in including plot No. 885 in the deed. It has been held by their Lordships of the Judicial Committee in *Raja Inuganti Venkatarama Rao v. Raja Sobhanadri Appa Rao Bahadur Garu* (L. R. 63 I. A. 169) (1) that in determining whether the requirements of the law as to registration have been complied with, the intention of the parties is the criterion by which the matter must be decided. It cannot be said in the present case that there was no intention on the part of the donor to vest the property in the donee and consequently it cannot be held that the inclusion of plot No. 885 in the deed of gift was a mere device to evade the Registration Act. Assuming for a moment that the title of Mirza Dilawar Husain to plot No. 885 was doubtful, it cannot lead to the inference that he was guilty of any fraud in including the same in the deed of gift. At any rate, there is nothing whatever to suggest any collusion between the donor and the donee or to show that defendant No. 1, a *pardanashin* lady, who

paid a valid consideration for the deed of *hiba-bil-iwaz* in her favour, was a privy to any such imaginary fraud. In the absence of any collusion between the donor and the donee the registration of the deed cannot be challenged as being defective in law (see *Lakshmikantaraju v. Jagannatharaju A.* I. R. 1924 Madras, 281) (2). Reference may be made to the observations of their Lordships of the Privy Council in *Biswanath Prashad v. Chandra Narayan Chowdhuri* (L. R. 48 I. A. 129, at 133) (3) which appear to apply fully to the facts of the present case. Their Lordships observed:—

"In coming to the conclusion that this appeal must be dismissed, their Lordships' judgment rests on the view that none of the parties ever intended that the one-*kauri* share in *Mouza* Kolhua should vest in Udit or should pass by the mortgage from him to the mortgagees. This case differs *toto caelo* from the case suggested in argument of a mere failure to make a good title to property dealt with by the instrument, and which both parties had intended should form part of the security."

I am satisfied that the deed of gift cannot be impugned on the ground that it was a fraud upon registration.

Lastly, it has been contended that the deed of gift is invalid on the ground that there was no *bona fide* intention on the part of the donor to part with the ownership of the property. It is not disputed that the deed of gift was executed in lieu of a dower debt of Rs. 2,000 out of Rs. 14,000 which was fixed at the time of the marriage. The finding of the lower Appellate Court upon this part of the case must be accepted as binding. The transaction evidenced by the deed of gift is a *hiba-bil-iwaz*, a term well understood in Muhammadan Law. In the case of a *hiba-bil-iwaz*, it has been laid down in a series of cases by their Lordships of the Judicial Committee, that only two conditions are necessary to establish the validity of such a transaction, (1) actual payment of consideration (*iwaz*), and (2) a *bona fide* intention on the part of the donor to divest himself *in praesenti* of the property and to confer it upon the donee. The adequacy of consideration is not material; but whatever its amount, it must be actually and *bona fide* paid. It is not denied that the first condition is fully satisfied in the present case. As regards the second condition, it is urged that no mutation was either claimed or obtained by the donee in the lifetime of

(1) 63 I A 169; 161 Ind. Cas. 29; 1936 O L R 163; A I R 1936 P C 91; 1936 A L R 269; 1936 O W N 278; 2 B R 338; (1936) M W N 305; 8 R P O 180; 70 M L J 378; 43 L W 456; (1936) A L J 258; 40 O W N 545; 38 Bom. L R 457; 38 P L R 308; 19 N L J 89; 63 C L J 382; 59 M 539 (P O).

(2) A I R 1924 Mad. 281; 77 Ind. Cas. 464; 46 M L J 12; 33 M L T 243; (1924) M W N 125.

(3) 48 I A 129 (133).

the donor and that possession remained with the donor till his death. Both these circumstances in my opinion are wholly irrelevant in the case of a *hiba-bil-iwaz*. It is well-settled that delivery of possession, although essential in the case of a simple gift, is not at all necessary in the case of a *hiba-bil-iwaz*. The deed of gift contains a declaration by the donor that he has delivered possession of the property to the donee. We have also from the evidence of the defendant No. 1 herself that the donor handed over the deed to her. The declaration in the deed as regards the delivery of possession is binding upon the heirs and representatives of the donor and is quite sufficient to establish delivery of possession even if it were necessary to do so, [see *Sheikh Muhammad Mumtaz Ahmad v. Zubaida Jan* (L. R. 16 I. A. 205) (4) and *Mohammad Sadiq Ali Khan v. Fakhr Jahan Begam* (L. R. 59 I. A., 1) (5)]. Had Mirza Dilawar Husain been alive, he would have been estopped from challenging the deed of gift on the ground of absence of delivery of possession or non-divestment of his interest in the property gifted. The plaintiff as his heir is in no better position and must be held bound by the declaration made by the donor. The lower Appellate Court rightly observes that the donee was admittedly a *pardanashin* lady and it was but natural that her husband should manage the property on her behalf as long as he lived. The absence of mutation is fully explained in the evidence of D. W. No. 1, Muzaffar Husain, a witness related to both parties. He stated that on being asked to mutate the property in favour of his wife, Mirza Dilawar Husain said that if he did so he would lose his *lambardari* dues. He, however, acknowledged the fact that he had gifted the property. The witness further stated that mutation on the basis of Ex. 3 was also not effected for the same reason.

It is also pointed out on behalf of the appellant that even after the gift Mirza Dilawar Husain carried on litigation in his own name and reference is made to Exs. 20 to 24. This action of Mirza Dilawar Husain was perfectly natural in the circumstances as mutation stood in his name

and no mutation had been made in favour of his wife.

Another circumstance pointed out in this connection is that there was a family settlement in the year 1928 between Mirza Dilwar Husain and his three sons from his first wife, whereby it was agreed that defendant No. 2 was to get the entire share in *patti* Ahmadi Begam in village Tendwa and he was to relinquish his share in other villages in the said *patti* in favour of other co-sharers in lieu thereof. To this settlement defendant No. 1 was not a party and it is argued therefore that had she possessed any interest in the deed of gift, she would not have been ignored in the family settlement. In this connection Ex. A-3, a deed of release, executed by defendant No. 1 on June 13, 1929, is also referred to. It appears from Ex. A-3 that defendant No. 2 wanted to mortgage village Tendwa, which had been allotted to him under the family settlement for satisfying certain debts but the mortgagee was not prepared to take the mortgage from him in view of the interest of defendant No. 1 in the village under the deed of gift executed in her favour by Mirza Dilawar Husain. The deed recites that defendant No. 1 had no objection to the family settlement that had been arrived at and she claimed no share in village Tendwa which defendant No. 2 intended to mortgage. The obvious motive of this deed of release was to afford satisfaction to the mortgagee against any claim which defendant No. 1 might advance on account of the deed of gift in her favour.

There is no statement whatever in this deed of release that the deed gift was a fictitious transaction not intended to pass any title to her. On the other hand, the fact that it became necessary to obtain a deed of release from her in respect of her share in village Tendwa proves that defendant No. 1 was regarded as possessed of an interest in the property by virtue of the deed of gift. The execution of this deed of release in my opinion far from showing that it was not given effect to on the other hand leads to a contrary inference. The lower Appellate Court believed the evidence of D. W. No. 1, who stated that in lieu of the release of her share in Tendwa she had got extra share in other villages along with other co-sharers, that her husband represented her in the family settlement and her interests were fully safeguarded by him. This evidence stands

(4) 16 I A 205; 11 A 460; 5 Sar. 433 (P O).

(5) 59 I A 1; 136 Ind. Cas. 385; 8 O W N 1378; A I R 1932 P O 13; 36 O W N 137; 62 M L J 320; Ind. Rul. (1932) P O 81; 6 Luck. 558; (1932) A L J 663 (P O).

unrebutted and there is no reason to doubt the veracity of this statement.

Lastly it is pointed out that in spite of the gift Mirza Dilawar Husain dealt with the property as his own, and he along with his two sons made a mortgage of Solepur on December 2, 1930 (*vide* Ex. 10). There is nothing whatever to show that this mortgage was brought home to defendant No. 1. In any case even if she was aware of it, this change of intention on the part of Dilawar Husain does not destroy the interest of the defendant No. 1 in the property which was the subject-matter of the gift. Solepur is only one of the four villages in dispute and as has been pointed out on behalf of the defendant No. 1 it may well be that the mortgagees under Ex. 10 was satisfied that the share of the mortgagors was an ample security for the satisfaction of his claim.

Having given my best consideration to the entire evidence and the circumstances of the case I am of opinion that the finding of the lower Appellate Court as regards the genuineness and validity of the deed of gift in favour of defendant No. 1 is perfectly correct and must be maintained.

Learned Counsel on behalf of the appellant frankly concedes that the evidence to support the plea that the deed of gift was a fraud upon the creditors is very slender.

In view of the above finding it is scarcely necessary to pursue the alternative point whether defendant No. 1 is entitled to retain possession of the property in lieu of her dower debt. The question is purely one of academic interest and need not be dealt with.

I, therefore, confirm the judgment and decree of the lower Appellate Court and dismiss the appeal with costs.

S.

Appeal dismissed.

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Appeal No. 122/22 of 1939

November 15, 1940

ALMOND, J. C. AND MIR AHMED, J.
INZAR GUL SAID ANWAR AND ANOTHER
—APPELLANTS

versus

HAJAB GUL TAZA GUL AND OTHERS—
RESPONDENTS

Pre-emption—Pre-emption suit decreed—Amount deposited by pre-emptor—Vendee withdrawing same—During execution proceedings by pre-emptor for possession, pre-emptor and vendee entering into compromise under which vendee paying certain

amount to pre-emptor before Court, which ordering execution to be filed in full satisfaction—Compromise held out and out sale.

A pre-emption suit was decreed on payment of Rs. 1,800. This sum was deposited in Court and was taken out by the vendees. The pre-emptor subsequently applied for execution of his decree by being put in possession. But during these proceedings the pre-emptor and the vendee entered into a compromise whereby the vendees paid Rs. 2,000 to the pre-emptor to cover the cost of the land and the expenses incurred by him in the litigation and the pre-emptor agreed that the suit should be considered as dismissed. Rs. 2,000 was paid in the presence of the Court and the Court passed an order that the execution should be filed in full satisfaction;

Held, that the question whether a sale was a sale of land or not must depend on the circumstances of each particular case, and that there was an out and out sale of land by virtue of the compromise inasmuch as the land had vested in the pre-emptor by virtue of the decree when he deposited Rs. 1,800 in Court and he was at the time of the compromise the absolute owner of the property of which he could get possession by execution.

[Case-law referred to.]

A. from the order of the Additional Judge, Peshawar, dated May 22, 1939.

Khan Bahadur Saaduddin Khan, for the Appellants.

Rai Bahadur Diwan Chand, for Respondents Nos. 1 and 2, Respondent No. 4 in person.

Almond, J. C.—On March 13, 1935 the brothers of one Mohammad Nabi sold certain land to Hijabgul and Nawabgul, two brothers. On March 12, 1936, Mahammad Nabi, through his maternal uncle as his next friend, sued for pre-emption of this land and was given a decree on payment of Rs. 1,800. This sum was deposited in Court and was taken out by the vendees. Subsequently, Mohammad Nabi applied for execution of his decree by being put in possession of the land and on July 7, 1936 he and the vendees entered into a compromise whereby the vendees paid Rs. 2,000 to the minor to cover the costs of the land and the expenses incurred by Mohammad Nabi in the litigation and Mohammad Nabi agreed that the suit should be considered as dismissed. Rs. 2,000 was paid in the presence of the Court and the Court passed an order that the execution should be filed in full satisfaction. On July 8, 1937, Inzargul and Redigul sued to pre-empt this sale effected by the compromise on payment of Rs. 1,500. The suit with respect to a portion of the land only as regards which they had a right of pre-emption. Their suit was decreed on payment of Rs. 1,500 and

Hijabgul and Nawabgul appealed to the District Judge against the decree. An Additional Judge accepted their appeal on the ground that what was sold by the compromise of July 7, 1936 was not land but "a chose-in-action." Inzargul and Redigul have presented a further appeal to this Court and the only point for decision by us at this stage is whether there was a sale of land by the compromise so as to give right to a claim for pre-emption.

The learned Additional Judge in coming to his conclusion relied on the Commentary in Shadilal's Law of Pre-emption, Edn. 3, p. 116. That Commentary refers to two decisions of the Lahore High Court reported in *Masihuddin v. Matu Ram* (1), and *Bhagta v. Bir Singh*, 61 Ind. Cas. 331 (2). Learned Counsel for the appellants contends that those rulings are in his favour. Learned Counsel for the respondents, on the other hand, relies on the following cases: *Ghutur Singh v. Angad Pande*, 41 Ind. Cas. 467 (3), *Lachhman Prasad v. Chamela*, 52 Ind. Cas. 170 (4), *Lashkari Mal v. Ishar Singh* (5), *Shams-ud-din v. Ghulam Hussain* (6), and *Attar Chand v. Umar Hayat*, 20 Ind. Cas. 556 (7). It will be necessary to examine those cases in some detail. In *Masihuddin v. Matu Ram* (1), property belonging to a lunatic was sold by his wife in 1883 to a man who was already the mortgagee. In 1912, after the lunatic had died, his sons sued for possession of that land on the ground that the sale was void and also for redemption from the mortgagee. They abandoned their suit in consideration of the receipt of Rs. 500 from the vendee. It was held that the sons of the lunatic had merely abandoned their rights to obtain a decision of the Court in a case which was genuinely contested and that there had not been a sale of land. In the course of the hearing of the case it was argued that to hold that the transaction was other than one of sale would defeat the law of pre-emption because all that had to be done was to go through the force of a suit and compromise. The Judges who decided that case re-

(1) 1 L 109, 55 Ind. Cas. 865; A I R 1920 Lah. 421; 96 P L R 1920; 48 P W R 1920.

(2) 61 Ind. Cas. 331; 3 U P L R (L) 37.

(3) 41 Ind. Cas. 467; A I R 1917 Oudh 80; 4 O L J 422.

(4) 52 Ind. Cas. 170; A I R 1919 Oudh 175; 1 U P L R (J O) 11.

(5) 94 P R 1902; 134 P L R 1902.

(6) 42 P R 1917; 38 Ind. Cas. 656; A I R 1917 Lah. 256.

(7) 20 Ind. Cas. 556; 296 P L R 1913.

marked that this result did not follow, and where the facts of the case indicated that the suit and compromise are sham there was nothing to prevent the Courts from holding that the transaction was in reality a sale. It is therefore clearly indicated in that case that there might be cases in which a compromise in Court could amount to a sale. In *Bhagta v. Bir Singh*, 61 Ind. Cas. 331 (2), one Birsingh had sold land and house to Belasingh for Rs. 6,000. A pre-emption suit was brought for the land and was decreed on payment of Rs. 4,635-6-0. Belasingh then sued Birsingh for recovery of Rs. 1,264-10-0 which he had lost after giving credit of Rs. 100 for the house. During the hearing of that parties agreed that the house should be reconveyed to Birsingh for the sum of Rs. 100 and a decree was passed for this. Rs. 100 in favour of Belasingh. Birsingh then by a separate suit obtained possession of the house. Belasingh's son then sued for pre-emption of the sale of this house for Rs. 100. The learned Judge held that the compromise made in the suit brought by Belasingh amounted to a sale of the house and allowed it to be pre-empted.

In *Ghutur Singh v. Angad Pande*, 41 Ind. Cas. 467 (3), which is a judgment of the Judicial Commissioner's Court of Oudh the pre-emptor after obtaining a decree had failed to obtain possession of the land by execution within the period allowed by law and when his right to obtain possession had lapsed the vendees had repaid to him the amount for which the property had been decreed. It was held that in those circumstances there was no sale but merely a lapse of the pre-emptor's rights and that there was no transaction which could be subsequently pre-empted. It was pointed out in that case that there was a considerable difference between the sale of a subsisting right and the lapsing of that right by reason of the operation of the law of limitation and it was held that the original pre-emptor had no subsisting right which he could transfer to the vendees after the period of limitation for obtaining possession had passed. *Lachhman Prasad v. Chamela*, 52 Ind. Cas. 170 (4), is also a judgment of the Judicial Commissioner's Court of Oudh. In that case a person who was in possession of a certain piece of land was sued but the suit was withdrawn on terms. It was held that the compromise did not amount to a sale. The learned Judge remarked in the course of

the judgment that he did not say that circumstances could not arise in which such a transaction might amount to a sale. In *Lashkari Mal v. Ishar Singh* (5), one Mahtab Singh had obtained a decree for pre-emption on payment of a certain sum of money. The following day, before he had deposited that money, he transferred his rights in the property to his grandson Isharsingh. It was held that the property had never vested in Mahtab Singh as it could not do so until he had fulfilled the conditions of the decree and deposited the amount in Court and that therefore he had not sold the property but only a right to obtain the property on satisfying the conditions laid down in the decree. *Shams-ud-Din v. Gulam Husain* (6), was a case in which a man had obtained a decree for possession of certain property on payment of Rs. 300. He was unable to pay Rs. 300 and therefore sold his rights. It was held that the transaction was not a sale of land but was a sale of his rights under the decree which could not be pre-empted :

In *Attar Chand v. Umar Hayat* (7). A had sold his reversionary rights to B. On the death of the widow who had a life interest A repudiated the sale and B sued him. A compromise was effected whereby half the land was decreed in B's favour. The son of A filed a suit for pre-emption and it was held that the compromise did not amount to a sale of land. In the present case we are of opinion that there was an out and out sale of land by virtue of the compromise of July 7, 1936. The land had vested in Mohammad Nabi by virtue of the decree when he deposited Rs. 1,800 in Court and he was at the time of the compromise the absolute owner of the property of which he could get possession by execution. The question of whether a sale is a sale of land or not must depend on the circumstances of each particular case. In the present case there was no genuine dispute between the parties as to their respective rights. Mohammad Nabi was absolutely entitled to get possession of the land by execution of his decree at the time when he entered into a compromise and the practical effect of his action was to sell the land to Hijabgul and Nawabgul. We therefore reverse the finding of the learned Additional Judge on this preliminary point and remand the case under O. XLI, r. 23 to the Court of the District Judge for decision of the remaining points. Stamp on appeal to be

refunded: other costs in this Court to follow the event. Parties present, i. e., both plaintiffs and respondents Nos. 1 and 2 instruct to appear before District Judge on December 2, 1940.

N.

Order accordingly.

PATNA HIGH COURT

Criminal Revision Application No. 131
of 1940

April 12, 1940

DHAVLE, J.

N. L. CARRICK—PETITIONER

versus

EMPEROR—RESPONDENT

Criminal trial—First information report—Person not named in—Action against, if can be taken—Criminal Procedure Code (Act V of 1898), ss. 155, 173, 435, 439—Cases disposed of by Sub-Divisional Officer as non-cognizable—No further investigation without order of competent Magistrate and no charge-sheet—Magistrate taking cognizance of case and transferring it to another Magistrate for trial—His act, whether judicial—If open to revision—Charge-sheet, when can be called—Final report of Police that case was non-cognizable accepted by Sub-Divisional Officer—Subsequently Court Sub-Inspector moving Magistrate on Inspector's report and copy of Government letter addressed to Deputy Inspector General of Police that cases should be tried and decided in Court—Magistrate calling for charge-sheet—There was held no proper material to put accused on trial—Magistrate held did not act judicially and order must be quashed in revision.

An action need not be confined to persons named in the first information or charged with taking a direct part in an occurrence. [p. 96, col. 1.]

Where the cases are disposed of by the Sub-Divisional Magistrate as non-cognizable there can be no further investigation under Chap. XIV of the Criminal P. O., without the order of a competent Magistrate according to s. 155 (2)—and no charge-sheet under s. 173. [p. 97, col. 1.]

Section 192 (1), Criminal P. O., empowers a Sub-Divisional Magistrate to transfer any case of which he has taken cognizance, for enquiry or trial, to any Magistrate subordinate to him. The order of transfer to another Magistrate, therefore, necessarily imports his taking cognizance of the case, and it constitutes a judicial act. Hence, the Magistrate's action in taking cognizance and transferring the case to another Magistrate for trial is a judicial matter open to scrutiny by Courts of Revision under ss. 435 and 439, Criminal P. O. [p. 96, col. 2.]

A complaint was made to the Magistrate about a cognizable offence. The investigating officer submitted a final report that the case was non-cognizable which was accepted by the Sub-Divisional Magistrate. The Magistrate was subsequently moved by the Court Sub-Inspector on a letter or report of the Inspector of Police and a copy of a letter from the Chief Secretary to Govt. in which it was stated that Govt. were of opinion that the counter cases should be tried and the issue decided in the Court. This letter was addressed to the Deputy Inspector General of Police, C. I. D., and was sent to the Inspector in the usual course for information and compliance. The Inspector wrote that "in face of the Govt. orders charge-sheets will

have to be submitted in both the cases and he enquired if it would be regular for the Police to submit the charge-sheets *suo motu* or whether in order "to regularize judicial proceedings" the Sub-Divisional Officer should call for charge-sheets. Upon this the Magistrate's order was "Inspector's report and copy of Govt. orders seen. Call for a charge-sheet". On the subsequent date the Magistrate noted that the charge-sheet had been received, and transferred the case to another Magistrate for disposal, adding, "you will please have the original record called for"; the accused and the witnesses were thereafter summoned in accordance with the charge-sheet;

Held, (i) that the Magistrate was competent under the law to reconsider the order accepting the final report of the Police but he could only do so on proper materials.

(ii) that the application in revision against the order of the Magistrate calling for the charge-sheet was one to revise the judicial order of the Magistrate and not the orders of the Govt;

(iii) that neither the Inspector's report nor the copy of the Govt. orders, on which materials the order passed by the Sub-Divisional Magistrate calling for a charge-sheet was founded, contained any relevant materials which could form the basis of that order whether by way of judicial action or as an obvious preliminary to judicial action. The Magistrate did not consider whether there were any proper materials for his putting the accused on their trial. It was clearly his duty as a judicial officer to form his own views on proper materials instead of merely carrying out the views of Govt. in his judicial work as a Magistrate. The Magistrate did not apply his judicial mind before putting the accused on his trial. As he took the judicial action upon what he took to be Govt. orders and not upon proper materials, the proceedings must be quashed. [p. 97, col. 1; p. 98, col. 1.]

Cr. R. App. against an order of the Magistrate, First Class, Jamshedpur, dated September 21, 1939.

Sir Manmathanath Mukherji, Messrs. S. S. Rakshit and Sarat Kumar Banerji, for the Petitioners.

The Assistant Govt. Advocate, for the Crown.

Order.—This is an application to quash the trial of the petitioner N. L. Carrick Chief Accountant of the India Copper Corporation at Ghatsila, in the following circumstances: On May 8, 1939, one A. B. Rao, a worker of the Company (as the Corporation seems to be called), wrote to the officer in charge of the Ghatsila Police Station that while he was waiting for payment, the Company's sepoys had begun to use force and one Karam Elahi and three other Pathans had caught him and Karam Elahi had pushed him and punched him twice. Shortly afterwards, A. T. Chatterji and two others also wrote to the same officer that they had been severely assaulted by the Pathan sepoys and Pathan workers, by the order of Mr. Carrick, as they were prominent

members of the Workers' Union. The Sub-Inspector drew up the usual first information on A. B. Rao's letter, though the other letter was also treated as part of the same cases, and dealt with it as a case under ss. 147 and 323 of the I. P. O. In the course of the investigation that followed, Kajir Khan, a sepoy of the Company who had been injured, made a statement which formed the subject of a counter case; and this case was also investigated at the same time. On June 1, the investigating officer submitted what is known as a final report to the effect that no case of rioting was made out as the ingredients of that offence were not all proved, and that it was a non-cognizable case under s. 323, I. P. O. On June 20, this report was accepted by Mr. Khan, the Magistrate then in charge of the Sub-Division, who ordered the case to be shown in the register accordingly. On August 21, 1939, Rai Bahadur M. P. Sinha, who had by this time succeeded Mr. Khan, was moved by the Court Sub-Inspector on a letter or report of the Inspector of Police and a copy of a letter of August 3, 1939, from the Chief Secretary to Govt. in which it was stated that Govt. were of opinion that the two cases (apparently Rao's case and the counter case) should be tried and the issue decided in the Court. This letter was addressed to the Deputy Inspector General of Police, O. I. D., and was sent to the Inspector in the usual course for information and compliance. The Inspector wrote that "in face of the Govt. orders charge-sheets will have to be submitted in both the cases under s. 147 of the I. P. O." and he enquired if it would be regular for the Police to submit the charge-sheets *suo motu* or whether in order "to regularize judicial proceedings" the Sub-Divisional Officer should call for charge-sheets. Upon this Mr. Sinha's order was "Inspector's report and copy of Govt. orders seen. Call for a charge-sheet by August 31, 1939". On August 28, 1939, Mr. Sinha noted that the charge-sheet had been received, and transferred the case to Mr. A. T. Bajpai for disposal, adding, "You will please have the original record called for". Mr. Bajpai apparently received the record on August 30, and three days afterwards he directed the summoning of the prosecution witnesses and the production of the petitioner and six other persons who had been named as the accused in the charge-sheet and had been recently put on bail by the Police.

Regarding these facts there is no dispute, and indeed they are mere matters of record. The petitioner states in para. 6 of his petition that in consequence of the dismissal of nine clerks on May 6, 1939, for refusing to obey orders, practically the whole office staff had declared a *hartal*; and in the next paragraph, that thereafter Mr. Mackillingin, the General Manager of the Company, had an interview with the Hon'ble the Prime Minister of Bihar on July 24, at which he had declined to accede to the request of the latter to reinstate the dismissed clerks. As to these allegations, there is no denial before me on behalf of the Crown. The letter of the Chief Secretary is dated 10 days after the interview.

The petitioner's contention is that in calling for the charge-sheet the Sub-Divisional Magistrate did not bring his judicial mind to bear on the case at all, but only acted on the Inspector's report which merely sought to carry out Govt. orders, that he made no reference to any proper materials before calling for the charge-sheet, and that inasmuch as the charge-sheet purports to refer to what may be called Rao's case, there was no justification for summoning the petitioner because the petitioner is not referred to in Rao's letter and there is no suggestion that the petitioner had taken any part in the occurrence complained of. In the latter part of this contention there is no substance, for the petitioner is mentioned in the letter that followed Rao's and was treated as a part of the same case, and action need not be confined to persons named in the first information or charged with taking a direct part in an occurrence.

There is no dispute that Mr. Sinha was competent under the law to reconsider the matter notwithstanding the order passed by his predecessor on June 20. It is also beyond question that Mr. Sinha could only do so on proper materials, but Sir Manmatha Mukharji for the petitioner has urged that the materials Mr. Sinha referred to in his order of August 20, ("Inspector's report and copy of Govt. order seen") were not proper materials for a Magistrate to act upon. A similar point was taken before the Sessions Judge when the petitioners first moved him, and Mr. M. P. Sinha in his explanation said that

"the Govt. orders on the subject being executive and not judicial, it is not to be governed by s. 435,

Criminal P. C., and as such the legality or otherwise of this order need not be taken up in the revision."

The petitioner, however, has been asking the Courts to revise not the "orders" of Govt., but the judicial orders of the Magistrate. The simple question is whether in taking judicial action the Magistrate acted merely on what he took to be Govt. orders or whether he had other sufficient materials on which he could and did proceed judicially; if the former be the case, the proceedings against the petitioner must plainly be quashed, leaving it open to those concerned to proceed in the proper way. There has been some difference of opinion in this Court on the question whether the order of a Magistrate (empowered to take cognizance on Police reports) calling for a charge-sheet is a judicial or an administrative order; but it is not necessary for the purposes of this case to go into that point because we are here dealing with a case in which the Magistrate has undoubtedly taken judicial action on what was before him on August 21, supplemented, if necessary, by the charge-sheet which, however, will presently be seen to provide little justification for judicial action. Section 192 (1) empowers a Sub-Divisional Magistrate to transfer any case of which he has taken cognizance for enquiry or trial, to any Magistrate subordinate to him. Mr. Sinha's order of transfer to Mr. Bajpai, therefore, necessarily imports his taking cognizance of the case, and though the expression 'taking cognizance' is not defined in the Code (see the discussion of this point in *Baldeo Prasad v. Emperor* (1), there can be no dispute that it constitutes a judicial act. It follows that even if the calling for a charge-sheet be regarded as an administrative matter, the Magistrate's action in taking cognizance and transferring the case to Mr. Bajpai for trial is a judicial matter open to scrutiny by Courts of Revision under ss. 435 and 439 of the Criminal P. C. The petitioner complains that the charge-sheet was called for "as a result of the unwarranted interference by the executive authorities"; and it is not a sufficient answer to this to say that calling for a charge-sheet is an administrative matter, for Mr. Sinha's further action in the case must in any event be regarded as judicial, and if it should appear to have been dictated by nothing better than what

(1) 12 Pat. 758; 145 Ind. Cas. 382; A I R 1933 Pat. 297; 14 P L T 330; (1933) Cr. Cas. 789; 6 R P 186; 34 Cr. L J 942.

were taken to be Govt. orders, it must (as I have already said) plainly be set aside in revision. As to the materials before the Magistrate, the petition says specifically that neither the Inspector's report nor the copy of the Govt. orders, on which materials the order of August 21, passed by the Sub-Divisional Magistrate calling for a charge-sheet was founded, contains any relevant materials which can form the basis of that order. A reference to the Inspector's report and the letter from the Chief Secretary shows that the contention is really unanswerable. Government were of opinion that the cases should be tried and the issues decided in the Court, and if that opinion was transmitted through the usual channels to the Inspector of Police for compliance, it is perhaps not surprising that the Inspector took it that under those Govt. orders (as he calls them) charge-sheets would have to be submitted in both the cases. But it is not to be supposed that Govt. intended to give any orders to the Sub-Divisional Magistrate, and it is just possible that this is what the Magistrate meant when he stated in his explanation to the Sessions Judge that the Govt. orders on the subject were executive and not judicial. But if the Magistrate did not take the Govt. letter to mean orders intended to be carried out by him, the Inspector's report of August 19, which is the only other material referred to in his order of August 21, contains no materials on which he could properly have decided to call for a charge-sheet, whether by way of judicial action or as an obvious preliminary to judicial action. The Inspector merely refers to the so-called Govt. orders and raises the question how those orders should be carried out by the Police submitting a charge sheet. Since the cases were disposed of by the Sub-Divisional Officer as non-cognizable under s. 323 of the I. P. C., there could be no further investigation under Chap. XIV of the Criminal P. C., without the order of a competent Magistrate—see s. 155 (2)—and no charge-sheet under s. 173. In his explanation to the Sessions Judge, the Magistrate said that the Inspector's report of August 19

"was enough to take up the matter for further consideration and to call for a charge-sheet under s. 190 (b) and s. 173."

This does not make it clear how far he realised at that time that to call for a charge-sheet on the Inspector's report without reference to any other materials was

but to carry out what he took to be the orders of Govt. In his explanation to this Court, however, he says in reply to ground No. 3—that in reality he had not at all applied his own mind to the facts of the case but had merely acted as desired by Govt.—that the Inspector's report gave him occasion to apply his mind to the final report, submitted and to review the previous orders thereon. This statement has caused me considerable difficulty. It is not clearly stated that he actually looked into the final report before passing his order of August 21, and indeed, if he had really done so, it is difficult to imagine how he only said to the Sessions Judge that the Inspector's report was enough to take up the matter for further consideration and to call for a charge-sheet. But this is not all; while in the order of August 21, he refers to the Inspector's report and the copy of Govt. orders only, he adds, when on August 28, he transferred the case for trial to Mr. Bajpai, that this Magistrate is to "have the original record called for." This suggests very strongly that what the Sub-Divisional Magistrate called the original record—and this must have contained the final report—could not have been with him on August 28, and if the record was not with him on August 28, it is difficult to imagine how it could have been with him on August 21 and then been sent away somewhere to be called for after the 28th. I am also bound to observe that if the Sub-Divisional Magistrate had really gone into the final report before passing his order of August 21, nothing would have been easier than for him to have said so clearly in his explanations to the Court of Session and to this Court, as he has refrained from doing. It is impossible on these materials to feel that the Magistrate, though he has thought of an "occasion to apply his mind to the final report", actually had that document before him when he considered the Inspector's report on August 21, or the charge-sheet on the 28th of that month. As to applying his mind to the facts of the case, it is unfortunate for the Magistrate that the charge-sheet in fact reads like a warning to a judicial officer, for it says:

"The case was investigated, and I submit the charge-sheet against the persons named in column 4 under s. 147, I. P. C. *in face of Govt. orders.*"

(The italics are mine). It does not say that the investigation pointed to the guilt of any of the accused persons named under s. 147, I. P. C. Indeed, the Inspec-

tor could not possibly have made any statement of that kind because the final report of June, 1939 with which the investigation had concluded expressly stated that no offence of rioting had been made out. If the Magistrate chose to call for a charge-sheet on no more than the Inspector's report and the Govt. letter, and if he further chose to put the accused on trial on such a charge-sheet, he would seem to have applied his mind merely to carrying out the views of Govt. rather than to considering whether there were any proper materials for his putting the accused on their trial. It was clearly his duty as a judicial officer to form his own views on proper materials instead of merely carrying out the views of Govt. in his judicial work as a Magistrate; and I find it impossible on present materials to hold that the Magistrate applied his judicial mind before putting the petitioner on his trial. It seems desirable to add that in submitting his replies to rules issued by the superior Courts the Magistrate should express himself clearly after an understanding of the grievance that a petitioner may be making out. For in para. 13 of the petition in this case, the whole of the Magistrate's order of August 28, is quoted and in ground No. 11 the Inspector's report and the Govt. orders are referred to as the materials on which his order of the 21st was founded; and yet the Magistrate has failed clearly to say that he looked into the final report if indeed he ever did so.

After coming to this conclusion I enquired from the Bar about the other six persons accused in the case. Sir Manmatha Mukharji has since filed an application on their behalf for relief on the same grounds as Mr. Carrick, and the Advocate-General who has communicated with the local authorities has stated that there is nothing further to say as against these persons.

The result is that the revisional application of Mr. Carrick and the other revisional application which has been filed by Sir Manmatha Mukharji on behalf of the other six accused to-day must both be allowed and the proceedings against them quashed. This will, however, leave it open to any body concerned to move the Sub-Divisional Magistrate, if necessary, on proper materials.

S.

*Application allowed.***MADRAS HIGH COURT**

Criminal Appeal No. 199 of 1940

August 1, 1940

LAKSHMANA RAO, J.

In re HUSAIN KHAN alias SULAIMAN KHAN AND ANOTHER—APPELLANTS

Madras Childrens Act (IV of 1920), s. 26 (1)—Son sentenced to pay fine for offence—Father directed to pay fine under s. 26 (1) without giving him opportunity to show that he did not neglect to take care of son—Order held improper—Proper order stated.

A young person was convicted under s. 326, I. P. O., and sentenced to pay a certain fine. His father was directed to pay the fine under s. 26 (1), Mad. Childrens Act without giving him opportunity of showing that he did not neglect to exercise due care on his son. Nor did it appear from the report of the probation officer that the offence was due to any neglect of the father;

Held, that the order under s. 26 (1) must be set aside and that the proper course was to commit the son to the custody of his father on his executing a bond to be responsible for the good behaviour of the son.

Or. A. against the order of the Juvenile Court of Vepery, Madras, dated February 7, 1940 and passed in J. C. No. 49 of 1940.

Mr. P. A. Krishnan Kutti Nair, for the Appellants.

The Crown Prosecutor on behalf of the Crown.

Judgment.—The first appellant, a young person, pleaded guilty to a charge under s. 326, I. P. C. and he was sentenced to pay a fine of Rs. 50. The second appellant the father was present in obedience to the notice under s. 21 (1) of the Mad. Childrens' Act and he was directed to pay the fine under s. 26 (1) of the Act. But no opportunity was given to him to show that he had been convicted to the commission of the offence by neglecting to exercise due care on the first appellant nor does it appear from the report of the probation officer that the offence was due to any neglect of the father. The order under s. 26 (1) of the Mad. Childrens' Act is therefore set aside and on the materials on record the proper course was to commit the first appellant to the custody of his father on his executing a bond to be responsible for the good behaviour of the son. The sentence of fine is therefore set aside and the first appellant will be committed to the custody of the second appellant on his executing a bond for Rs. 100 to be responsible for the good behaviour of the first appellant for one year.

N.-S.

Sentence set aside.

PATNA HIGH COURT

Appeal from Appellate Order No. 182
of 1940

February 25, 1941

HARRIES, C. J. AND VARMA, J.

Babu SREE KANT LAL—DECREE-HOLDER

—APPELLANT

versus

AJODHYA SINGH AND OTHERS—

JUDGMENT-DEBTORS—RESPONDENTS

Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act (IX of 1938), ss. 15, 16, 18, 19—Holding paying produce rent—S. 16 applies and not s. 15—Relationship of landlord and tenant existing when rent accrued—Whether must be subsisting when application is made under s. 16 (1)—Application under s. 16—All three conditions under s. 18, if must be complied with—Rent Reduction Officer reducing rent under s. 18 on application under s. 16—Non-compliance with all conditions under s. 18—Rent reduction officer, whether acts without jurisdiction—Inherent want of jurisdiction and wrong exercise of jurisdiction, distinction—Effect of reduction of arrears under ss. 16 and 18—Execution—Executing Court can ignore orders made without jurisdiction—Order reducing rent and granting instalments made—Executing Court, if can sell property under original decree.

Section 15 of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act has no application to the case, where the rent of the holding is not a money rent but is produce rent. Such a holding comes within s. 16, and proceedings for reduction of rent of such a holding can properly be made under s. 16 of the Act. The Rent Reduction Officer, therefore, has jurisdiction to reduce the rent of such a holding. [p. 100, col. 2.]

If a relationship of landlord and *raiyat* existed between the parties during the period in which the rent accrued, then it matters not whether such relationship is subsisting when application is made under s. 16 (1) of the Act to reduce the arrears due to the ex-landlord. If a landlord transfers his ownership and sues for arrears of rent, he can only obtain a money decree; but that is no reason at all why the tenant should be deprived of a benefit which is conferred upon him by the plain terms of the Act, namely, a right to claim reduction of arrears against the person entitled to receive the rent, namely the ex-landlord. [p. 101, col. 1.]

Section 15 (1) of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, 1938, deals with disposal of applications under s. 16. The Collector must dismiss the application of the tenants unless the latter have complied with the three requirements of the sub-section, namely, (2) (a) (i), (2) (a) (ii) and (2) (a) (iii). If they have not complied with the whole three, they have no right to claim a reduction of rent. [p. 101, cols. 1 & 2.]

Where the judgment debtors are occupancy *raiyyats* paying produce rent they are entitled to make an application to the Rent Reduction Officer under s. 16 of the Act and the Rent Reduction Officer has full jurisdiction to call upon the decree-holder to answer the application and to hear the parties and make such orders as he deems proper in the circumstances. There is a confusion between the existence of jurisdiction and the exercise of jurisdiction. A Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not

taken, the decision, however, wrong cannot be disturbed. 189 Ind. Cas. 739 (1) and 142 Ind. Cas. 113 (2), followed. [p. 101, col. 2; p. 102, col. 1.]

Where there is no inherent want of jurisdiction the revenue authorities have jurisdiction under s. 18 to entertain the application under s. 16. It may well be that they had to decide three facts in favour of the applicants before they could give them relief, and in a sense the existence of these three facts would be necessary to confer jurisdiction; but it is for the Court to consider whether the facts gave it jurisdiction to grant the relief, and the fact that it found the facts wrongly cannot make its decision wholly null and void. Where it had jurisdiction to entertain the matter, it is no answer to say that it had decided wrongly in the exercise of its jurisdiction. [p. 102, col. 1.]

The decision of the Collector cannot be treated as wholly null and void for want of jurisdiction merely because he has decided wrongly that the tenant was entitled to relief. If the order is wholly without jurisdiction, the executing Court, of course, would be at liberty to ignore it. The executing Court, however, cannot ignore an order made with jurisdiction, no matter how erroneous it may be. Where the Revenue Officer acts with jurisdiction his order must be observed by the executing Court. [p. 102, col. 2.]

Where the decree has been reduced and converted into an instalment decree it gives the decree-holder no right whatsoever to proceed with the execution except in a particular manner when default is made in payment of instalments. The effect of reduction of arrears under ss. 16 and 18 is dealt with under s. 19 of the Act. It is clear from s. 19 of the Act that the moment the Rent Reduction Officer has reduced the arrears and granted instalments, execution of the decree as it originally stood cannot proceed. [p. 102, col. 2; p. 103, col. 1.]

The executing Court has no right whatsoever to sell the property once the order is made reducing the arrears and granting instalments. Section 19 (2) of the Act provides for the decree-holder's rights should the judgment-debtor default in performance of the new order. A sale under the original decree in contravention of the plain terms of the Collector's order is a sale wholly without jurisdiction, and must be set aside. [p. 103, col. 1.]

A. from an order of the District Judge, Gaya, dated March 26, 1940.

Mr. Rajkishore Prasad, for the Appellant.

Mr. Lalnarayan Sinha, for the Respondents.

Harries, C. J.—This is a decree-holder's second appeal from an order of the learned District Judge of Gaya in an execution matter.

The facts of the case can be shortly stated as follows:—

In 1936 the decree-holder appellant obtained a decree for arrears of rent for 1340 to 1342 F. against the respondents the amount of the decree being Rs. 309. In the year 1937 the decree-holder, who had been the landlord of the holding in question, parted with his interest in favour of his wife and ceased to be a co-sharer

in the village. In October 1937, the decree-holder proceeded to execute his decree for the arrears of rent as a money decree and attached certain *zamindari* properties of the judgment-debtors and proceeded to put them to sale. On January 13, 1939, the judgment-debtors applied to the Rent Reduction Officer under s. 16 of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, 1938 (Act IX of 1938) for reduction of the arrears of rent due from them to the appellant. The appellant filed objections, but on June 5, 1939, the Rent Reduction Officer disallowed the objections of the appellant and reduced the rent by 5 annas 4 pies in the rupee. It is to be observed that up to this time no application had been made by the respondents for stay of the execution proceedings which were proceeding. It appears that June 21, 1939, was the day fixed for sale; but before this date the judgment-debtor-respondents applied to the Court for a reduction of the decree granted by the Rent Officer and prayed that further execution proceedings should be brought to an end and that the application for execution should be dismissed. By some error the property was put up for sale on June 22, 1939, before the judgment-debtor's application was considered. The property was bought by the decree-holder. On July 3, 1939, the objections of the judgment-debtors were considered by the Court but were disallowed and the sale was in due course confirmed.

The respondents appealed from the order of the learned Munsif in execution to the Court of the District Judge, who by an order dated March 26, 1940, reversed the decision of the learned Munsif and allowed the appeal. The effect of the order of the learned District Judge was to set aside the sale in its entirety. From that order of the learned District Judge the present second appeal has been preferred.

The holding in question was an occupancy holding in respect of which produce rent was payable. It was at first argued by Counsel for the appellant that the Rent Reduction Officer had no jurisdiction whatsoever to reduce the rent in the present case. The Rent Reduction Officer purported to act under s. 16 (1) of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, 1938, and it was pointed out that that section has no application whatsoever to holdings falling within s. 15 of the Act.

Section 15 (a) deals with an occupancy holding of which the rent has been settled or reduced under s. 112 or cl. (a), (b), (d) or (e) of sub-s. (1) of s. 112-A of the Bihar Tenancy Act, 1885, or under certain other enactments; and cl. (b) of that section deals with the case of an occupancy holding in which the rent has not been settled or reduced under the same enactments. The contention was that occupancy holdings were governed by s. 15 of the Act and that s. 16 had no application whatsoever to such holdings. On a careful consideration of the sections, however, it is now conceded that s. 15 of the Act has no application to the present case, because the rent of the holding in question is not a money rent but is produce rent. Such holding is not within s. 15 of the Act but comes within s. 16 and proceedings for reduction of rent of a holding such as the one in the present case can properly be made under s. 16 of the Act. The Rent Reduction Officer, therefore, had jurisdiction to consider the judgment-debtors' application for reduction of rent in the present case.

It was next contended by Counsel for the appellant that the Act had no application whatsoever to the facts of this case, because the relationship of landlord and tenant had ceased to exist when these rent reduction proceedings were commenced. It is true that the decree-holder parted with his interest in 1937. The Rent Reduction Officer seemed to have some doubt as to whether this transfer was a genuine one or not, but there has been no finding that it is a *farzi* transaction and, therefore, it must be accepted that the decree-holder had transferred his interest before the arrears of rent were reduced under the Rent Reduction Act. Section 16 (1) which entitles the Rent Reduction Officer to reduce arrears of rent, is in these terms :

"Notwithstanding anything to the contrary contained in any law, where any arrears of rent are due to a landlord in respect of a holding other than a holding referred to in s. 15 for any period ending before the first day of *Asin* 1345 *Fasli* corresponding to *Asin Badi* 1 of 1994 *Sambat*, the *raiyat* may make an application to the Collector for the reduction of such arrears"

It is argued that on the plain words of the section the arrears of rent must be due to a landlord in respect of a holding and unless a relationship of landlord and *raiyat* is subsisting no application can be made under this section. It is abundantly

clear that during the period for which arrears of rent claimed there was a relationship of landlord and *raiyyat* between the decree-holder and the respondents otherwise no decree for rent could ever have been granted. It must be remembered that one of the main objects of this Act is to grant tenants relief in cases where claims for arrears of rent are made against them. Why should a tenant be deprived of the relief to which he would be otherwise entitled merely on the ground that his landlord subsequent to the accrual of the arrears has transferred his interest to some other person? It appears to me that if a relationship of landlord and *raiyyat* existed between the parties during the period in which the rent accrued, then it matters not whether such relationship is subsisting when application is made under s. 16 (1) of the Act to reduce the arrears due to the ex-landlord. Mr. Rajkishore Prasad also urged that as the ex-landlord who had transferred his interest in the property could no longer proceed against the holding it should be held that the tenant should not be allowed the benefit of a reduction of arrears of rent under this Act. I cannot see the connection between the two. If a landlord transfers his ownership and sues for arrears of rent, he can only obtain a money decree; but that is no reason at all why the tenant should be deprived of a benefit which is conferred upon him by the plain terms of the Act, namely a right to claim reduction of arrears against the person entitled to receive the rent, namely the ex-landlord. In my view the tenant was entitled to maintain proceedings for reduction of rent and the Rent Reduction Officer had full jurisdiction to consider the claim.

Section 18 (1) of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, 1938, deals with disposal of applications under s. 16. On receipt of an application by the *raiyyat*; the Collector shall fix a date for the hearing of the application, and he must give notice of the application and of the date fixed for hearing to the landlord. If the landlord appears, the Collector must hear the parties, and if he is satisfied that

(i) the *raiyyat* has not paid or tendered to the landlord before the expiry of three months from the date on which this section comes into force at least ten per centum of the arrears mentioned in the application, or

(ii) the *raiyyat* has not paid or tendered to the landlord or deposited with the Collector along with his application any of the instalments of rent for the

holding which have fallen due in the agricultural year in which the application is made, or

(iii) during the period of five years immediately preceding the date on which the application by the *raiyyat* is made under sub-s. (1) of s. 16, the *raiyyat* has never paid the rent of the holding except after the institution of a suit by the landlord for the realisation of the arrear of such rent, the Collector shall dismiss the application."

In the present case it appears that the instalments of rent for the agricultural year in which the application was made were paid, but it is clear that no deposit of ten per cent. of the arrears or indeed of any sum has been made.

It was urged by Mr. Rajkishore Prasad on behalf of the appellant that as the three necessary conditions laid down in s. 18 of the Act had not been complied with the Collector was bound to dismiss the judgment-debtors' application. On the other hand, it was contended that this section gives three alternatives, and if the judgment-debtors have complied with one of the alternatives the Collector must consider their application upon the merits and reduce the rent. In my judgment upon a true construction of s. 18 (2) (a) of the Act the Collector must dismiss the application of the tenants unless the latter have complied with the three requirements of that sub-section, namely (2) (a) (i), (2) (a) (ii) and (2) (a) (iii). If they have not complied with the whole three, they have no right to claim a reduction of rent.

It was further argued that if such be the true construction of the section, then the Rent Reduction Officer in the present case has no jurisdiction whatsoever to make the order which he did, reducing the rent. It may well be that the Rent Reduction Officer was wrong in making the order which he did, but that is very different from saying that he acted without jurisdiction. It is quite clear that in the present case the judgment-debtors being occupancy *raiyyats* paying produce rent were entitled to make an application to the Rent Reduction Officer under s. 16 of the Act. The Rent Reduction Officer had full jurisdiction to call upon the appellant decree-holder to answer the application and to hear the parties and make such orders as he deemed proper in the circumstances. In my view there can be no question that this application is one which the Revenue Officer had full jurisdiction to entertain. This is not a case of inherent want of jurisdiction. As pointed out in the case of *Central Co-operative Bank Ltd., Barh v. Dasrath Pandey* (1);

(1) 21 P L T 246; 189 Ind. Cas. 739; A I R 1940 Pat. 406; 13 R P 128; 6 B R 849.

there is a confusion between the existence of jurisdiction and the exercise of jurisdiction. A Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken, the decision however wrong cannot be disturbed. This latter case of this Court followed an earlier case, *Girwar Narayan Mahton v. Kamla Prasad* (2), in which it was held that a judgment of a Court having pecuniary and territorial jurisdiction over the subject-matter and the parties to the suit, however erroneous cannot be a nullity but is merely voidable. The question whether a previous suit is or is not barred under s. 109 of the Ben. Ten. Act is one within the competency of the Court which decides that suit, and its bar does not constitute inherent want of jurisdiction. The question of jurisdiction in such a case is to be decided by the Court itself which otherwise has jurisdiction to try the suit. And the question of s. 109 of the Act being a bar, ought to be raised before the decree in the previous suit is passed. At p. 743* the learned Judges observed :

"Thus if the question of jurisdiction is to be decided by the Court itself with reference to the existence or otherwise of a particular fact in bar of trial, there is no want of inherent jurisdiction, and the judgment pronounced may be erroneous but not void and cannot be collaterally impeached. The question of jurisdiction in such a case is, like other questions of fact of law to be decided by the Court itself which otherwise has jurisdiction to try the suit."

"In my judgment the Revenue Authorities had jurisdiction in this case to entertain the application. It may well be that they had to decide three facts in favour of the applicants before they could give them relief, and in a sense the existence of these three facts would be necessary to confer jurisdiction; but it was for the Court to consider whether the facts gave it jurisdiction to grant the relief, and the fact that it found the facts wrongly cannot make its decision wholly null and void. It had jurisdiction to entertain the matter, and it is no answer to say that it had decided wrongly in the exercise of its jurisdiction. It is pointed out that s. 22 of the Act makes orders of the Collector final in the sense that they cannot be varied or set aside by a Civil Court. Under various

rules, however, a person aggrieved by an order of the Collector is not without remedy but may apply by way of revision to the Commissioner and the Board of Revenue. Be that as it may, the decision of the Collector cannot be treated as wholly null and void for want of jurisdiction merely because he has decided wrongly that the tenant was entitled to relief. In my judgment the order of the Collector reducing the rent cannot be ignored, and effect would have to be given to it in the execution proceedings. Had the order been wholly without jurisdiction, the executing Court, of course, would have been at liberty to ignore it. The executing Court, however, cannot ignore an order made with jurisdiction, no matter how erroneous it may be.

The Revenue Officer not only reduced the rent but ordered the payment of the arrears by three instalments, and it is clear that the respondents have strictly complied with his order and paid the first subsequent instalments due into the Court of the Collector as they became due. In short the effect of the finding of the Rent Reduction Officer was to reduce the decretal amount and to convert it into an instalment decree, and this the Rent Reduction Officer is fully empowered to do. There can be no doubt that where he acts with jurisdiction his order must be observed by the executing Court but in the present case the executing Court proceeded to sell for the full decretal amount as if it was immediately payable. As I have stated, the decree had been reduced and converted into an instalment decree which gave the decree-holder no right whatsoever to proceed with the execution except in a particular manner when default was made in payment of instalments. The effect of reduction of arrears under ss. 16 and 18 is dealt with under s. 19 of the Act which provides that where proceedings in execution have already been stayed no further steps can be taken by any Court. It also provides that the amount of arrears as reduced are to be deposited by the *raiyat* within a period of eighteen months with the Collector and such deposit must be made either in a lump sum or in such instalments as fixed by the Collector and sub-s. (2) of s. 19 provides for the decree-holder's remedy in the event of the judgment-debtor failing to carry out the provisions of the Collector's order. It is clear from s. 19 of the Act that the moment the Rent Reduction Officer has reduced the arrears and granted

(2) 13 P. L. T. 737; 142 Ind. Cas. 113; A. I. R. 1933 Pat. 104; 12 Pat. 117; Ind. R. L. (1933) Pat. 109.

* Page of 13 P. L. T.—[Ed.]

instalments execution of the decree as it originally stood cannot proceed.

Mr. Rajkishore Prasad has argued that execution proceedings could only be stayed or stopped if they had already been stayed under s. 17 of the Act. Section 17 allows a Court to stay proceeding pending proceedings for reduction of rent in the Court of the Rent Reduction Officer. Unless such a stay has been obtained, it is contended that the executing Court could proceed to sell the property in spite of an order reducing the rent and granting instalments. In my view whether a previous application had or had not been made to stay proceedings pending the result of rent reduction proceedings, further execution proceedings cannot proceed once the Rent Reduction Officer has made an order reducing rent and granting instalments. In any event, I am satisfied that before the sale an application was made to the executing Court to stay proceedings on the original decree and to reduce the decretal amount in accordance with the orders of the Rent Reduction Officer. In the present case the executing Court had no right whatsoever to sell the property once the order was made reducing the arrears and granting instalments. Section 19 (2) of the Act provides for the decree-holder's rights should the judgment-debtor default in performance of the new order. A sale under the original decree in contravention of the plain terms of the Collector's order is, in my view, a sale wholly without jurisdiction, and that being so, must be set aside.

For the reasons which I have given, I am satisfied that the lower Appellate Court was right in setting aside the sale, and I would therefore, dismiss this appeal with costs.

Varma, J.—I agree.

S. Appeal dismissed.

CALCUTTA HIGH COURT

Suit No. 1653 of 1935

February 28, 1940

McNAIR, J.

JITENDRA MULLICK AND ANOTHER

—PETITIONERS

versus

Haji Hafiz ALLA BUX—OPPOSITE PARTY
Civil Procedure Code (Act V of 1908), ss. 55 (4),
145.—No attempt by decree-holder to execute decree
for three and half years.—Security given by judg-
ment-debtor held should not be forfeited.

In execution of a decree the judgment-debtor was arrested but was released on his furnishing security that he would apply within one month to be declared as insolvent. He failed to apply within one month but the decree-holder made no attempt to execute the decree for over three and half years;

Held that the obvious inference was that the decree-holder realized that the judgment-debtor had substantially, if not technically, complied with the order of the Court, and that the purpose for which the security was given was substantially fulfilled. It would be wholly inequitable at such late stage to order that the security should be forfeited.

Mr. A. C. Mitra, for the Petitioners.

Mr. M. N. Banerji, for the Opposite Party.

Judgment.—The petitioner has obtained a succession certificate entitling him to recover the debt due to Mahammad Safi, deceased, who was surety in this Court in a sum of Rs. 500 for a judgment-debtor, Haji Hafiz Alla Bux. Both the surety and the judgment-debtor have since died. On December 6, 1935, a decree was passed against the judgment-debtor. On July 2, 1936, the judgment-debtor was arrested in execution of the decree and brought before the Court. The judgment-debtor informed the Court that he would apply to be adjudicated insolvent and Mahammad Safi was accepted as his surety for the sum of Rs. 500. On July 22, 1936, the judgment-debtor stated to the Court that Mahammad Safi who was present in Court would stand surety for him for Rs. 500 and it was ordered:

"That the hearing of this matter do stand over till Friday, July 24, 1936, the defendant undertaking to attend Court on that date, and it is further ordered that the Registrar of this Court be at liberty to accept the security in the sum of Rs. 500 for filing by the defendant of his petition in insolvency within one month from the date of furnishing of such security and for his appearance in Court when called upon to do so."

Mahammad Safi deposited Rs. 500 with the Registrar on July 22, and the judgment-debtor filed his petition in insolvency on August 25, and an adjudication order was made. Later, both the judgment-debtor and the surety died. The decree-holder never suggested that the judgment-debtor had not complied with the order, and he has never to this day applied for forfeiture of the surety deposit, but now that the surety has died, and an application is made by the person who is apparently entitled thereto for payment of the Rs. 500 deposit, the decree-holder objects and claims that sum. He argues that the Court ordered, in any event on July 22, if not earlier, that the judgment-debtor should file his petition in insolvency within one month and that order was not complied with since the judgment-debtor filed his petition on August

25. It is admitted that the judgment-debtor was given time until July 24, to deposit the sum of Rs. 500 but it is contended that inasmuch as the judgment-debtor failed to file his petition by August 22, the security was forfeited. The relevant sections of the Civil P. O. are ss. 35 (4) and 145. Section 55 (4) provides :

"Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court may release him from arrest, and if he fails so to apply and to appear, the Court may either direct the security to be realized or commit him to civil prison in execution of the decree."

For the applicant it is contended that the words "the Court may either direct the security to be realized or commit to civil prison in execution of the decree" give the Court a discretion as to whether or not it will order the security to be realized. Assuming that there is such a discretion I have no doubt that the Court would not, in the circumstances disclosed, have ordered the security to be realized. From the affidavit of Shaik Mahammad Ameen it appears that the judgment-debtor deposited Rs. 50 for his costs with the Official Assignee on August 14, and his books of account on August 17, and signed the petition in insolvency on August 20, and the failure to present the petition was due to "inadvertance" on the part of his attorney. Section 145 provides of far as is material :

"Where any person has become liable as surety for the fulfilment of any condition imposed on any person ... the decree or order may be executed against him to the extent to which he has rendered himself personally liable. ..."

This section provides a summary method of executing against the surety, but the decree-holder, if he now sought to execute his decree against the surety, would have to apply to the Court for leave to execute, and I cannot conceive that any Court would grant such leave in the circumstances. No attempt has been made to execute for over three and half years and the obvious inference is that the decree-holder realized that the judgment-debtor had substantially, if not technically, complied with the order of the Court, and that the purpose for which the security was given was substantially fulfilled. It would, in my opinion, be wholly inequitable at this late state to order that the security should be forfeited. There will be an order for payment in terms of the summons subject to the deduction by the Registrar of his charges or commission

if any. Each party must bear his own costs of the application. Certified for Counsel.

D.

Order accordingly.

PATNA HIGH COURT

Civil Revision No. 667 of 1940

January 28, 1941

AGARWALA, J.

GOPAL PRASAD—JUDGMENT-DEBTOR—
PETITIONER

versus

RAMPRASAD GUPTA AND OTHERS—

DECREE-HOLDERS—OPPOSITE PARTY

Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939), s. 11—Decree on promissory note passed before commencement of Act—Application under s. 11 for instalments—If can be allowed.

A obtained a decree against B on the basis of a promissory note before the enactment of Bihar Money-lenders Act, 1939. In execution of this decree B applied under s. 11 of the Money-lenders Act of 1939, to pay the decretal amount by instalments. The Court rejected the application on the ground that the provisions of the Act regarding instalments did not apply to a suit on a promissory note :

Held, that the liability under the promissory note had merged into the decretal debt before the commencement of the Act. It had ceased to be a debt evidenced by or based on the promissory note, and had become a judgment-debt. The Court, therefore, ought to consider whether the case was one in which it should exercise its powers under s. 11 of the Act. 192 Ind. Cas. 225 (2) relied on. 190 Ind. Cas. 704 (1), distinguished.

O. R. from an order of the Subordinate Judge, First Court of Arrah, dated November 7, 1940.

Mr. S. N. Dutt for Mr. J. N. Sahai, for the Petitioner.

Mr. S. N. Bose, for the Opposite Party.

Order.—The opposite party obtained a decree against the petitioner on the basis of a promissory note. In the execution proceedings which followed the decree the petitioner applied under s. 11 of the Money-lenders Act of 1939 to pay the decretal amount by instalments. The Court below rejected that application on the ground that the provisions of the Act regarding instalments do not apply to a suit on a promissory note. The learned Subordinate Judge purported to follow the decision of this Court in *Sagarmal Marwari v. Bhuthu Ram* (1). That, however, was a case under s. 8 of the Act, but the section

(1) 21 P. L. T. 739; 190 Ind. Cas. 704; 1940 P. W. N. 719; 7 B. R. 28; A. I. R. 1941 Pat. 99; 13 R. P. 239; 19 Pat. 974.

of the Act applicable to instalments is s. 11. It is to be observed that the decree in this case had been passed before the enactment of the Money-lenders Act, 1939, with the result that the liability under the promissory note had merged into the decretal debt. In considering the Mad. Agri. Relief Act (IV of 1938) in *Subrahmanyam Chettiar v. Muthuswami Goundan* (2), at p. 166 the learned Chief Justice of India observed in similar circumstances as follows:—

"But these questions do not in my opinion arise in the present case, because the liability on which the Act operated was a liability under a decree of the Court passed before the commencement of the Act. It has ceased to be a debt evidenced by or based on the promissory note, for that had merged in the decree and had become a judgment-debt; nor could the appellant any longer have sued upon the note.....and it was upon that liability and upon no other that the Act operated, even though it might be necessary to go into its earlier history for a particular and special purpose. In the present case the judgment-debt was already in existence when the Act was passed, and it is not necessary to consider whether any different principle would be applicable in the case of decrees made after its enactment. It is sufficient to say that here the Act has neither affected nor purported to affect any liability on a promissory note."

These observations are applicable to the facts of the present case, which must, therefore, go back to the learned Subordinate Judge to consider whether this is a case in which he should exercise his powers under s. 11 of the Act.

There will be no order as to costs.

S.

Case sent back.

(2) 3 F L J 157 (166); 192 Ind. Cas. 225; A I R 1941 F O 47; 53 L W 109; 13 R F O 47; 1941 O L R 157; 7 B R 523; 22 P L T 155; 1941 M W N 100; 45 C W N F O 1.

MADRAS HIGH COURT

Second Appeal No. 809 of 1936

January 12, 1940

HORWILL, J.

BAVA C. GOPALASWAMI

MUDALIAR—APPELLANT

versus

ANNADANA KATTALAI OF SRI
TYAGARAJASWAMI TEMPLE, TIRU-
VARUR BY TRUSTEE VAITHILINGA
PANDARASANNADHI AND ANOTHER—

RESPONDENTS

Contract Act (IX of 1872), s. 65—Applicability—Trust—Trustee of temple prohibited by scheme from borrowing money—He commits breach of

trust—Creditor advancing money with knowledge of prohibition, if can recover money—Trustee acting contrary to trust—Principle that creditor advancing money to trust for trust purposes cannot be defeated by contention that duties could have been performed on less elaborate scale, does not apply.

Section 65, Contract Act, does not apply to contracts into which persons deliberately enter, knowing that the contract cannot have any validity and is in express contravention of the rules and restrictions imposed on them. [p. 108, col. 1.]

Where a trustee of a temple who is prohibited under the scheme of the temple for borrowing money, borrows money in spite of such prohibition, he commits a breach of trust and the creditor advancing money with the knowledge of such breach of trust cannot be heard to say that he was enabling the trustee to perform his duty to the trust and is not therefore entitled to be compensated for what he has supplied. *Ex parte Chippendale* (1) and *In re Electric Telegraph Co. of Ireland* (2), distinguished. [p. 107, col. 1.]

The principle that where it appears to a creditor advancing money to a trust that the money is being used for the trust and not for the trustee's private purposes and where the money is definitely applied, the creditor cannot be defeated by a contention that the duties could have been performed on a less elaborate scale, is true only where a trustee acts in the discharge of his duties as trustee. The principle cannot be applied where a trustee is acting contrary to the trust or to the rules imposed on him by a scheme. [p. 107, col. 2.]

S. A. against the decree of the Sub-Judge Tiruvarur, is A. S. No. 18 of 1935.

Messrs. K. Rajah Aiyar and R. Sundaralingam, for the Appellant.

Messrs. B. S. Ramachandra Rao and K. Kameswara Rao, for the Respondents.

Judgment.—The appellant brought a suit on two promissory notes for amounts advanced to the Annadhana Kattalai for the necessary performance of the duties imposed on the trust. Defendant No. 1 was the trustee of the kattalai and defendant No. 2 was the Receiver of the Kattalai property, who has since been replaced by the executive officer of the temple. It appears from the plaint that the money was not advanced direct to the Kattalai. The plaintiff, who had received a power-of-attorney from the trustee, was managing the Kattalai on defendant No. 1's behalf, receiving income from the property, and making purchases; and the sum claimed is that admitted by defendant No. 1 to be due to the plaintiff on account of provisions and other necessities supplied to the Kattalai in excess of the income. The defendants contended that some of the alleged items of expenditure were not true; but it was found that the plaintiff had properly accounted for the money mentioned in the promissory notes and that it was properly expended on the temple. Defen-

dant No. 2 raised another plea and that was that defendant No. 1 had no power to borrow money, that the plaintiff knew of it, and that he was not therefore entitled to recover any of the money, even though it might have been true that he advanced it. The District Munsif of Tiruvarur found both points against defendant No. 2. In appeal, the Subordinate Judge of Tiruvarur agreed with the District Munsif that the plaintiff had properly accounted for all the money advanced; but he held that the scheme which had been framed for the temple by the High Court absolutely prohibited such an advance being made. He therefore found himself constrained to allow the appeal and dismissed the suit.

The attention of the Courts below seems to have been focussed on s. 23 of the scheme, which is to this effect: "All borrowing from and all lending on interest to the funds of the trust is absolutely prohibited." The rest of the section deals with the punishments to be inflicted in case of a disobedience of this injunction. It has to be noticed that the word "borrowing" is followed by "from" which shows that the prohibition is against borrowing from the funds of the trust. That was not done here; but the section also prohibits lending on interest to the funds of the trust. If the plaintiff, as the terms of his promissory note suggest, had lent money on interest to the trust—even though it was for necessary purposes—I think such a loan would have fallen within the scope of the prohibition under s. 23. But I do not think that s. 23 as it stands meant to work a prohibition of the supplying of articles for the carrying on of the services of the Kattalai. Nevertheless from a reading of the scheme as a whole, there can be no doubt that the purpose of the scheme is that the trustees should not be left in possession of any money at all. As soon as they collect money, they have to deposit it with the treasurer of the temple, they have to submit a budget to the Board of Control three months before the beginning of each year, and they can only spend money in accordance with the budget as accepted. They are then allowed to draw on the amount standing to their credit in the accounts kept by the treasurer for each Kattalai and they may not exceed the budget allotment. There can also be no doubt, on a general reading of the scheme, that it was directly against the principle of the scheme that the trustees of the Kattalai should try to circumvent certain sections of the scheme by taking supplies from a per-

son and contracting some liability on behalf of the trust. That this disobedience of the scheme was not accidental has been proved by the defendant; and the lower Appellate Court has found very clearly that defendant No. 1 deliberately ignored the scheme. He says in para. 13 of his judgment:

"It would appear that notwithstanding the scheme, defendant No. 1 as trustee of Annadana Kattalai, was never in the habit of submitting his budget to the treasurer. He himself continued to manage the properties of the Annadana Kattalai as though his powers had not been in any way curtailed or restricted. In consequence of the defiant attitude of defendant No. 1 it became necessary for the Board of Control to apply for the appointment of a Receiver for the purpose of collecting the income of the properties of the Annadana Kattalai and remitting the same to the treasurer."

The plaintiff was also aware of the prohibition and he knew that defendant No. 1 was disobeying the terms of the scheme. He had attended the meetings of the Board of Control and he knew that the temple and the Kattalais were being managed under s. 3 of the scheme. Although a trustee may not have power to incur debts, yet if a person supplies articles which are necessary for carrying on the services under the trust then he is entitled to be reimbursed. Two English cases have been quoted. In *Ex parte Chippendale* (1) the directors of a coal-mining company had no powers of raising money except by certain restricted means. They however during the course of the management of some mines in Germany found that they had no money to pay the wages of the miners. If the wages had not been paid the mines, under the law of the country, would have been closed down and the property of the company would have been lost. It was held that as they had acted beyond their powers as directors and agents in borrowing money, the creditors who had advanced money in order that the miners might be paid, would not be able to have recourse against the company under the Companies Act. Nevertheless, the directors were not merely agents but were trustees of the property of which they were in management; and as trustees they were bound to take all reasonable steps to prevent the property of the company from being wasted. They were therefore not only permitted but bound to borrow money to pay the miners' wages and thus save the property of the company which would otherwise have been lost. In *Troup's case*

(1) (1854) 4 De G M & G 19; 2 W R 547; 28 L T (O S) 200; 102 R R 7; 43 E R 415.

In re Electric Telegraph Co., of Ireland (2) a somewhat similar case, where directors had no borrowing powers, it was laid down that,

"where the directors of a company have no power to borrow money, the repayment of money borrowed cannot be enforced by the lender against the company. Yet if the money has been *bona fide* applied to the purposes of the company, the *bona fide* lender is entitled to payment as against the company."

The learned Advocate for the appellant has also referred to the principle laid down in the leading case *Lawford v. Billericay Rural District Council* (3) that where a corporation asked a contractor to perform certain works which were necessary for the carrying out of the duties of the corporation the corporation could not afterwards refuse to pay the contractor for the work he had done; merely because the contract had not been sealed as required by law and so was void. The principle of *quantum meruit* was applied and it was held that the corporation were not entitled to rely on this fact. It was found that there was an implied contract to reimburse the contractor for any work done by him which was necessary to be done and was required by the corporation to be done. Clearly, *Ex parte Chippendale* (1) and *In re Electric Telegraph Co., of Ireland* (2) would not apply to a case where a trustee, far from acting in the interest of the trust and for the trust, acted expressly against the rules which had been laid down for his conduct. In borrowing this money, the trustee committed a breach of trust and the plaintiff knew it. The plaintiff cannot therefore be heard to say that he was enabling the trustee to perform his duty to the trust and was therefore entitled to be compensated for what he has supplied.

With regard to the application of the principle of *quantum meruit* it may of course be true that if there was no money left to the credit of this particular Kattalai and certain services were absolutely necessary, then the plaintiff would be entitled to receive compensation for such money spent as was absolutely necessary. But we do not know what expenditure would have been absolutely necessary in such extreme cases. The plaintiff did not plead this, and the attention of the Courts below and of the parties was not directed to this aspect of the question; and so we have no material

on which to come to a decision as to what expenditure by the trustee, if any, was absolutely necessary. The learned District Munsif, whose judgment is generally followed by that of the Subordinate Judge, says in para. 7 of his judgment:—

"So then there is clear proof in this case that as a matter of fact the plaintiff advanced several sums of money as found in the accounts, Exs. A and B, for the supply of articles absolutely necessary for the purpose of the trust in connexion with the daily *pūja abhishekam, naivedyam*, etc."

He draws this conclusion from certain findings of his in para. 6 of his judgment which he gives in the words used by the clerk of the Receiver:

"Until the Receiver took charge from plaintiff all the *kalapūjas* were being done properly, all the functions of the *annadhana* and *abhisheka* Katalais having been regularly and properly done."

I cannot see how it follows from this that the supply of the articles by the plaintiff was absolutely necessary for the purpose of the trust. A distinction must be drawn between what is necessary for a full and proper conduct of the services that is what is desirable, and what is absolutely necessary when there are no funds available to meet the full expenses or where the rules prohibit the spending of money unauthorizedly. All these various duties could have been performed on a less elaborate scale; and if defendant No. 1 had done his duty and had applied to the treasurer for money and the matter had been referred to the Board of Control, the Board would probably have supplied a smaller amount of money which would have permitted the carrying out of these services on a smaller scale. The learned Advocate for the appellant has sought to get over this difficulty by quoting the Privy Council decision, *Vibhudapriya Thirtha Swamiar v. Lakshmindra Thirtha Swamiar* (4) which is to the effect that where it appears to a creditor advancing money to a trust that the money is being used for the trust and not for the trustee's private purposes and where the money is definitely applied, the creditor cannot be defeated by a contention that the duties could have been performed on a less elaborate scale. That is true only where a trustee acts in the discharge of his duties as trustee. That principle could not be applied where a trustee is acting contrary to the trust or to the rules imposed on him by a scheme. In such a case both the trustee

(2) (1860) 29 Beav 353; 54 E R 664; 7 Jur. (Ns) 901; 9 W R 878; 131 R R 612.

(3) (1903) 1 K B 772; 72 L J K B 554; 88 L T 317; 51 W R 630; 67 J P 245; 1 L G R 535; 19 T L R 322.

(4) 54 I A 228; 101 Ind. Cas. 545; A I R 1927 P C 131; 50 M 497; 29 Bom. L R 955; 45 C L J 613; (1927) M W N 507; 53 M L J 196; 25 A L J 627; 31 C W N 1021; 39 M L T 45 (P C).

and the creditor know that the money ought not to be spent.

It has been pointed out that this contract has to be viewed in the light of the express words used in s. 65, Contract Act, and not by the principles laid down in certain English cases which are less liberal. But the language used in s. 65 shows that it does not apply to contracts into which persons deliberately enter, knowing that the contract cannot have any validity and is in express contravention of the rules and restrictions imposed on them. Moreover it is difficult to see how in this case there ever was a contract—void or otherwise—with the trust. The so-called contract was nothing more than a dishonest device of the plaintiff and defendant No. 1 to defeat the scheme. In making this promise to pay, defendant No. 1 cannot be said to have been acting for the trust; and the plaintiff knew it. It follows from what has been said above that the plaintiff is not entitled to recover from the trust the amount claimed by him on the suit pro-notes. There is no equitable principle that can be invoked by him which will enable the Court to grant a decree. If he had raised a plea of *quantum meruit* and suitable evidence had been let in, it is just possible that he might have succeeded in obtaining a decree for some part of the sum he advanced; but it is not necessary for me to express any opinion on this point. It is contended that a decree should be given against defendant No. 1; but defendant No. 1 did not execute the pro-note in his personal capacity but only as trustee of the institution. A petition has been put in to amend the plaint so that the plaintiff may be given some relief against defendant No. 1, but even if the amendment were made, the plaintiff could not, for reasons given, be given a decree against defendant No. 1. The appeal is dismissed with costs of respondent No. 2.

N.-S.

Appeal dismissed.

PATNA HIGH COURT

Criminal Revision Application No. 753 of 1940

December 18, 1940

DHARLE, J.

BRIJBEHARI—PETITIONER

versus

EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), ss. 21, Expl. 2, 167—"Public servant"—Person in actual possession of situation—Absence of formal appointment—If public servant—Word "charged", construction—

Appointment of Head-Clerk to prepare electoral rolls under r. 13 (1), Bihar Municipal Election Rules, 1937, of Municipality of five wards—Subsequent Government Notification dividing Municipality into sixteen wards—Appointment of Head Clerk neither revoked nor fresh formal appointment made—He continuing to work—Head Clerk held public servant charged with preparation of electoral rolls—Preparation and framing of electoral rolls, difference—Signing and delivery of rolls is essential to framing required by s. 167—Electoral rolls prepared by Head Clerk charged with such duty—Signing and delivery by his locum tenens—Head Clerk, if liable under s. 167—Bihar Municipal Election Rules 1937, r. 13 (1)—Scope—Chairman, if must make formal appointment in writing.

The Chairman of a Municipality, acting under r. 13 (1) of the Bihar Municipal Election Rules, 1937, appointed a Head Clerk of the Municipality, to prepare the electoral rolls of all persons entitled to be registered as voters in each of the five wards into which the Municipality was divided at that time. Subsequently by a Govt. Notification the Municipality was divided into sixteen single-seated wards instead of the former five plural-seated wards:

Held, that as the appointment of the Head Clerk was not revoked subsequent to the Govt. Notification and he continued to work as such he was public servant within the meaning of s. 167 read with s. 21, Expl. 2, I. P. O. The absence of his formal appointment subsequent to Notification was immaterial as the Head-clerk was indubitably "in actual possession of the situation of a public servant". [p. 110, col. 2.]

Held, further that the word "charged" in s. 167 is not to be very narrowly construed. It was no part of the ordinary duty of Head Clerk to prepare any electoral roll but as he was expressly appointed to prepare the electoral rolls under the Election Rules he was a public servant charged with the preparation of electoral rolls. *Queen-Empress v. Deodhar Singh* (1), referred to. [p. 111, col. 1.]

Under s. 167, I. P. O., there is no difference between the preparation and the framing of an electoral roll. The signature and the delivery of the electoral rolls under r. 13 (1), Bihar Municipal Election Rules are operations subsequent to the preparation under sub-r. (1); and serve to indicate that the preparation was complete, but cannot be said to be essential to the framing required by s. 167, I. P. O., for it is not always impossible to show in other ways that the process of preparing was complete. *Megraj v. Empress* (2), referred to. [p. 111, cols. 1 & 2.]

A Head-clerk of a Municipality appointed under r. 13 (1) of the Bihar Municipal Election Rules, 1937, to prepare the electoral rolls, prepared them but went away on leave before signing or delivering them and they were therefore, signed and delivered by his *locum tenens*:

Held, that for s. 167, I. P. O., to apply the preparing and framing must be complete and final so far as the author is concerned, and it was difficult to exclude anything that it would have been permissible for the Head Clerk to do to the rolls until the time came for his signing them and delivering them. He could not therefore be convicted under s. 167. [p. 112, col. 2.]

Rule 13 (1) of the Bihar Municipal Election Rules, 1937, does not require the Chairman to make the appointment in writing. The rule is not intended to deal with the manner of appointment at all, and

only lays down which authority is to appoint a person to prepare the rolls. [p. 110, cols 1 & 2.]

Or. R. App. against an order of the Magistrate, 1st Class, Dinapore, dated July 3, 1940.

Messrs. Ramanugrah Prasad and L. B. Lal, for the Petitioner.

The Assistant Govt. Advocate, for the Crown.

Order.—This is an application in revision against the conviction of the petitioner under s. 167 of the I. P. O. A general election of the Dinapore Nizamat Municipality was fixed for January 10, 1938, and the Chairman of the Municipality, acting under r. 13 (1) of the Bihar Municipal Election Rules, 1937, appointed the Head Clerk of the Municipality,—a post held by the petitioner—with the tax-collectors of the Municipality as his assistants, to prepare the electoral rolls of all persons entitled to be registered as voters in each of the five wards into which the Municipality was divided at that time. In September, 1937, Govt. intimated that they were contemplating the division of the Municipality into single-seated wards and asked that the election proceedings be postponed. In October came a Govt. Notification dividing the Municipality into sixteen wards instead of the former five plural-seated wards. The general election in accordance with this new division was fixed for May 11, 1938. Under r. 13 (3) the electoral rolls were to be signed and delivered to the Chairman not less than 120 days before the date fixed for the general election; and on January 11, 1938, electoral rolls were so handed over to the Chairman, including Exs. 20 and 20/1, the rolls for Wards IV and V, which were admittedly written by the petitioner. The prosecution case was that in each of these rolls there were incorrect entries made by the petitioner

"intending thereby and knowing it to be likely that you may thereby cause injury to the persons affected, particularly the Congress candidates seeking election as Commissioners", and that he thereby committed an offence punishable under s. 167, I. P. O. There was another charge under ss. 471/465, I. P. O., but we are not concerned with it now, though it is curious that Magistrate thought that there was a separate charge under each of these two sections. To the charge under s. 167, from which I have been quoting, were appended by way of particulars five items in connection with Ward No. IV (Ex. 20) and five in connection with Ward No. V (Ex. 20/1). The

Magistrate found that out of these ten entries specifically charged as incorrect, three were proved to be incorrect to the knowledge of the petitioner—two relating to his brother who is shown in Ward No. IV as Paras Nath and in Ward No. V as Dr. Paras Nath Gargaya, and one to his brother-in-law Sheonarayan Lal in Ward No. V. The learned Magistrate was not prepared to infer that the accused intended by such entries to harm the Congress party but he held that "his acts did result in, injuries to persons"—he named two such—"whose right of voting or chance of election was affected." The learned Sessions Judge also held that these entries had been definitely proved to be incorrect; but according to him "the obvious intention" was "injuring the chance of election of the candidates set up by the rival party." The charge spoke both of the intent and of the knowledge of the petitioner; either of these elements would be sufficient for a conviction, and while the Magistrate, apparently found the knowledge, the Sessions Judge found the intent, though towards the end of his judgment he speaks of the petitioner intending to cause or knowing it to be likely that he might cause injury by the incorrect entries. The Magistrate imposed a fine of Rs. 500 for the offence, but the Sessions Judge, reduced the sentence to Rs. 100 on the ground that the petitioner was

"evidently a tool in the hands of the then Chairman of the Municipality, who was apparently anxious to consolidate his own party and strengthen the chances of election of the members of his party."

It has been contended on behalf of the petitioner and the contention was advanced in the lower Courts as well—that s. 167 has no application to him because he was not a public servant as required by the section, nor was he, even if taken to be a public servant, "charged as such with the preparation of the electoral rolls" within the meaning of the section. The case for the prosecution was that he was a public servant within the eleventh clause of s. 21 of the I. P. O. read with Expl. 2. The former includes within the definition of public servant "every person who holds any office in virtue of which he is empowered to prepare... an electoral roll..." The Head Clerk of the Municipality had no authority, merely as Head Clerk, to prepare the electoral rolls, but the Chairman of the Municipality had appointed him to do so in exercise of the power given by r. 13 (1) of the Municipal Election Rules. This was, however, before Govt. divided the

Municipality into the sixteen wards for which the general election was to be held on May 11, 1938. There was no fresh appointment of the petitioner by the Chairman under r. 13 (1) after the Govt. Notification of October, 1937, and it has, therefore, been urged that the petitioner was not a public servant nor charged as such with the preparation of the rolls, that were delivered to the Chairman on January 11, 1938. There is, however, no dispute that these electoral rolls included two rolls Exs. 20 and 20/1, written by the petitioner himself. It is also clear that the petitioner wrote these rolls (even though he was not expressly appointed by the Chairman after the Notification of October to do so) for the reason that his earlier appointment under the rule was taken to extend to the deferred election, and taken not by the petitioner alone, but by the Chairman as well. As the petitioner himself said in a statement made in October, 1938, to Pandey R. Sahay, one of the Magistrates who inquired into the matter, the appointment made by the Chairman in June or July (to prepare electoral rolls) was never revoked. Explanation 2 to s. 21, I. P. O. provides that wherever the word 'public servant' occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation. The learned Advocate for the petitioner has contended that though this explanation may be available in cases where appointments suffer from informality, it cannot have any application to a case where there was a total absence of authority. The explanation, however, speaks of "whatever legal defect there may be", and r. 13 (1) of the Municipal Election Rules does not require the Chairman to make the appointment in writing. In the present case there was an express appointment of the petitioner made in writing by the Chairman in June or July, at a time when the Municipality was only divided into five wards. After the division of the Municipality into sixteen wards it became necessary to prepare the electoral rolls of persons entitled to be registered as voters in each of these new wards, but the Chairman made no new appointment for this work. The petitioner, however, acted as if he had been appointed to do this work, and the electoral rolls, two of which were entirely written by him, were accepted by the Chairman when delivered to him on January 11, by a *locum tenens*

during the absence of the petitioner on short leave. Rule 13(1) of the Election Rules does not seem to be intended to deal with the manner of appointment at all, and only lays down which authority is to appoint a person to prepare the rolls. The learned Sessions Judge took the rule to require an express appointment, but, I find it difficult to read this into the rule, and the learned Judge himself saw much force in the prosecution contention that

"the very moment the appellant undertook the preparation of the electoral rolls, either under a verbal order of the Chairman or purporting to act under the powers given to him by the earlier order of appointment, he became a public servant within the meaning of the eleventh clause of s. 21 read with Expl. 2."

The learned Advocate for the petitioner has contended that there is no evidence that the petitioner was appointed by any verbal order of the Chairman. That may be, but there is nothing to prevent such an order being fairly inferred from the facts that the petitioner had been expressly appointed in June or July and appointed because he was the Head Clerk, that he continued to be Head Clerk after the new division of the Municipality and prepared the rolls, and that the Chairman who had never revoked the appointment of June or July accepted them. The absence of a formal appointment is immaterial; the petitioner was indubitably "in actual possession of the situation of a public servant" within the clause and the explanation. In my opinion, therefore, he was rightly held to be a public servant in the circumstances. Section 167 further requires that he should be shown, as such public servant, to have been charged with the preparation of any document etc. It has been urged that the prosecution fails in this respect for want of an express order appointing the petitioner to prepare the rolls in question. But the words "charged" in the section is not to be very narrowly construed—see *Queen-Empress v. Deodhar Singh* (1), a case in which it was held that a Sub-Inspector of Police was charged with the preparation of a report within the meaning of s. 218 of the I. P. O. (a section which closely resembles s. 167 and will be again referred to) when it appeared that he submitted such a report in pursuance only of a practice requiring such a report. The word "charged" does not therefore provide any additional defence to the petitioner. It is true, as I have already said, that it was no part of his

ordinary duty as Head Clerk to prepare any electoral roll: without more he could not even be a public servant within cl. 11 of s. 21. The work of preparing electoral rolls could only fall to him on appointment by the Chairman under r. 13 (1). For the new elections his appointment was implied—in continuation of the former express appointment, and it was taken by the petitioner no less than by the Chairman to be an appointment to prepare new rolls, which not only made a public servant of him but also charged him as such with the preparation of the rolls. The petitioner's double contention that he was not a public servant and was not as such public servant charged with the preparation of the electoral rolls must, therefore, be overruled.

It has been further contended on behalf of the petitioner that he cannot be said to have "framed" the electoral rolls within the meaning of s. 167. The contention is based on the fact that from January 8, 1938, to after January 11, 1938, when the rolls were delivered to the Chairman, the petitioner was away on leave, and that though the rolls (Exs. 20 and 20/1) had been written by the petitioner, it was his *locum tenens*, one Shiva Prasad Varma who was not examined in the case, that signed the rolls and delivered them to the Chairman. The learned Advocate has pointed out that s. 167 speaks of the framing of the document by the public servant charged with its preparation. He has also referred to r. 13 (3) of the Election Rules which requires the persons appointed to prepare the electoral roll, to sign and deliver it to the Chairman. On the very face of the sub-rule, however, read with sub-r. (1), it is clear that the preparation of the electoral roll is distinct from signing it and delivering it. As to s. 167, it is difficult to see any sensible difference between the preparation and the framing of an electoral roll. According to the dictionaries 'to prepare' is to make ready or make by a regular process, and 'to frame', to construct by combination of parts or adaptation to design; and no case has been suggested before me in which a person who prepares a document in the ordinary meaning of the former word could yet be said not to have framed it (provided the preparation is complete and final), or *vice versa*. The learned Advocate points out that the electoral rolls prepared under sub-r. (1) of r. 13 can only be further operated on after they are signed and

delivered to the Chairman. But even so, the signature and the delivery are operations subsequent to the preparation under sub-r. (1); they would serve to indicate that the preparation was complete, but cannot be said to be essential to the framing required by s. 167, for it is not always impossible to show in other ways that the process of preparing was complete. In *Megraj v. Empress* (2), it was contended that an offence under s. 218 of the I. P. O. (a section which deals with the offence of a public servant framing an incorrect record, expressed in the same terms as the offence under s. 167 of framing an incorrect document, though with a different intent) could not be deemed to have been committed as the documents had never been submitted to the proper authorities. The contention was overruled and it was held that it was not necessary to constitute a complete offence under the section that the incorrect document should be submitted to another person, or be otherwise used by the writer:

"The requirements of the section are satisfied if it is shown that the document has been prepared by a public servant charged with its preparation in a manner which he knows to be incorrect and with the knowledge that he is thereby likely to cause loss to the public".

and further,

"if after such preparation he submits the document, with intent thereby to procure credit for or payment of more than to his own knowledge is due to him, all the elements of an attempt to cheat in its simple or aggravated form (s. 417 or s. 418, I. P. O.) would be present."

I am, therefore, unable to accept the contention that because the electoral rolls were signed and delivered by Sheo Prasad Varma, therefore the petitioner cannot be said to have prepared or framed them. It was argued below that the petitioner's responsibility for the rolls ceased when he went on leave on January 8. The learned Sessions Judge declined to accept this contention because "the making of the rolls was entirely in the petitioner's charge. His *locum tenens* merely signing and delivering them. It has been argued for the petitioner that this overlooks the consideration that the petitioner might, if he had not been away have changed his mind in respect of the incorrect entries and corrected them before the time came to deliver them to the Chairman, or in other words, that the petitioner had not completed his preparation of the rolls. The learned Sessions Judge has observed that no explanation has been offered for

either of the two incorrect entries—he was then considering the entries relating to Paras Nath—and that the petitioner could not raise the plea of *bona fide* mistake because Paras Nath was after all his own brother. But it is to be noticed that no explanation was called for on this point from the petitioner by the trying Magistrate who, as I have already said, was not prepared to infer that the petitioner intended to harm the Congress party as stated in one part of the charge. There is also no suggestion that the petitioner went on leave merely to shift his responsibility on to his *locum tenens*; it seems clear on the contrary that he did so because of the illness of a daughter who died in the following month. The learned Magistrate took the view that the petitioner did not really expect his *locum tenens* “the officiating fellow”, as he put it, to correct his mistake, but left the rolls in the state of completeness which is connected by the word ‘framed’. He added that the fact that the petitioner did not sign them “could only be attributed either to gross carelessness in view of the peremptory provisions of r. (13) (3) or to deep game to have others hauled up for his mistakes.” The former hypothesis, however is rather inconsistent with the Magistrate’s view that the petitioner did not expect his *locum tenens* to correct his mistakes, and the latter, with his finding that the petitioner was not convincingly shown to have intended to harm the Congress party. The learned Advocate for the petitioner has laid stress on this observation of the Magistrate as suggesting that he was not really convinced that the petitioner had left the rolls in a state of completeness. We cannot, in the circumstances of this case, exclude as too remote the possibility that if the petitioner had remained on duty, he might have corrected the incorrect entries before signing and delivering the rolls. The petitioner was not asked to explain why he had made the incorrect entries, and we can, therefore, only conjecture what was happening. As the Sessions Judge has said the petitioner was only a tool in the hands of the then Chairman of the Municipality, and the latter was apparently anxious to consolidate his own party and strengthen the chances of election of the members of his party. This influence may not inconceivably have waned in the party politics of the time before the date for delivering the roll to the Chairman,

opposed as he was to the party of the Ministry then in power. The learned Advocate for the petitioner has pointed out that under the Election Rules the rolls handed over to the Chairman were to be published as draft rolls only, being finally settled by a revising committee which was not to be appointed by the Chairman and which was to hear claims and objections invited by notice public notice. The value of the draft rolls must, therefore not be exaggerated. And this makes it even less improbable that the mistakes as the Magistrate apparently regarded them might have been corrected before January 11, if the petitioner had not been compelled to go on leave for urgent, private reasons. It is at any rate, difficult on the record of this case to hold that when the petitioner went on leave on January 8, he had done to the electoral rolls all that he intended to do, and could have done before the time came to deliver them to the Chairman. I am not unaware that s. 106 of the Evi. Act places upon the petitioner the burden of proving facts especially within his knowledge. But as was pointed out in *U. Damapala v. Emperor* (3) this section cannot be used to support a conviction unless the offence is convincingly brought home to the accused person. There is further the failure of the Magistrate to question the petitioner on the point. For s. 167 to apply the preparing and framing must be complete and final so far as the author is concerned, and it is difficult to exclude anything that it would have been permissible for the petitioner to do to the rolls until the time came for his signing them and delivering them. It has also not been found that the petitioner handed the papers over to his *locum tenens* as completed rolls. I consider it extremely doubtful in the circumstances whether the petitioner could be properly held to have framed the electoral rolls in the sense of final preparation. I must accordingly allow this application and set aside the conviction and sentence passed upon the petitioner. Should the fine imposed upon the petitioner have been paid, it must be refunded to him on application.

s. Application allowed.

(3) 14 R 666; 168 Ind. Cas. 193; A I R 1937 Rang 38; 9 R Rang. 340; 38 Cr. L J 524 (FB.)

ALLAHABAD HIGH COURT

Civil Revision Application No. 38 of 1940

November 7, 1940

COLLISTER, J.

FIRM Sheikh WAJID ALI MOHAMMAD.

RAFIQ—PLAINTIFF—APPLICANT

versus

BENGAL AND NORTH WESTERN

RAILWAY CO. AND ANOTHER—DEFENDANTS

—OPPOSITE PARTY

Railways Act (IX of 1890), s. 72—Risk note form H—“Misconduct”, meaning of—Duty of Court Railway held not guilty of misconduct.

The word “misconduct” in risk note Form H means “improper conduct.” The Court has in cases of this sort to consider all the facts and circumstances and then arrive at a conclusion as to whether the conduct of the railway employees was such as to render the railway administration liable in damages upon a reasonable view of the matter. If it is established that the employees of the railway administration, in defiance of the ordinary practice, placed tins of molasses in the wagon which contained the plaintiff's yarn consignment or alternatively, if they placed the plaintiff's consignment in a wagon which contained tins of molasses, it must be held that they acted recklessly, knowing that contamination and damage would be a likely and probable result, and that by their conduct they showed themselves to be indifferent to such results. Where, however, the plaintiff has merely proved that the packages were received in good condition at the station from which they were despatched and that they were found to be damaged by molasses on arrival at the destination, the railway cannot be held to be guilty of misconduct in the absence of proof that they placed tins of molasses in the wagon containing the plaintiff's yarn consignment. 147 Ind. Cas. 752 (2), 148 Ind. Cas. 396 (3) and 144 Ind. Cas. 113 (4); referred to, 80 Ind. Cas. 737 (1), distinguished.

C. R. App. against the order of the Judge, Small Cause Court, Ballia, dated September 28, 1939.

Mr. Mushtaq Ahmad, for the Applicant.

Mr. B. Malik, for the Opposite Party.

Order.—This is an application in revision under s. 25, Small Cause Courts Act. The applicant was the plaintiff in a suit to which the defendants were the Bengal & North Western Railway Company and the Bombay Baroda & Central India Railway Co. The facts may be briefly stated thus: A consignment of five packages of yarn was despatched to the plaintiff three being sent by firm Nehal Chand Baldeo Sahai and two by Shambhu Nath. The consignment was despatched under risk note form H from the Gwaltoli Station at Cawnpore to the address of the plaintiff at Ballia. On arrival the packages were found to be soiled with molasses, and the plaintiff accordingly instituted a suit for damages against the two railway companies. The learned Judge has dismissed the suit, finding that the defendant companies are not liable for any da-

mages under the terms of risk note form H. He has mainly relied upon a decision of this Court in *E. I. Ry. Co. Ltd. v. Lala Janki Prasad* (1) but in that case a risk note which is no longer in force and whose terms differed materially from the Risk Note Form H with which we are now concerned was under consideration.

It is nowhere pleaded by the defendants that the goods were in a damaged condition when they were brought to the Gwaltoli station for despatch and it may safely be presumed that they were undamaged at that time; otherwise they would not have been accepted. And it is an admitted fact that on arrival at Ballia the packages were soiled on one side with molasses. The learned Judge says:

“At the most, due to neglect of the servants of either of the railway companies, tins of molasses were placed in the bogie in which the bales in suit were placed.”

On the assumption that this is a finding of fact, it is contended for the plaintiff that the defendants are liable for the damage caused to the packages. Risk note form H provides that in consideration for the consignment being charged for at reduced rates the cosignor does.

“... hereby agree and undertake to hold the said railway administration harmless and free from any loss, destruction or deterioration of damages to all or any of such consignment from any cause whatever except upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the railway administration's servants.”

Then follow certain provisos with which we are not concerned. The issue therefore is whether the plaintiff has proved misconduct on the part of the defendants within the meaning of the word as used in this risk note. I have been referred to a considerable number of authorities mostly from other High Courts, which disclose a somewhat confusing diversity of view as regards the proper definition of the word “misconduct” in risk note form H. In *M. & S. M. Ry. Co. Ltd. v. Sunderjee Kalidas* (2), it was observed as follows:

“... misconduct is not necessarily established by proving even culpable negligence... misconduct is something opposed to accident or negligence; it is the intentional doing of something which the doer knows to be wrong, or which he does recklessly, not caring what the result may be.”

In *Jamunadas Ramjas v. E. I. Ry. Co. Ltd.* (3), it was held that “misconduct” would ordinarily mean failure to do what is re-

(1) A I R 1924 All. 605; 80 Ind. Cas. 737; L R 5 A 586 Civ.

(2) A I R 1933 Cal. 742; 147 Ind. Cas. 752; 60 C 996; 57 C L J 281; 6 R C 356.

(3) A I R 1933 Pat. 630; 148 Ind. Cas. 396; 6 R P 454.

quired of a person to be done. In that case rain water had leaked into a wagon and had damaged a consignment of grain, and the learned Judge at p. 632* says :

"Certainly it was the duty of the railway administration to provide against such ordinary contingency such as rain water forcing itself into the wagon and causing damage to grain, etc. in it. The fact that the rain water did enter the wagon and caused damage to the plaintiff's consignment is itself sufficient to show that proper and requisite precautions were not taken by the railway administration to provide against such contingency."

Between these two somewhat extreme views as to the meaning of "misconduct" there are many other definitions by learned Judges which I do not think it necessary to cite in this judgment. The only case from our own High Court to which I have been referred in which the meaning of "misconduct" has been considered is *Secretary of State v. Madhuri Das Narain Das* (4) in which there is an *obiter dictum* of Niamatullah, J. to the following effect :

"I may . . . note that the word "misconduct" occurring in risk note B is of wider import than the popular sense in which that word is used. Want of proper care and caution may amount to misconduct within the meaning of the risk note B. A mistake in the preparation of the railway receipt which throws doubt on the identity of the consignment to which it relates is a misconduct in the above sense."

Admittedly the terms of risk note B as now in force are similar to the terms of risk note H. It seems to me that it will serve no very useful purpose to attempt a general definition of "misconduct" in risk note form H. But if I did venture upon one, I should say that the simplest and most non-committal definition of the word would be "improper conduct." What the Court has to do in cases of this sort is to consider all the facts and circumstances and then arrive at a conclusion as to whether the conduct of the railway employees was such as to render the railway administration liable in damages upon a reasonable view of the matter. It was admitted in the present case by two of the defence witnesses, one of whom is the Traffic Inspector of Claims of the B. & N. W. Ry. Co., that molasses or other fluid substances are not placed in the same wagon with yarn, etc., and the obvious reason for this is the danger of the packages of yarn or other similar goods suffering contamination and damage. This being the practice of the company, it seems to me that if it is established that the employees of the railway administration, in defiance of the ordinary practice, placed tins of molasses in the wagon which contained the

plaintiff's consignment or alternatively, if they placed the plaintiff's consignment in a wagon which contained tins of molasses, it must be held that they acted recklessly, knowing that contamination and damage would be likely and probable result, and that by their conduct they showed themselves to be indifferent to such results. If this has been proved to the satisfaction of the Court, I should hold that the plaintiff has established misconduct on the part of the defendants within the meaning of risk note H.

But has this been proved? When the learned Judge says that "at the most" there was neglect of the employees by placing tins of molasses in the same wagon, this does not appear to have been a finding of fact on his part; all that he was attempting to do was to put the case at its highest on behalf of the plaintiff. Since therefore I am not bound by any finding of fact, I am free to consider whether on the proved facts misconduct has been committed. It is a curious fact that either of the two witnesses for the defendants was asked the obvious question whether tins of molasses were or were not placed in the wagon containing the plaintiff's consignment between Gowaltoli station and Ballia. What the plaintiff has proved is that the packages were received in good condition at the Gwaltoli station and that they were found to be damaged by molasses on arrival at Ballia. The question is whether this is enough to prove misconduct on the part of the railway administration. Learned Counsel for the defendants contends that the damage may have been caused in several ways; for instance, he says that while the packages were on the railway premises at the Gwaltoli station, a tin of molasses somewhere in the vicinity may have leaked and the molasses may have trickled as far as the packages in question and so caused the damage. I am bound to concede that there are possibilities of this kind and in such a case, although there might be negligence of some sort, I do not think that it would necessarily amount to "misconduct" on the part of the railway administration. It was for the plaintiff to prove misconduct, but as I have already said, all that he has established is that the goods were found to be damaged on arrival at Ballia, he does not appear to have made any attempt whatsoever by cross-examining the witnesses for the defence to elicit what was the act or what were the acts of the railway employees which resulted in this damage. As I said before, if the plaintiff had proved—as he probably could have done without much difficulty—

(4) A I R 1933 AH 477; 144 Ind. Cas. 113; 55 A 625; (1933) A L J 966; Ind. Rul. (1933) All. 381.

*Page of A. I. R. 1933 Pat.—[Ed.]

that molasses had been placed in the same wagon and if there was a finding to this effect, I should have allowed this revision; but as it is I am of opinion that misconduct has not been proved. This being my view, I dismiss this application with costs.

S. *Application dismissed.*

BOMBAY HIGH COURT

Criminal Appeal No. 404 of 1940

November 22, 1940

BEAUMONT, C. J. AND SEN, J.

GULAMHUSSEIN ALIBHOY

JARIWALLA—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY

Mussalman Waqf Act (XLII of 1923 as amended in Bombay by Act XVIII of 1935), ss. 2 (e), 3, 5, 10-B—Trustee, if can dedicate—Applicability of Act to any property of waqf within jurisdiction of local Court—S. 5, scope of—S. 10-B—Mussalman Waqf Rules, 1936, r. 26—Person failing to deliver accounts under s. 3—Court holding that person fell within terms of Act and directing papers to be sent to Public Prosecutor—There was held sufficient compliance with r. 26.

It cannot be said that the only person who can dedicate a property must be a beneficial owner; a trustee can also dedicate. The collection of money on terms which made it charitable in the hands of the trustees who held it, their subsequent investment of that money in immovable property, and their declaration of a trust of that immovable property for the charitable purpose for which it was held constitutes a good dedication.

A *mutwalli* with property within the local limits of the Small Cause Court at Bombay, has to furnish under s. 3 the required particulars, although other properties of the *waqf* may be situate and those who benefit from the *waqf* may be resident, outside Bombay or outside British India. The Act applies to any property of a *waqf* within the jurisdiction of the local Court.

There cannot be an offence under s. 5 unless a statement has been delivered under s. 3.

The accused was called upon to deliver accounts under s. 3, Mussalman Waqf Act, and he failed to do so. Thereupon the Court,—the Chief Judge of the Small Cause Court—holding that the accused fell within the terms of the Act, directed that the papers be sent to the Public Prosecutor in order that he might take the appropriate action:

Held, that there was sufficient compliance with r. 26 of Mussalman Waqf Rules, 1936, as required by s. 10-B though it would be better in order to avoid any question, that formal sanction should be given independently of the judgment.

Cr. A. from the conviction and sentence passed by the Chief Presidency Magistrate, Bombay.

Sir Jamshedji Kanga and Mr. R. M. Shah, for the Accused.

Messrs. M. C. Setalvad (Advocate-General) and R. A. Jahagirdar, (Govt. Pleader), for the Crown.

• **Beaumont, C. J.**—This is an appeal by the accused against his conviction by the Chief Presidency Magistrate, Bombay, under s. 10, Mussalman Waqf Act (XLII of 1923), for failure to comply with ss. 3 and 5 of the said Act. The facts are not in dispute so far as they are material for the present purpose. The accused with others collected monies from Dawoodi Bohras at Sunnel, which is in the Indore State, for the purpose of building a Madressa at Sunnel, and a Madressa was duly built. On February 26, 1932, the trustees of the Madressa purchased an immovable property at Bhoiwada in Bombay out of the funds belonging to the Madressa, and on December 7, 1934, they executed a declaration of trust, which is Ex. D, admitting that they had purchased the Bhoiwada property out of monies collected from Dawoodi Bohras at Sunnel for the support of a Madressa of Sunnel, and declaring that they held the property upon trust, in substance, for the Madressa. The appellant was called upon to deliver accounts under s. 3, Mussalman Waqf Act, and he failed to do so. Thereupon the Court,—that is the Chief Judge of the Small Cause Court at Bombay who is the Court for the purposes of this case—holding that the appellant fell within the terms of the Act, directed that the papers be sent to the Public Prosecutor of Bombay in order that he might take the appropriate action. This was done, and the learned Chief Presidency Magistrate convicted the accused under ss. 3 and 5, Mussalman Waqf Act.

Four points have been taken in appeal. The first is that the necessary sanction to the prosecution has not been given. By the Mussalman Waqf (Bom. Amendment) Act which is Bom. Act, XVIII of 1935, s. 13, there was added to the principal Act s. 10-B which directs that "no prosecution under this Act shall be instituted except by or with the previous sanction of the Court given in the prescribed manner." The prescribed manner means the manner prescribed by rules under the principal Act. Rule 26 of the Bom. Mussalman Waqf Rules, 1936, provides that the order of sanction shall state the offence in respect of which the accused is to be prosecuted. In my opinion, the last sentence of the judgment of the learned Chief Judge of the Small Cause Court in which he holds that the appellant has committed default by failing to file particulars and accounts, as required by ss. 3 and 5, Mussalman Waqf Act, in respect of this property and has thus rendered himself liable to be prosecuted under s. 10 and in which he directs the papers to be sent to the Public Prosecutor for taking necessary

action against the appellant sufficiently complies with r. 26 though it might be better in future in order to avoid any question, that formal sanction should be given independently of the judgment.

The second point taken is that a trustee cannot create a *waqf* and the third point is that there can be no *waqf* of a foreign charity. These points can be dealt with together, because they both turn on the definition of "*waqf*" and the terms of s. 3 of the principal Act. Section 3 provides that within six months from the commencement of this Act every *mutwalli* shall furnish to the Court within the local limits of whose jurisdiction the property of the *waqf* of which he is the *mutwalli* is situated, a statement containing the particulars prescribed. So that if one finds a *mutwalli* with property within the local limits of the Small Cause Court at Bombay, it seems to me clear that he has to furnish the required particulars, although other properties of the *waqf* may be situate and those who benefit from the *waqf* may be resident, outside Bombay or outside British India. That disposes of the contention that the Act does not apply to a foreign *waqf*. It applies to any property of a *waqf* within the jurisdiction of the local Court.

Then we have to see what is the meaning of "*waqf*" in order to deal with the point that a trustee cannot create a *waqf*. Now, "*waqf*" is defined in s. 2 (e) of the principal Act and we are only concerned with that definition and we are not concerned with the question often difficult as to whether a particular trust constitutes a *waqf* under Muhammadan Law. Under the definition in this Act "*waqf*" means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman Law as religious, pious or charitable. It is not disputed that the purpose of benefiting the Madressa at Sunnel is a purpose recognized as charitable by the Mussalman Law; but it is argued that there has been no permanent dedication by a person professing the Mussalman faith, because it is said that the only person who can dedicate a property must be a beneficial owner and a trustee cannot dedicate. I know of no authority for that proposition, though of course a trustee must keep within the terms of his trust, but in any event the dedication here was not merely the declaration of trust of 1934 by trustees. The dedication is constituted by the collection of money on terms which made it charitable in the hands of the trustees who held it, their subsequent investment of that

money in immovable property, and their declaration of a trust of that immovable property for the charitable purpose for which it was held. That, to my mind, constitutes a good dedication. In my opinion therefore the learned Chief Judge of the Small Cause Court was right in holding that this was *waqf* property and the learned Chief Presidency Magistrate was similarly right.

Then the fourth point taken is that the conviction under s. 5, Mussalman Waqf Act, is bad, because s. 5 cannot come into operation unless s. 3 has been complied with. It is not an argument which invokes my sympathy, because it really enable the accused to escape from the consequences of a breach of s. 5 by his own wrong in committing a breach of s. 3; but, on the wording of s. 5, I do not see any answer to the argument. Section 5 provides that within three months after March 31, next following the date on which the statement referred to in s. 3 has been furnished and thereafter within three months of March 31, in every year, every *mutwalli* shall prepare and furnish to the Court a certain statement; but unless a statement has been furnished under s. 3, there is no date within which he is required to furnish a statement under s. 5 and it seems to me that on the wording of s. 5, there cannot be an offence under that section unless a statement has been delivered under s. 3. I think therefore that we must set aside the conviction under s. 5, but we uphold the conviction under s. 3. The fine of Rs. 200 imposed under s. 5 to be refunded.

Sen, J.—I agree.

s. Order accordingly.

CALCUTTA HIGH COURT

Appeal No. 264 of 1940

May 7, 1940

HENDERSON, J.

GOLAM MORTUZA MOULIK—

DEFENDANT No. 1—APPELLANT

versus

Munshi MANIRUDDIN AHAMAD,

PLAINTIFF AND OTHERS—RESPONDENTS

Bengal Village Local Self-Government Act (V of 1919), s. 17-A—Question whether person is properly elected as president of Union Board—Jurisdiction of Civil Court to decide—Rules for election of president—Suit for declaration that rival candidate is not properly elected president—Plaintiff, if can be declared president.

The Civil Courts have jurisdiction unless their jurisdiction has been definitely taken away. There is no section in the Bengal Village Local Self-Govt. Act which takes away the jurisdiction of the Civil

Courts to decide that certain person is not properly elected as a president of a Union Board.

In a suit by a candidate for a declaration that his rival candidate is not properly elected as a president of the Union Board, the plaintiff is not entitled to a declaration that he (the plaintiff) is the president unless it has been found that under the rules made by the Local Govt. he has been duly elected as president.

Mr. Radhika Ranjan Guha, for the Appellant.

Mr. Hemendra Kumar Das, for the Respondents.

Judgment.—This appeal is by defendant No. 1. The question at issue between the parties is whether defendant No. 1 or the plaintiff has been elected as president of a certain Union Board in the District of Dacca. There are altogether nine members of the board. They were all present at the election. As required by the rules, the circle officer presided over the meeting. The plaintiff obtained six votes, defendant No. 1, the remaining three. Both the plaintiff and defendant No. 1 voted for themselves. After the votes had been recorded, the circle officer on most flimsy grounds ignored three of the votes given in favour of the plaintiff, pretended that each candidate had no equal number of votes and proceeded to give his casting vote in favour of defendant No. 1. The finding of the Munsif that he was acting in collusion with defendant No. 1 is fully justified. The plaintiff then instituted the present suit and obtained a decree. Defendant No. 1 appealed without success to the District Court and now appeals to this Court. The first ground urged in support of the appeal is that the Civil Courts have no jurisdiction to decide the question and that the suit ought to have been dismissed as incompetent. There can be no question that the Civil Courts have jurisdiction unless their jurisdiction has been definitely taken away. It cannot even be pretended that there is any section in the Bengal Village Local Self-Govt. Act which takes away the jurisdiction of the Courts. There is merely an agreement based upon analogy. Section 17-A is concerned with the election of members of a Union Board. It provides that such an election shall not be called in question in any Court. Then s. 17-B provides a special tribunal for deciding such disputes.

The present suit has nothing to do with the election of a member of a Union Board. It is not the plaintiff's case that the appellant has been improperly elected. It is not disputed that he is a member of the Union

Board. It cannot possibly be argued that, because a special tribunal has been provided to deal with election disputes, a precisely similar tribunal must by implication be provided to decide questions about the election of a president. There is no connection whatever between the two causes of action. As the jurisdiction of the Courts has not been excluded the Munsif was entitled to entertain and decide the suit. The second ground urged in support of the appeal is with regard to the relief granted. It is contended that the plaintiff should only be given a declaration to the effect that the appellant is not the president and that it should then be left to the District Board to appoint a president under the provisions of s. 8 of the Act. The precise relief to which the plaintiff is entitled must of course depend upon the findings in a particular case. Certainly the plaintiff is not entitled to a declaration that he is the president unless it has been found that under the rules made by the Local Govt. he has been duly elected as president. Rule 32 provides that the candidate for whom there is the largest number of votes shall be declared by the presiding officer to be the president of the Board. The plaintiff's case is that he obtained six votes while the appellant obtained only three. If he can establish this case then under the rules he is entitled to a declaration that he has been properly elected president of the Board.

Both the Courts below have found that the respondent obtained six votes. He examined the members who voted for him and he is supported by their evidence. The first vote he obtained was his own vote. The circle officer disallowed this on the ground that he had not signed the paper. The finding of the Munsif is that this was due to the trickery of the circle officer. The plaintiff was given to understand that he might sign his name on a piece of paper in order to show that he was a candidate. Then when he afterwards discovered that this was supposed to be the voting paper he asked that it might be returned to him so that he might affix his signature. The circle officer refused to do this. It is not disputed on behalf of the respondent that under the rules voting papers require to be signed. There can be no question that this paper was not signed. The Circle Officer ought to have returned it to the plaintiff in order that he might sign it. Of the next two papers, one was given in favour of Sheikh

Maniruddin and the other in favour of Munshi Maniruddin. I do not pretend to understand how the circle officer can have thought that these two papers might have been meant to be votes in favour of the appellant whose name is Golam Mortuza Moulik. There cannot be any question that the decision of the Courts below to the effect that the plaintiff obtained six votes is the only decision which could be supported by the evidence. Finally it was argued that in deciding this question the learned Judge and the learned Munsif imported their own personal knowledge. They know nothing whatever about the parties to the case or what their names are. The learned Judge certainly says that to anyone having a smattering of Arabic, it would be clear that 'Maniruddin' is the real name; "Munshi" is an honorific title. I myself cannot even pretend to have a smattering of Arabic but I know perfectly well that "Munshi" may be a title, and I have no doubt whatever that the circle officer ignored these votes on merely flimsy grounds. The appeal accordingly fails and is dismissed with costs.

D.

Appeal dismissed.

MADRAS HIGH COURT Special Bench

O. P. No. 110 of 1940

September 25, 1940

LEACH, C. J., KING AND PATANJALI
SASTRI, JJ.COMMISSIONER OF INCOME-TAX,
MADRAS—PETITIONER

versus

S. M. S. KARUPPIAH PILLAI, MADURA
—RESPONDENT

Income Tax Act (XI of 1922), ss. 26 (2), 44—Partner continuing business of partnership after its dissolution—Whether succeeds to business within s. 26 (2)—S. 44, if applies.

A firm for the purposes of assessment to income-tax is an entity quite distinct from the partners who compose it. Consequently where a partner carries on the business of the partnership after dissolution of the partnership, he succeeds to the business within the meaning of s. 26 (2) and s. 44 does not apply to such a case. *Karuppaswami Mooppanar v. Commissioner of Income-tax*, Madras (1), 181 Ind. Cas. 525 (2), 148 Ind. Cas. 594 (3) and *Faraday, Rodgers & Eller v. Cartner* (4), relied on, 159 Ind. Cas. 840 (5), explained.

O. P. reference by the Commissioner of Income-tax, Madras.

Mr. K. V. Sesha Ayyangar, for the Petitioner.

Mr. V. Ramaswami Iyer, for the Respondent.

Leach, C. J.—The main question raised in this reference is whether a partner who continues the partnership business after the dissolution of the partnership succeeds to the business within the meaning of s. 26 (2), Income Tax Act, 1922. On September 16, 1935 the assessee and one Venkatarama Ayyar entered into a partnership for the production and exhibition of a cinema film called "Pathi Bhakthi." The partnership continued until the month of May of the following year, when Venkatarama Ayyar retired from the partnership and was paid the amount of the profits which represented his share, namely the sum of Rs. 9,524. Thereafter the film was exhibited by the assessee for his own benefit. For the assessment year 1937-38 the income-tax authorities assessed Venkatarama Ayyar in respect of this sum of Rs. 9,524 and he paid the tax, but later the income-tax authorities considered that they were wrong in so doing, and to have the question settled, the Commissioner of Income-tax has, under the provisions of s. 66 (2) of the Act referred the following question:

"Whether the provisions of s. 26 (1) or s. 26 (2) of the Act are applicable to this case and the petitioner is liable to be assessed on the sum of Rs. 9,524 which represents the ex-partner's share of the profits of the film business."

In his statement of the case the Commissioner has very properly stated that should the Court answer this question against the assessee he would exclude the sum of Rs. 9,524 from the assessment of Venkatarama Ayyar, who, of course, would thereupon be entitled to a refund. Section 26 (2) reads as follows:

"Where at the time of making an assessment under s. 23, it is found that the person carrying on any business, profession or vocation has been succeeded in such capacity by another person, the assessment shall be made on such person succeeding, as if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the whole of the profits for that year."

For the assessee it is said that inasmuch as he was a partner in the business of exhibiting this film before he acquired the right to exhibit it for his sole benefit there could be no succession, because as part owner of the business he could not succeed to himself. This argument ignores the fact that a partner is not the partnership. A firm for the purposes of assessment to income-tax is an entity quite distinct from the partners who compose it. In two cases which have come before this Court it has been accepted that where a partner carries on the business of the partnership after dissolution he does "succeed" within the

meaning of s. 26 (2). These cases are *Karuppaswami Mooppanar v. Commissioner of Income-tax, Madras* (1) and *Commissioner of Income-tax, Madras v. Muthukaruppan Chettiar* (2). For the assessee, it has been suggested that the judgments in these cases cannot be regarded as deciding the question because this proposition was not disputed. It is true that the argument which has been addressed to this Court was not addressed to the Court in the two cases mentioned; but the cases cannot be ignored for this reason. Obviously it was not considered to be worth while taking the point. If the partnership is an entity distinct from the partners there must be succession in circumstances such as we have here. The Rangoon High Court took the same view in *Commissioner of Income-tax, Burma v. N. N. Firm* (3) and the same view has been taken in England: see *Faraday, Rodgers & Eller v. Cartner* (4).

In the course of his arguments, Mr. Ramaswami Ayyar has suggested that the decision of this Court in *Kesava Rao v. Commissioner of Income-tax, Madras* (5) has application here, but this cannot be accepted. There the Court was merely concerned with the question whether there could be succession within the meaning of s. 26 (2) in the case of the death of one member of a joint Hindu family. It was held that there could not be. It was not a matter of succession at all. It was a matter of survivorship. The family remained joint, notwithstanding the death of the member. In no sense of the word could it be said that there was succession or a change in the identity of the assessee. It has been also argued on behalf of the assessee, that as Venkatarama Ayyar has paid the tax on the Rs. 9,524, there cannot be a fresh assessment by reason of the provisions of s. 44 of the Act. That section says:

"Where any business, profession or vocation carried on by a firm has been discontinued, every person who was at the time of such discontinuance a member of such firm shall be jointly and severally liable for the amount of the tax payable in respect of the income, profits and gains of the firm."

This section only applies when there has been a discontinuance of the business, which

(1) 2 I T R 284; 7 I T C 283 (S B).

(2) I L R (1939) Mad. 269; 181 Ind. Cas. 525; A I R 1939 Mad. 376; (1939) 1 M L J 482; 7 I T R 29; (1939) M W N 214; 49 L W 399; 11 R M 828 (S B).

(3) 11 R 501; 148 Ind. Cas. 594; A I R 1934 Rang. 13; 2 I T R 85; 6 R Rang. 235 (S B).

(4) (1927) 11 Tax Cas. 565.

(5) 59 M 377; 159 Ind. Cas. 840; A I R 1936 Mad. 67; 70 M L J 13; 3 I T R 339; (1935) M W N 1237; 8 R M 553; 43 L W 155 (F B).

is not the case here. The section says that if a business is discontinued the partners shall nevertheless be jointly and severally liable for the profits which had been earned. We are not concerned here with a case where there has been a discontinuance of the business. We are concerned with a case where the same business has been carried on by one of the partners, and carried on without any break. In such a case the section which is applicable is s. 26 (2) and not s. 44. For the reasons indicated we answer the question referred in the affirmative. The Commissioner is entitled to his costs, Rs. 250.

N.-S.

Answered in affirmative.

CALCUTTA HIGH COURT

Suit No. 511 of 1937

April 11, 1940

AMEER ALI, J.

SOHONLAL DAGA—PLAINTIFF

versus

SREECHAND DAGA AND ANOTHER—
DEFENDANTS

Libel—Action for—Publication to third party is essential—Tort—Action in—That defendant committed tort must be alleged—Allegation of tort against his guardian acting for him, whether allegation against defendant.

It is an essential part of a cause of action for libel, to allege publication which means to a third party, or such circumstances as will lead the Court to presume publication to a third party. Publication to the plaintiff, according to the law is not publication.

In order to found a cause of action in tort, it must be alleged that the defendant committed the tort. An allegation that the tort was committed by the defendant's guardian purporting to act on his behalf is not a pleading of a sufficient or proper nature alleging that the defendant committed the tort alleged.

Facts.—This was a suit on libel and there was an argument on the pleadings as to the maintainability of the suit. The following preliminary points were taken:

1. Has the Court jurisdiction to entertain the suit?
2. Has the plaintiff any cause of action?
3. Was there any publication of the letter alleged?
4. If so, was such publication by or on behalf of defendant No. 1.

Mr. S. M. Bose, for the Plaintiff.

Mr. K. P. Khaitan, for the Defendants.

Judgment.—This suit can be dealt with upon the pleading, and Mr. Khaitan was quite justified in asking me to deal with the issues of law, including those by way of demurrer. There are, in my opinion,

two points where the plaint breaks down. In para. 2 the only publication alleged is to the plaintiff. That, according to the law, is not publication. I accept the position as set out in Bullen and Leake that it is an essential part of a cause of action for libel, to allege publication which means to a third party, or of course, such circumstances as will lead the Court to presume publication to a third party. This pleading in terms excludes publication to a third party. From this it follows that there is no cause of action, and secondly, no cause of action arose in Calcutta, the two points overlapping.

The other point on which the plaint fails is in the same paragraph, so far as defendant No. 1 is concerned. It is alleged that defendant No. 2 purported to act on behalf of defendant No. 1 though his lawyer. In my opinion in order to found a cause of action in tort, it must be alleged that the defendant committed the tort. It seems fairly obvious this is not the pleading. In point of fact, defendant No. 2 was the guardian of defendant No. 1; but in my opinion this is not a pleading of a sufficient or proper nature alleging that defendant No. 1 committed the tort alleged. Dealing therefore with the issues raised by Mr. Khaitan, which are before me, I answer Issue No. 1 in the negative, Issue No. 2 in the negative, Issue No. 3 in the negative and Issue No. 4 in the negative, the meaning of which I have just explained. This being the case, it will hardly be necessary to proceed to any evidence. The suit must be dismissed with costs. Certified fit for two Counsel.

•P.

Suit dismissed.

NAGPUR HIGH COURT

First Appeal No. 110 of 1936

October 16, 1939

STONE, C. J. AND BOSE, J.

UDHAO—DEFENDANT—APPELLANT

versus

NARAYAN—PLAINTIFF—RESPONDENT

Civil Procedure Code (Act V of 1908), O. VIII, r. 5—Defendant admitting to have executed bond for certain amount on certain date and admitting to have agreed to pay it on certain date—Case does not fall under O. VIII, r. 5—Evidence Act (I of 1872), s. 65—Debtor's application to Debt Conciliation Board, whether admission of liability within s. 65 (b)—C. P. Debt Conciliation Act (II of 1933), s. 9—Admission by debtor, of agreement to pay sum due on bond—S. 9 does not operate.

Where in a suit the defendant admits that he executed a bond for certain sum on a certain date, on taking ac-

counts and also admits that he agreed to pay the amount on certain date, it is not a case which falls under O. VIII, r. 5, Civil P. C., of an implied admission. This is an example of an express admission.

The statement contained in the debtor's application to the Debt Conciliation Board cannot be regarded as an admission within the meaning of s. 65, Evi. Act. It is a statement. Under s. 6 of the Debt Conciliation Act the statement is not to be deemed a statement of the amount admittedly due but of the amount claimed. The debtor is in no sense promising to pay this amount: on the contrary he is applying to a Debt Conciliation Board with a view to having his liability cut down, and it cannot be inferred that there is any promise to pay anything or any admission of liability for anything.

Where there is an admission by the debtor of an agreement to pay the sum due on a bond, it is not necessary to prove the bond. Therefore s. 9 of the Debt Conciliation Act does not operate. That section does not declare that no suit could be brought on the debt. It merely states that some documents cannot be proved.

F. A. from the decree of the Court of the Additional Subordinate Judge, 1st Class, Yeotmal, dated August 26, 1936.

Mr. R. N. Padhye, for the Appellant.

Mr. V. V. Kelkar, for the Respondent.

Judgment.—This appeal is from a judgment decreeing the claim founded upon a loan for Rs. 4,000 effected on March 30, 1929. On the same date the defendant executed a bond in respect of the same transaction. Re-payments were made from time to time. On February 26, 1933 a payment of Rs. 5 was endorsed on the back of the bond. On March 25, 1933, there was a renewal. Rs. 4,400 was then found due and a bond was given for that amount. The bond, we are informed, contained interest clauses. The date of the suit is February 25, 1936.

On January 21, 1935, the debtor applied to a Debt Conciliation Board and included his debt on the bond of 1933, that item of his indebtedness being shown in his application in the following words:—

"Executed a bond for Rs. 4,400 in the year 1933. Interest at the rate of 8 annas per cent. per month. The amount of Rs. 4,870-6-0 is found due on the said bond."

The matter came before the Debt Conciliation Board, and the Board ordered the creditors to file statements and to produce various documents. The plaintiff failed to produce the bond of 1933. The Board accordingly treated his failure as coming within s. 9 of the Debt Conciliation Act, 1933, and intimated that the document would thereafter not be admissible in evidence against the debtor in any suit brought by the creditor or by any person claiming under him. A review application was made in which the creditor pointed out that his failure was due to floods. That review

application failed and the Debt Conciliation Board maintained the position it had taken up. The matter came before the Civil Court in this case, and the Civil Court considered itself not bound by the findings of the Debt Conciliation Board. It said, however, that the Civil Court was bound by s. 9 (3) and held that the document could not be looked at; neither could the earlier bond be looked at for a like reason. But the Court decreed the claim on the ground that the plaintiff could resort to the original contract of loan and ignore the bond altogether.

Before us it has been pointed out that this is not a case of a loan with collateral security, but is a case of a loan transaction reduced to writing; and it is therefore argued that so far as the original contract of loan is concerned that is reduced to writing the terms of which are to be found in the bond executed in 1929, and therefore one cannot go outside that bond to find out what the terms were of that bond and the contract that it evidenced which came to an end when the new bond was brought into existence, because not only was the new bond brought into existence but a letter of even date signed by the plaintiff was given. That letter is proved in this case and contains the following statement: "after receiving credit for remission and payment, the previous stamp dated March 30, 1929, is cancelled." In other words the first bond ended and the contract it evidenced was brought to an end and was substituted by a new contract evidenced by the terms of the bond of 1933. Therefore it is said that as the contract has been reduced to the form of a document within the meaning of s. 91, Evi. Act, and as that document, the bond of 1933, in the circumstances here present, cannot be looked at by any Court, and as it follows from that and from s. 91, that no evidence at all can be given of the terms of the contract, the plaintiff's claim should have been dismissed with costs.

In this case, however, the defendant has admitted that he executed a bond for Rs. 4,400 on March 25, 1933, on taking accounts and has admitted that he agreed to pay the amount on April 15, 1935. That is, in our opinion, an admission that on March 3, 1935, he agreed to pay Rs. 4,400 on April 15, 1935 and in the light of that admission it was quite unnecessary for the plaintiff to prove anything in order to succeed to the extent of Rs. 4,400.

This is not a case, which falls under

O. VIII, r. 5 of an implied admission. This is an example of an express admission. It is said by the plaintiff that not only should Rs. 4,400 be awarded but that interest thereon should also be awarded because there is an implied admission as to interest derived through the other admissions contained in the written statement. But, in our opinion, bearing in mind the fact that this point has been taken for the first time in this Court, that there is no issue turning round the question of admission, and that we have a discretion in the case of an implied admission, under the proviso to O. VIII, r. 5, to require the fact to be proved otherwise than by such admission, we should require the fact of the interest reserved to be proved otherwise than by admission. Were the plaintiff driven to prove it he would find himself unable to do so because he would then have to put in the bond, and that bond the Court cannot look at. It is said, however, that the amount of interest can be derived from the entry abovementioned in the application, and s. 65 of the Evi. Act is relied on. It is necessary for the plaintiff to rely on s. 65 because obviously the primary evidence is the evidence of the bond; and the bond is in existence, is not destroyed or lost; but the plaintiff's difficulty is due to the fact that he is shut out by s. 9 of the Debt Conciliation Act from proving it.

Section 65 of the Evi. Act only helps the plaintiff, however, if the statement contained in the defendant's application to the Debt Conciliation Board can be regarded as an admission. We are not prepared to treat it as an admission. It is a statement. Under s. 6 of the Debt Conciliation Act the statement is not to be deemed a statement of the amount admittedly due but of the amount claimed. The defendant is in no sense promising to pay this amount: on the contrary he is applying to a Debt Conciliation Board with a view to having his liability cut down, and it cannot, we think, be inferred that there is any promise to pay anything or any admission of liability for anything.

However that may be here there is in the pleadings an admission of an agreement to pay Rs. 4,400 due on a bond. It is therefore not necessary to prove the bond. Therefore s. 9 of the Debt Conciliation Act does not operate. That section does not declare that no suit could be brought on the debt. It merely states that some documents cannot be proved. Here it is not necessary to prove the bond in order to establish liability

to the extent of Rs. 4,400 due on April 15, 1935. The admission, however, does not go beyond that; and beyond that the plaintiff is unable to prove his claim.

The result is that the decree is varied, and the plaintiff's claim is allowed to the extent of Rs. 4,400 only together with proportionate costs in the lower Court. The defendant will have half his costs of this appeal.

D.

Appeal partly allowed.

BOMBAY HIGH COURT

Criminal Appeals Nos. 406 to 418 of 1940

November 27, 1940

BEAUMONT, C. J. AND SEN, J.

BIRAM SARDAR AND OTHERS—ACCUSED

versus

EMPEROR—OPPOSITE PARTY

Evidence Act (I of 1872), s. 27—S. 27, if affected by s. 162, Criminal Procedure Code (Act V of 1898)—Penal Code (Act XLV of 1860), s. 395—Evidence of identification of those taking part in dacoity—Value of—Criminal trial—Evidence—Report of Police Sub-Inspector to his superior that certain persons were going to commit dacoity—Source of information not disclosed—Whether can be treated as first information—Trial by jury—Unanimous opinion of Judge and assessors as to credibility of witness—High Court is reluctant to differ.

Section 27, Evi. Act, is not affected by s. 162, Criminal P. C., being saved by s. 1 (2), Criminal P. C. 184 Ind. Cas. 593 (2) and 181 Ind. Cas. 1001 (3), approved. [p. 123, col. 2.]

Evidence of identification of those taking part in dacoities at night is apt to be unreliable. [p. 122, col. 2.]

The report made by the Police Sub-Inspector to his superiors that certain suspected persons were going to commit dacoity cannot be used as a sort of first information, if the Sub-Inspector has not in his report disclosed the source of his information, and the mere fact that he says that somebody told him that certain persons were going to commit a dacoity is no evidence at all against those persons. If the Sub-Inspector of Police wanted to prove as against the accused the information which he had received, he would be bound to give evidence as to the source of his information, and to call his informant. [p. 123, col. 1.]

The High Court always differs with reluctance from the unanimous opinion of the trial Judge and the assessors as to the credibility of witnesses. [*ibid.*]

Cr. As. from the convictions and sentences passed by the Additional Sessions Judge, Jalgaon, East Khandesh.

Mr. R. R. Desai (*amicus curiae*), for the Accused.

Mr. R. A. Jahagirdar, Govt. Pleader, for the Crown.

Beaumont, C. J.—In this case the accused, other than accused No. 6, who were convicted by the Additional Sessions Judge of East Khandesh under s. 395, I. P. C.

appeal against their convictions. We are indebted to Mr. R. R. Desai, who has represented the accused as *amicus curiae*, for the industry he has devoted to the case and the ability with which he has presented it. The case has some peculiar features. All the accused, except accused No. 18, are from the village of Savkheda in taluka Yaval, and it appears that on March 5, 1940 the Sub-Inspector of Police of Yaval received information that a dacoity was contemplated that night at the village of Shirsoli, taluka Jalgaon. So he went to Jalgaon and reported to the Sub-Inspector of Police there and put in a written report, which is Ex. 8, in which he mentioned the names of the nineteen men who, he was informed, were going to commit the dacoity. The Sub-Inspector of Police of Jalgaon and the City Sub-Inspector of Police of Jalgaon accordingly went to Shirsoli with a party of Police, some of them armed and some unarmed. Unfortunately they did not arrive at Shirsoli until about 11 o'clock at night, when the dacoity was in progress, and instead of blocking the exits from the village, the Police seem to have entered the village at one end, and, when the dacoits started to throw stones at them, the Police fired, whereupon all the dacoits ran away from the other end of the village.

The result was that full advantage of this information, which at any rate was good as to the fact that a dacoity was contemplated, was not taken and no arrests were made. But the Police suspecting that the dacoits would go back to Savkheda, and realizing that for that purpose they would have to cross the river Tapti at one or other of the fordable places at Kolnhavi or Thorgaon, posted Police at those places. But the Police did not arrive at Kolnhavi until about 6 o'clock in the morning by which time there had been ample opportunity for any of the dacoits to get across the river. Accused No. 1 and accused No. 2 were arrested at Jalgaon. Accused Nos. 8 and 10, among the present appellants, were arrested at Savkheda, and the other appellants were arrested at Thorgaon trying to cross the river. All the arrests were made on the 6th, that is to say, in the early morning after the dacoity. None of the stolen property was recovered, and the evidence against the various accused consists primarily of evidence of identification, and experience shows that evidence of identification of those taking part in dacoities at night is apt to be unreliable.

I think that we shall have to be very critical in dealing with the evidence because

of this report which the Police had obtained and which mentioned the names of various persons. The learned Govt. Pleader has made a great effort to induce us to treat Ex. 8, report made by the Sub-Inspector of Police of Yaval to his superior in Jalgaon, mentioning the names of suspects, as a sort of first information, and as affording evidence that the persons named in that report were under suspicion in connection with this dacoity; but it is quite clear that the report cannot be used for any such purpose. The Sub-Inspector of Police has not in his report disclosed the source of his information, and the mere fact that he says that somebody told him that certain persons were going to commit a dacoity is no evidence at all against those persons. If the Sub-Inspector of Police wanted to prove as against the accused the information which he had received, he would be bound to give evidence as to the source of his information, and to call his informant and that, no doubt for sufficient reasons he was not prepared to do.

All that the report amounts to therefore is that the Sub-Inspector of Police did receive information which caused him to think that there might be a dacoity at Shirsoli and which induced him to go to Shirsoli with a Police party. But his information affords no ground of suspicion whatever against any of the accused, and we have to see whether the evidence against the various accused is sufficient to justify their conviction. The learned Sessions Judge and the assessors were for the most part unanimous in believing the different witnesses, and this Court always differs with reluctance from the unanimous opinion of the trial Judge and the assessors as to the credibility of witnesses. In this case I am prepared to assume that the witnesses who were regarded as honest by the learned Sessions Judge and the assessors were in fact honest; but as to some of them I think they were not in a position to be certain of the facts to which they deposed. I think that the risk of mistake on their part is in some cases too great to be run. (His Lordship after discussing the evidence against the accused proceeded further.) Mr. Desai has also raised a point of law which is occasioning a good deal of trouble to the High Courts in India, and that is the question whether information leading to the discovery of a fact and *prima facie* admissible under s. 27, Evi. Act, is inadmissible having regard to the terms of s. 162, Criminal P. C. That trouble started with the decision of the Privy

Council in *Pakala Narayana Swami v. Emperor* (1). In that case their Lordships pointed out that s. 162, Criminal P. C., which prohibits any statement made by any person to a Police Officer in the course of an investigation under Ch. XIV from being used as evidence for any purpose, except as mentioned in the section, is wide enough to include a statement made to the Police by a person who either at the time of the statement was or afterwards became an accused; and as far as I know that view had always been acted upon by this Court. Their Lordships further pointed out that on that reading of s. 162 there would to some extent be a conflict between that section and s. 27, Evi. Act, and they observed that the question might arise whether s. 162, *pro tanto* repeals the provisions of s. 27, Evi. Act, or whether s. 27, Evi. Act, is saved by s. 1, sub-s. (2), Criminal P. C., and their Lordships left that question open.

Since that decision the matter has been considered by four of the High Courts in India. The High Court of Madras in *re Subbiah Tevar* (2), and the High Court of Patna *Emperor v. Mayadhar Pothal* (3), have taken the view that s. 27, Evi. Act, is not affected by s. 162, Criminal P. C., being saved by s. 1 (2). On the other hand, a Full Bench of the Lahore High Court in *Hakam Khudayar v. Emperor* (4), by a majority have held that s. 27, Evi. Act, is *pro tanto* repealed by s. 162, Criminal P. C., and the same view has also been taken by a Full Bench of the Allahabad High Court in *Baldeo v. Emperor* (5). Having read the various judgments of the other High Courts, some of which extend to a considerable length, I am reluctant to add to the number of judgments on the point; but the lower Courts in this province are entitled to guidance. I prefer the view taken by the High Courts of Madras and Patna to the view taken by the High Courts

(1) 41 Bom. L. R. 428; 180 Ind. Cas. 1; A I R 1939 P. O. 47; 40 Cr. L. J. 364; 18 Pat. 234; I L R (1939) Kar. (P. O.) 123; 66 I. A. 66; 1939 O. L. R. 134; (1939) M. W. N. 185; 11 R. P. C. 166; 1939 O. W. N. 282; 20 P. L. T. 265; 49 L. W. 349; 43 O. W. N. 473; (1939) A. L. J. 298; 41 P. L. R. 272; 69 C. L. J. 273; (1939) 1 M. L. J. 756 (P. O.).

(2) I L R (1939) Mad. 947; 184 Ind. Cas. 593; A I R 1939 Mad. 856; 50 L. W. 318; (1939) 2 M. L. J. 455; (1939) M. W. N. 1000; 12 R. M. 469; 41 Cr. L. J. 41.

(3) 18 Pat. 450; 181 Ind. Cas. 1001; A I R 1939 Pat. 577; 20 P. L. T. 420; 5. B. R. 706; 11 R. P. 653; 40 Cr. L. J. 625.

(4) I L R (1940) Lah. 242; 188 Ind. Cas. 498; A I R 1940 Lah. 129; 41 Cr. L. J. 591; 13 R. L. 1 (F. B.).

(5) I L R (1940) All. 396; 188 Ind. Cas. 562; A I R 1940 All. 263; 41 Cr. L. J. 627; (1940) A. L. J. 241; 13 R. A. 48 (F. B.).

of Lahore and Allahabad. Section 1 (2), Criminal P. C., reads :

"In the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force."

Most, if not all, of the learned Judges agree that s. 27, Evi. Act, is a special law in force at the date of the passing of the amended s. 162 and that point seems to me beyond question. It is a law applicable to a particular subject within s. 41, I. P. C. But the view accepted in Lahore and Allahabad is that s. 162 amounts to a "specific provision to the contrary" because the prohibition therein is expressed in the most clear and emphatic terms. But surely much more than that is required. Section 1 (2) enacts a rule of construction to be applied in the interpretation of the Code. That rule is that where there is a conflict between the Code and a special law, the special law is to prevail in the absence of a specific provision to the contrary. But the provision must be to the contrary of the rule of construction, and not merely of the special law. The section presupposes a conflict, and a conflict is none the less a conflict because it is clear for all to see. Reliance has been placed on the use of the word "specific" rather than "express".

I am myself inclined to think that "specific provision" is a stronger expression than "express provision," and means a provision clearly expressed. I do not see how a provision arising by implication only can be said to be specific. But, if this is going too far, I am clearly of opinion, that the language of the Code giving rise to the implication must at any rate be so directly contradictory to the special law that it can be affirmed with certainty that the Legislature intended to override the special law. There is, however, nothing in the language of s. 162 which suggests that the Legislature had in mind s. 27, Evi. Act. The language of the two sections is quite distinct, and to a large extent the respective subject-matters are not identical. Section 162, deals with all statements made to a Police Officer in the course of an investigation ; s. 27, Evi. Act, merely deals with information received from a person accused of an offence in the custody of a Police Officer which leads to a discovery. The two sections only overlap in respect of statements made to a Police Officer in the course of an inquiry which lead to a discovery. It seems to me impossible to hold that s. 162, contains a specific provision that s. 27, Evi. Act, is not to prevail over it.

Another argument which appealed to the High Courts of Lahore and Allahabad is based on the history of the two sections. It is said that the Legislature must have known when they amended s. 162 in 1923 that originally the subject-matter of s. 27, Evi. Act, had been included in the Code ; that prior to 1893, when the terms of s. 162 were in conflict with s. 27, Evi. Act, the latter section was expressly saved from the operation of the former section, and that the Court is bound to assume that the omission to insert in 1923 an express provision saving the operation of s. 27 was deliberate, more particularly as in the section as it existed from 1898 there was an express saving of s. 32, Evi. Act. I do not suppose that anyone seriously doubts that the omission of the Legislature in 1923 to deal with s. 27 in one sense or another was due to the fact that it was not present to the minds of the legislators that the amendment of s. 162 would appreciably affect s. 27 ; but if the Court must deal with the matter pedantically, one may suggest that the omission to save s. 27 may have been due to a just appreciation by the Legislature of the true effect of s. 1 (2), and to a reluctance to insert an unnecessary saving clause in respect of s. 27, merely because the Legislature of 1898 had inserted such a clause in the case of s. 32. This explanation, if not conspicuous for its probability, seems to me much more probable than the hypothesis that the Legislature, realizing the conflict between the amended s. 162 and s. 27, and intending to repeal the latter section *pro tanto*, and thereby to alter the law as it had existed for 50 years nevertheless omitted any mention of s. 27. In my opinion to read s. 162, Criminal P. C., as overriding s. 27, Evi. Act, is to ignore the terms of s. 1 (2) of the Code.

The point is really not of very much substance in the present case as against the accused whose appeals have been dismissed. But, as I have said, the lower Courts are entitled to have a lead from this Court on a question which arises so frequently, particularly in dacoity cases, as to the admission of evidence under s. 27, Evi. Act. I think that those Courts may safely proceed on the assumption that at present the law has not been altered by anything which the Privy Council said. In the result, the appeals of accused Nos. 1, 2, 3, 4, 5, 15 and 18 will be allowed and the appeals of accused Nos. 8, 10, 12, 13, 14 and 16 will be dismissed.

s.

Order accordingly.

LAHORE HIGH COURT
Full Bench

First Appeal No. 149 of 1939

January 2, 1941

TEK CHAND, ABDUL RASHID AND SALE, JJ.

MOHAMMAD SOHAIL AND OTHERS

—PLAINTIFFS—APPELLANTS

versus

GHULAM RASUL AND ANOTHER—

DEFENDANTS—RESPONDENTS

Court Fees Act (VII of 1870), s. 7 (iv) (b), Sch. II, Art. 17 (vi)—Suit by Muhammadan co-sharer in actual possession of portion of property for partition alleging his joint possession of entire property by reason of possession of another co-sharer—Court-fees payable—It makes no difference for purpose of Art. 17 (vi) that in one case joint property is held by parties as joint tenants and in other they own it as "tenants-in-common"—Muhammadan Law—Co-heirs of deceased Muhammadan succeeding to his property hold it as co-owners until partition—Possession of one is possession of all.

Section 7 (iv) (b) applies to cases relating to joint family property, where the plaintiff has been ousted from its enjoyment and seeks to be restored to joint enjoyment. It does not apply where he is in enjoyment of the right but merely seeks to change the mode of such enjoyment. It does not apply to a suit for partition of joint property by a person alleging himself to be in joint possession whether he owns property in co-parcenary or as a tenant-in-common with the defendants. Hence a Muhammadan co-sharer, who alleges that he is in joint possession of the entire property by reason of the possession of another co-sharer and who is also in partial actual possession of certain portion of the property as indicative of his right to co-ownership in the whole property, can bring a suit for partition on a stamp of Rs. 10 only and the case falls under Art. 17 (iv) and not under s. 7 (iv) (b), Court Fees Act. 186 Ind. Cas. 328 (1), **Overruled**.

[Case-law referred to.]

Clause (vi) of Art. 17, Sch. II, Court Fees Act, applies to a suit by a co-parcener for partition and equally to a similar suit by a co-owner. It makes no difference for this purpose, that in one case the joint property is held by the parties as 'joint tenants', while in the other they own it as 'tenants-in-common.' And in the latter class of cases, it is again, immaterial that the parties are governed by Muhammadan Law, or that they do or do not belong to the same family. [p. 129, cols. 1 & 2.]

The co-heirs of a deceased Muhammadan, who have succeeded to his property in specific shares under their personal law, hold it as co-owners until there has been a partition by metes and bounds, and possession of one is the possession of all. 109 Ind. Cas. 658 (8), 118 Ind. Cas. 905 (9) and 117 Ind. Cas. 803 (10), relied on. [p. 129, col. 2.]

F. A. referred by Dalip Singh and Sale, JJ., dated January 25, 1940.

Order of Reference.

Dalip Singh, J.—One Mehr-un-Nisa was married first to Rahim Bakhsh from whom she had a son Abdul Latif. Abdul Latif had three sons and two daughters as shown at p. 3 of the printed paper-book. Subsequently Rahim Bakhsh died and Mehr-un-Nisa married Ghulam Rasul, defendant No. 1. Abdul Latif predeceased his mother

Mehr-un-Nisa. Four of the children of Abdul Latif have now sued for partition of their share of the property of Mehr-un-Nisa. Ghulam Rasul is the contesting defendant. In the plaint the plaintiffs alleged that they were in actual possession of houses Nos. 2 and 8 out of the property in dispute through tenants and they were constructively in possession of the entire property jointly with Ghulam Rasul, defendant No. 1. Accordingly they sued for partition on a ten-rupee stamp on the ground that their case fell within Art. 17 (vi). The defendant took various defences, which need not now concern us, and the Court framed preliminary issues given at p. 11, the relevant issues for the purposes of this appeal being :

"Issue No. 1: Whether the plaintiffs are in possession of any portion of the property in dispute and so are entitled to sue on a court-fee stamp of Rs. 10 ? and Issue No. 2: Whether the plaintiffs have *locus standi* to sue when their father died during the lifetime of Mst. Mehr-un-Nisa ?"

On Issue No. 1 the trial Court held that at best the plaintiffs by force or fraud have succeeded in getting possession of properties Nos. 2 and 8, but they were not in constructive joint possession of the entire property because they were not co-sharers at all under the Muhammadan Law as their father Abdul Latif had predeceased their mother, Mst. Mehr-un-Nisa. If they had been co-sharers the suit could have been properly brought on a ten rupee stamp but as they were not co-sharers with Ghulam Rasul they had neither *locus standi* to bring the suit nor could their suit proceed on a ten rupee stamp. It therefore dismissed the plaintiffs' suit but left the parties to bear their own costs in the circumstances of the case. The plaintiffs have come in appeal and their Counsel urges that the plaintiffs are co-sharers under Muhammadan Law as they would only cease to be co-sharers if there were sons of Mehr-un-Nisa other than Abdul Latif, now alive.

The learned Counsel for the respondent does not contest this proposition nor does he support the judgment of the trial Court on any of the other issues which were found against him. All he contends is on the authority of *Nisar Ali Khan v. Nawazish Ali Khan* (1), that neither the suit nor this appeal is competent on a ten rupee stamp. The contention appears to be that granting that they are co-sharers they are still constructively not in possession of the entire property and even if they were construc-

(1) A I R 1939 Lah. 568; 186 Ind. Cas. 328; 12 R. L. 388.

tively in possession their title not being joint with Ghulam Rasul, defendant, but their shares being specific and ascertainable their suit for possession of specific shares amounts to a suit to enforce a share in joint family property and therefore falls under s. 7 (iv) (b), Court Fees Act. As the trial Court has not decided the case except the preliminary issues, apart from the objection raised by the learned Counsel for the respondents, the appeal would have to be accepted and the case remanded for disposal on the merits to the trial Court. There is no doubt however that the contention of the learned Counsel for the respondents is supported by the authority to which he refers. The reasoning of that authority, which was a Division Bench authority of this Court appears to be as given at p. 571*, cols. 1 and 2. There a Full Bench ruling, *Asa Ram v. Jagan Nath* (2), where in a case of a joint Hindu family it was held that a suit of this kind would proceed on a ten rupee stamp, is distinguished in the following manner: All the members of a Hindu co-parcenary were in actual or constructive possession of the whole of the property and the plaintiffs were merely seeking a change in the form of the enjoyment of the property. The distinction therefore according to the ruling, is that where the title is joint each co-parcener is in possession of every portion of the joint property and his share is not defined and hence Art. 17, Court Fees Act, becomes applicable but where the shares of co-sharers are known and ascertained, a suit for partition is virtually a suit to enforce a right to a share in joint family property. The plaintiffs in such a case are not in actual or constructive possession of their share and therefore the suit falls under s. 7 (iv) (b), Court Fees Act.

The reasoning does not seem to be correct to me, speaking with respect to the learned Judges, for the simple reason that though the shares of tenants-in-common may be defined yet nevertheless until actual partition each co-sharer is in constructive possession of the entire property for in each particle of that property he has a share and therefore though he cannot claim the whole of each particle of that property nevertheless he remains in possession of the whole property to the extent of a share. Therefore I do not see any validity in the distinction sought to be drawn. If this were not so then the possession of one co-sharer would

be adverse to that of the other co-sharer, but this is contrary to various rulings of the Privy Council. I therefore do not think that this reasoning is correct. However as the matter has been decided by a Division Bench, the point is of importance and I think arises frequently. I would refer this point to a Full Bench for decision, namely, "Whether a Muhammadan co-sharer who alleges that he is in joint possession of the entire property by reason of the possession of another co-sharer and who is also in partial actual possession of certain portion of the property as indicative of his right to co-sharership in the whole property can bring a suit for partition on a stamp of Rs. 10 only and the case falls within Art. 17 (vi) and not under s. 7 (iv) (b), Court Fees Act?"

Sale, J.—In this case the learned Subordinate Judge has held on a preliminary issue that the plaintiffs are not heirs under Muhammadan Law because they are children of a predeceased son. He has further expressed the view that the suit would lie on a ten-rupee stamp only if the plaintiffs can show that they are heirs under the Muhammadan Law. It was urged before us by Counsel for the appellants, and conceded by Counsel for the respondents, that the decision that the plaintiffs are not heirs under the Muhammadan Law cannot stand, because, there being no other sons of Mehr-un-Nisa alive, the plaintiffs though not entitled to the status of 'sharers' under the Muhammadan Law, would at any rate succeed as residuaries. We must therefore assume for the purposes of court-fees in this case that the plaintiffs are heirs under Muhammadan Law and as such entitled to a share in the property. Now, under the Division Bench authority, *Nisar Ali Khan v. Nawazish Ali Khan* (1), which related to a case of heirs under Muhammadan Law suing for partition of their share, the present case would fall for the purposes of court-fee under s. 7 (iv) (b), Court Fees Act, which requires the plaintiff to state for purposes of court-fee the amount at which he values the relief sought.

With all due respect I feel a double difficulty in following this authority. In the present case a right to share in the property in question is conceded. It is difficult therefore to see how the suit can be described as a suit to enforce a right to share as contemplated by s. 7 (iv) (b), Court Fees Act. What the plaintiffs want in this case is not to enforce a right to share, but to change the mode of enjoying their share from a state of jointness, to a state of exclusive

(2) 15 L 531; 150 Ind. Cas. 994; A I R 1934 Lah. 563; 36 P L R 48; 7 R L 46 (F B).

*Page of A. I. R. 1939 Lah.—[Ed.]

possession. It is possibly arguable that the case might fall under s. 7 (v), Court Fees Act, as being in effect a suit for possession of property; in the alternative it would be, as contended by Counsel for the appellants before us, a suit falling under Art. 17 (vi) of Sch. II, Court Fees Act, on the ground that it is not possible to estimate at a money-value the subject-matter in dispute. But in any case it is difficult to see how the suit can fall under s. 7 (iv) (b), Court Fees Act. The second difficulty which I see in this case is that with all due respect to the Division Bench decision it seems to me that the title of one co-sharer in such a case is joint with that of the other co-sharers and every co-sharer therefore is, as pointed out by my learned brother, in constructive possession of the entire property. Accordingly I would agree with the terms of reference to a Full Bench as proposed by my learned brother.

Messrs. *Ghulam Mohy-ud-Din* and *Abdul Aziz*, for the Appellants.

Mr. *Madan Mohan Kapur*, for the Respondents.

OPINION

Tek Chand, J.—The facts of the case which has given rise to this reference are as follows: The property in dispute belonged to one *Mst. Mehr-un-Nisa*. She was originally married to *Rahim Bakhsh*. On *Rahim Bakhsh's* death many years ago, she married *Ghulam Rasul* (defendant No. 1). From *Rahim Bakhsh* she had a son, *Abdul Latif*. *Abdul Latif* died in 1929, in the lifetime of his mother (*Mst. Mehr-un-Nisa*), leaving three sons, *Mohammad Sohail*, *Subah Sadiq* and *Abdul Hafiz* (plaintiffs Nos. 1 to 3) and two daughters, *Mst. Shamshad Ara Begum* (plaintiff No. 4) and *Mst. Balqis Ara Begum* (defendant No. 2). *Mst. Mehr-un-Nisa* died sometime in 1935. It is alleged by the plaintiffs that at the time of her death she owned nine houses which are now in dispute. On June 16, 1936, *Ghulam Rasul*, describing himself as the exclusive owner of these houses, executed a document, whereby he purported to make them *waqf* for the purposes mentioned therein. On May 25, 1938, the plaintiffs, who are the three sons and one of the daughters of *Mst. Mehr-un-Nisa*, instituted a suit for possession by partition of 21/32nd share in nine houses left by *Mst. Mehr-un-Nisa*, alleging that they were in actual possession of two of the houses (Nos. 2 and 8) and were in constructive possession of the others as co-sharers, that the so-called *waqf* created by *Ghulam Rasul* was fictitious and had been effected

to deprive the plaintiffs of their lawful rights, and that it was ineffectual against them. They, further averred that they did not want to keep their share in the properties in dispute joint with the defendants. They, therefore, prayed that:

"A decree for possession by partition (i. e., change from joint to separate possession) of 21/32nd share in the houses in dispute be passed in their favour against the defendants."

The suit was valued for purposes of jurisdiction at Rs. 60,000 and a court-fee of Rs. 10 was paid under Art. 17 (vi) of Sch. II, Court Fees Act. The defendant, *Ghulam Rasul*, resisted the suit on various grounds, of which those material for our present purposes are: (1) that the plaintiffs were not in possession of any part of the joint property and, therefore, they must pay *ad valorem* court-fee on the market value of their share and (2) that under Muhammadan Law, which admittedly governed the parties, the plaintiffs had no *locus standi* to sue for partition as they were not heirs of *Mst. Mehr-un-Nisa*, their father *Abdul Latif* having predeceased her. The trial Judge found as a fact that the plaintiffs were in actual possession of houses Nos. 2 and 8, but as, in his view of the Muhammadan Law, the plaintiffs were "not heirs of *Mst. Mehr-un-Nisa*, they were not co-sharers and could not be in constructive joint possession of the entire property." He therefore held that the court-fee paid on the plaint was insufficient, and also that the plaintiffs had no *locus standi* to sue for partition. On these findings he dismissed the suit, leaving the parties to bear their own costs.

From this decree the plaintiffs preferred a first appeal to this Court, which came up for hearing before *Dalip Singh* and *Sale, JJ.* Before them, it was conceded by Counsel for *Ghulam Rasul*, respondent, that the finding of the lower Court that the plaintiffs were not heirs of *Mst. Mehr-un-Nisa* under Muhammadan Law was incorrect. The plaintiffs being the children of a predeceased son of *Mst. Mehr-un-Nisa* were no doubt not "sharers," but as no child of *Mst. Mehr-un-Nisa* was alive at the time of her death, the plaintiffs were "residuaries" and as such were entitled to succeed under Muhammadan Law. Counsel however contended that neither the suit nor the appeal was competent on a ten rupee stamp, as the plaintiffs, even though they were co-heirs with *Ghulam Rasul*, could not, in the eye of the law, be held to be constructively in possession of the entire property, and even if they were constructively in possession their title not being

joint with Ghulam Rasul but their shares being specific and ascertainable their suit for possession of specific shares was really a suit to enforce a right to a share in joint family property and therefore falls under s. 7 (iv) (b) and not under Art. 17 (vi), Court Fees Act. In support of this contention the learned Counsel relied upon a Division Bench ruling of this Court reported in *Nisar Ali Khan v. Nawazish Ali Khan* (1). That case certainly supported the contention of Counsel for the respondents, but as the learned Judges doubted its correctness they have referred the following question to the Full Bench :

"Whether a Muhammadan co-sharer who alleges that he is in joint possession of the entire property by reason of the possession of another co-sharer and who is also in partial actual possession of certain portion of the property as indicative of his right to co-ownership in the whole property can bring a suit for partition on a stamp of Rs. 10 only and the case falls within Art. 17 (vi) and not under s. 7 (iv) (b), Court Fees Act?"

Article 17 (vi) is the residuary article and would apply to a particular case only if it did not fall within any other provision of the Act. In *Nisar Ali Khan v. Nawazish Ali Khan* (1) a suit by a Muhammadan co-sharer for partition of joint properties on allegations similar to those described in the above question was held to be governed by cl. (b) of sub-s. (iv) of s. 7 of the Act, which prescribes the court-fee payable on suits "to enforce the right to share in any property on the ground that it is joint family property." It will be seen that the clause applies to those cases only, in which the allegation in the plaint is that the property in dispute is "joint family property" and the relief asked for is to "enforce the right to share" in it. Now, a suit by a Muhammadan co-sharer for partition of alleged joint property is not a suit of this description at all. A Muhammadan family, as such, has no property, and property owned by two Muhammadans in co-ownership, even though they are related to each other, is not "joint family property" in the sense in which this expression is used in the clause. Secondly, a claim for partition of alleged joint property is not a suit "to enforce the right to share" in it. As pointed out by the Full Bench in *Asa Ram v. Jagan Nath* (2), at p. 560*, this clause applies to cases relating to joint family property, where the plaintiff has been ousted from its enjoyment and seeks to be restored to joint enjoyment, and not where he is in enjoyment of the right, but merely seeks to change the mode of such

enjoyment. The Calcutta and the Bombay High Courts, also, have interpreted this clause in the same way.

In *Bidhata Rai v. Ram Chariter Rai* (3), at p. 655 Mookerji, J., observed that the clause referred to a suit for joint possession and not to a suit for partition. In *Dagdu Sakharam v. Totaram Narayan* (4), at p. 663 Batchelor and Beaman, JJ. held that cl. (b) was intended merely for suits to enforce what may be called an "abstract claim or right to share" in joint property. In Madras however the contrary view prevailed for several years. In *Rangiah Chetty v. Subramania Chetty* (5), the majority of a Full Bench of three Judges disagreed with the interpretation put on the clause by the Calcutta and Bombay High Courts in the cases cited above and held that it applied to a suit by a co-parcener in possession for partition of joint family property. The question was recently reconsidered in *Ramaswami Ayyangar v. C. S. Rangachariar* (6), when a Full Bench of five Judges overruled the majority decision in *Rangiah Chetty v. Subramania Chetty* (5), and unanimously adopted the interpretation put on the clause by the Calcutta, Bombay and the Lahore High Courts, and held that

"Section 7 (iv) (b) cannot be deemed to apply to a partition suit, where the plaintiff is in joint possession. It can only apply in seeking relief in respect of possession of immovable property, when he is out of possession."

Abdur Rahman, J., who discussed the question at length (p. 285*) observed that this clause

"is apparently applicable to persons who own joint family property in the sense in which that expression is used in the Hindu Law and could not be applied to persons who are merely tenants-in-common.....As for the words used in s. 7 (iv) (b), ordinarily the expression to 'enforce the right to share' would convey the meaning that the plaintiff wanted to enforce a right which he had been deprived from sharing and not that he wished to exercise a right which he had been enjoying although in a different form or manner."

The learned Judge, after referring to various provisions of the Act, came to the conclusion that a suit by a person for partition of property, of which he is in joint possession, either as a co-parcener or as a tenant-in-common, is governed by Art. 17 (vi) of

(3) 6 C L J 651; (655); 12 C W N 37; 3 M L T 33.

(4) 33 B 658 (663); 4 Ind. Cas. 243; 11 Bom. L R 1074.

(5) 21 M L J 21; 8 Ind. Cas. 512; (1910) M W N 755; 9 M L T 3.

(6) I L R (1940) Mad. 259; 186 Ind. Cas. 494; A I R 1940 Mad. 113; (1940) 1 M L J 32; 51 L W 11; (1940) M W N 126; 12 R M 645 (F B).

Sch. II, Court Fees Act. In this connection, reference may also be made usefully to Art. 127, Lim. Act, the wording of which is analogous to that of s. 7 (iv) (b), Court Fees Act. In interpreting that article, it has been laid down in numerous cases that the expression "to enforce a right to share in joint family property" contemplates a suit by one member of a co-parcenary against the other members for his restoration to joint enjoyment (*status quo ante*) from which he has been excluded. The leading case on the subject is *Amme Raham v. Zia Ahmad* (7), in which it was held by the Full Bench that the article has no application to the case in which members of a Muhammadan family are suing for possession by right of inheritance of shares in immovable property alleged to have been that of a deceased common ancestor of themselves and the defendants, but that it relates to properties held by a family in co-parcenary.

It will thus be seen that the consensus of opinion among the High Courts is that s. 7 (iv) (b) does not apply to a suit for partition of joint property by a person alleging himself to be in joint possession, whether he owns the property in co-parcenary, or as a tenant-in-common, with the defendants. The learned Judges, who decided *Nisar Ali Khan v. Nawazish Ali Khan* (1), observed that in this matter there was a distinction between the case of a Hindu co-parcener suing the other co-parceners for partition of joint property and that of a Muhammadan co-owner suing the other co-owners for the same relief as though in both cases, there is unity of possession; in the latter case (unlike the former) there is no unity of title, the shares of the co-owners being known and ascertained. With great respect, it is difficult to see how this circumstance has any bearing on the question of payment of court-fee—it certainly cannot bring the case of a co-owner suing for partition within the purview of cl. (b) of sub-s. (iv) of s. 7, which as already shown above, is meant to apply to an entirely different type of cases.

Further the reason as to why a suit by a co-parcener for partition falls within cl. (vi) of Art. 17 of Sch. II, Court Fees Act, applies equally to a similar suit by a co-owner. In either case, the relief sought is the change in the mode of enjoyment of joint property of which the plaintiff *ex hypothesi*, is in joint possession and it is not possible to estimate at money value the subject-matter in dispute. It makes no difference for this purpose, that in one case the joint property is

held by the parties as 'joint tenants,' while in the other they own it as 'tenants-in-common.' And in the latter class of cases, it is, again, immaterial that the parties are governed by Muhammadan Law, or that they do or do not belong to the same family. It is well-settled that the co-heirs of a deceased Muhammadan, who have succeeded to his property in specific shares under their personal law, hold it as co-owners until there has been a partition by metes and bounds, and possession of one is the possession of all. *Ahmed Bibi v. Shamas Din* (8), *Muhammad Bakhsh v. Fateh Mahammad* (9) and *Jano v. Narsingh Das* (10). It has accordingly been held that if a Muhammadan co-heir, alleging himself to be in constructive joint possession of the property left by the common ancestor, and in actual possession of a part of it, sues the other co-heirs for partition, his claim is merely one for change in the mode of enjoyment of the alleged joint property and this relief is one which is not capable of being valued in money and is governed by Art. 17 (vi) of Sch. II, Court Fees Act, under which a court-fee of Rs. 10 only is payable, see *Ahmuddin Tamijuddin v. Amiruddin*, 44 Ind. Cas. 216 (11), at p. 218, *Ma Ma Nyun v. Maung Mya* (12), *Hassan Khan v. Ahmed Khan* (13), *Kurshit Kathumby v. Hyder Khan*, 75 Ind. Cas. 93 (14), *Nikka v. Fazal Dad Khan* (15), *Hajaran v. Muhammad Shafi Khan* (16) and *Haji Yusif v. Ghulam Hussein*, 16 Ind. Cas. 771 (17). The only ruling to the contrary is a Single Bench decision of Harrison, J., in *Rakhi v. Khairan* (18), but that case was dissented from in *Hajaran v. Muhammad Shafi Khan* (16), and has been disapproved by the Full Bench in *Asa Ram v. Jagan Nath* (2), at pp. 554 and 561*.

It will be seen that the decision in *Nisar Ali Khan v. Nawazish Ali Khan* (1), that

(8) 10 L 842; 109 Ind. Cas. 658; A I R 1929 Lah. 195 (2).

(9) 10 L 849; 118 Ind. Cas. 905; A I R 1929 Lah. 464; 31 P L R 179; Ind. Rul. (1929) Lah. 825.

(10) 11 L 29; 117 Ind. Cas. 803; A I R 1929 Lah. 549; 31 P L R 421.

(11) 44 Ind. Cas. 216 (218); A I R 1918 Cal. 501.

(12) (1937) Rang. 447; 174 Ind. Cas. 794; A I R 1938 Rang. 76; 10 R Rang. 428.

(13) A I R 1935 Pesh. 30.

(14) 75 Ind. Cas. 93; A I R 1924 Mad. 207; (1923) M W N 564.

(15) A I R 1930 Lah. 839; 123 Ind. Cas. 525 (2); Ind. Rul. (1930) Lah. 445; 31 P L R 315.

(16) A I R 1933 Lah. 780 (2); 144 Ind. Cas. 614; Ind. Rul. (1933) Lah. 534; 34 P L R 772.

(17) 16 Ind. Cas. 771; 6 S L R 74n.

(18) A I R 1932 Lah. 421; 139 Ind. Cas. 676; 33 P L R 261; Ind. Rul. (1932) Lah. 604.

*Pages of 15 L.—[Ed.]

such a suit for partition by a Muhammadan co-heir is governed by s. 7 (iv) (b) is supported neither by the plain wording of the section nor by authority, and it must be held that that case was not correctly decided. My answer to the question referred to us is that in a suit for partition of joint property by a Muhammadan on the allegations mentioned in the question, the proper court-fee payable is Rs. 10 under Art. 17 (vi) of Sch. II, Court Fees Act, and that the case does not fall within s. 7 (iv) (b) of the Act. The case will now be sent back to the Division Bench for disposal.

Abdul Rashid, J.—I agree.

Sale, J.—I agree.

D.

Answer accordingly.

MADRAS HIGH COURT Full Bench

Second Appeal No. 620 of 1937

November 8, 1940

LEACH, C. J., VENKATARAMANA RAO AND
HORWILL, J.J.

CHINATALAPATI VENKATANARA-
SIMHARAJU—APPELLANT

versus

SURISETTI RAMASWAMI AND ANOTHER—
RESPONDENTS

Easement—Right of way—Use of, by person for less than prescriptive period—If can sue to prevent stranger from obstructing his way—Interference of—Right of way—Principles applicable.

A person who has been using a particular way over land adjoining his, but for less than the prescriptive period, cannot maintain an action to prevent a stranger from obstructing him using the way. An action can only be maintained if the obstruction to user will have the effect of substantially depriving a person of the enjoyment of his property. 29 Ind. Cas. 255 (2), approved, 6 Ind. Cas. 266 (3), explained, *Jeffris v. Williams* (5) and *Bibby v. Carter* (6), explained and approved, *Jootoor Acchanna v. Vanamala Venkamma* (4), referred to. [p. 131, col. 2; p. 132, col. 2.]

The considerations which may apply when the interference complained of has reference to the access of light and air or to support from adjoining land may not apply when the interference has reference to the use of a way over another's land. [p. 131, col. 2.]

S. A. against the decree of the Sub-Judge, Vizagapatam, in A. S. No. 101 of 1936.

Order of Reference

Krishnaswami Ayyangar, J.—The appellant in this second appeal was the defendant in a suit instituted by the respondents for a declaration that they are entitled to a right of way along the passage marked E in

the plan attached to the plaint and for an injunction restraining the defendant from interfering with their exercise of the right. According to the respondents the passage which is the subject-matter of the dispute between the parties is a portion of the *gramakantam* land of the village belonging to the Govt. They alleged that from time immemorial the owners of the house which now belongs to them have been exercising the right. They further alleged that they anticipated obstruction to their right of way by the appellant and hence instituted the suit. The appellant denied that the passage E is a portion of the *gramakantam* and denied also the right of passage along it claimed by the respondents. The main issue framed in the suit by the District Munsif was whether the plaintiffs are entitled to the easement claimed. The learned District Munsif did not frame any issue to the title to the property in which the passage E lay, though as I have mentioned the plaintiffs claimed that the whole of the land in which that passage lay was *gramakantam*. Indeed he made it perfectly clear at about the end of para. 8 that in his opinion this question of title did not require to be decided and he accordingly gave no decision regarding it. He however considered the evidence on the question whether the plaintiffs had established user of the passage as of right for the statutory period and came to the conclusion that they had not made out their case. The suit was accordingly dismissed. The plaintiffs preferred an appeal which was heard by the Subordinate Judge of Vizagapatam. In the appellate judgment two findings have been recorded both findings of fact *viz.* (1) that the site in which the passage E lay was not proved to be the property of the defendant and (2) that the plaintiffs had established long user for over 20 years of the passage E for egress and ingress to their house.

From the finding of the learned Judge that the site in which the passage lay did not belong to the defendant it followed that the title was in the Govt., the land being *gramakantam* land. On this footing the learned Judge was of opinion that the respondents had not prescribed a right of easement as against the Govt. as there had been no enjoyment as of right for 60 years which is the period of limitation as against the Govt. None the less he held that the appellant who was a mere stranger cannot obstruct the respondents who had had more than 20 years enjoyment of the right of way and who were in the process of acquiring a

full easementary right against the Govt. The learned Judge observes as follows:

"The progress of the acquisition of easement cannot be obstructed by any other than the owner of the servient tenement and a mere stranger cannot obstruct any person in the exercise of what may be called an inchoate easement."

In support of this opinion he relied upon the observations of the learned Judges who decided the case reported in *Chinnasami Goundan v. Balasundara* (1). On a reading of the case cited above it is clear that no decision was actually rendered on the precise question which arises for consideration in this second appeal. It may be that there is some indication of an inclination in favour of the view of the Subordinate Judge in this sentence which occurs at p. 264*:

"It may be a question whether a mere stranger can obstruct another person in the exercise of even what may be called an inchoate right of easement."

But it is fairly clear that a decision regarding the correctness of the proposition was not called for in the view that the learned Judges took of the facts of the case before them. Lower down in the same paragraph the Court observed:

"All that I am concerned to point out is that the case cannot be compared to that of a mere stranger interfering with the use of a right of way by a person who is in the process of acquiring it by a course of prescriptive enjoyment."

Mr. Govindarajachari appearing for the appellant has drawn my attention to the decision reported in *Narasappayya v. Ganapati Rao* (2) where Miller and Sadasiva Ayyar, JJ. held that unless an easement had ripened into a prescriptive one, mere enjoyment of the user for any length of time short of the full period of prescription gave no right for the enjoyer to maintain an action against any person infringing such a user. There is a reference in this decision to an earlier decision of a Bench of this Court reported in *Kondappa Rajan Naidu v. Dewarakonda Suryanarayana* (3). The headnote in the latter case runs as follows:

"It is well settled law that a trespasser, in enjoyment of land for less than the statutory period, is entitled to be maintained in possession against all persons except the true owner. The same principle is applicable to incorporeal rights such as rights to light and water courses. A person in enjoyment of a water course for less than 20 years is entitled to protection in such enjoyment against persons who have no right to such water course."

(1) 67 M L J 262; 152 Ind. Cas. 216; A I R 1934 Mad. 575 40 L W 514; 7 R M 200; (1934) M W N 1012.

(2) 38 M 280; 29 Ind. Cas. 255; A I R 1916 Mad. 801.

(3) 34 M 173; 6 Ind. Cas. 266; 20 M L J 803; 7 M L T 352? (1910) M W N 117.

* Page of 67 M L J—[Ed.]

In spite of the observations in *Narasappayya v. Ganapati Rao* (2) to the contrary I find it impossible to reconcile the two decisions or to escape the conclusion that they are really in conflict. It appears to me the only way in which this conflict is to be solved is by having the point referred to a Full Bench and obtaining an authoritative ruling and not by my preferring one view to the other. The papers will therefore be placed before my Lord the Chief Justice for orders as to the case being posted before a Full Bench, for a decision of the following question, namely, whether a person who is in the enjoyment of an easement but who has not acquired a title to it by prescription or otherwise, can maintain an action to prevent its obstruction by any person other than the owner of the servient tenement?

Messrs. V. Govindarajachari and B. V. Ramanarasu, for the Appellant.

Mr. C. Rama Rao, for the Respondents.

OPINION

Leach, C. J.—The question which has been referred reads as follows:

"Whether a person who is in the enjoyment of an easement but who has not acquired a title to it by prescription or otherwise, can maintain an action to prevent its obstruction by any person other than the owner of the servient tenement?"

The considerations which may apply when the interference complained of has reference to the access of light and air or to support from adjoining land may not apply when the interference has reference to the use of a way over another's land and as this reference arises out of a case relating to an alleged right of way we consider that the question should be reframed in these terms: "Can a person who has been using a particular way over land adjoining his, but for less than the prescriptive period, maintain an action to prevent a stranger from obstructing him using the way."

In *Jootoor Acchanna v. Vanamala Venkamma* (4) a Bench of this Court (Collins, C. J., and Parker, J.) held that a plaintiff who had received light through a window opening on vacant ground, but had not enjoyed the light sufficiently long to acquire an easement, was entitled to an injunction against a person who was not the owner of the vacant land, restraining him from building on it so as to cause obstruction to the light. The Court said:

"It was not necessary for plaintiff to establish prescriptive rights of easement against a wrongdoer and that the mere fact of plaintiff's enjoyment is sufficient to entitle him to an injunction."

(4) 5 M L J 24.

The authority for this statement was the well-known case in *Jeffris v. Williams* (5) where Parke, B. observed :

"If a house is *de facto* supported by the soil of a neighbour, this appears to us to be sufficient title against any one but that neighbour, or one claiming under him. Just as one who should prop his house up by a shore resting on his neighbour's ground, would have a right of action against a stranger, who, by removing it, causes the house to fall ; but none against his neighbour or one authorized by the neighbour to do so, if he took it away and caused the same damage."

The strict form of pleading of the olden days was an important factor in the decision in *Jeffris v. Williams* (5), but nevertheless the case established the principle that a person without title cannot interfere with the enjoyment of property by one whose title does not even extend beyond possession. *Jeffris v. Williams* (5) cannot however be read as laying down the proposition that there is in the person in possession the right of action against a stranger who interferes with the acquisition of an easement which is not essential for the enjoyment of the property possessed. Interference with the normal enjoyment of the property is the essence of the decision.

What the Court is called upon to decide in this case is whether a person who has been in the habit of using a way over his neighbour's land, but has not acquired an easement, can prevent a stranger obstructing his user of the way. There is no direct authority to be found either in the English or in the Indian decisions, but there are emphatic statements against the maintenance of such an action to be found in "The Common Law" by Holmes, in Salmond on "The Law of Torts" and in Pollock "On Torts." Holmes takes the case of a way used *de facto* for four years, but in which no easement has been acquired, and asks whether the possessor of the *quasi* dominant tenement would be protected in his use as against third persons. He says, "it is conceivable that he should be, but I believe that he would not." ("The Common Law" by Holmes at p. 241). At p. 354 we have this passage:

"A way, until it becomes a right of way, is just as little susceptible of being held by a possessory title as a contract."

And at p. 382 this :

"But, as has been said before, the Common Law does not recognize possession of a way. A man who has used a way ten years without title cannot sue even a stranger for stopping it. He was a trespasser at the beginning, he is nothing but a trespasser still. There must exist a right against the servient owner before there is a right against anybody else."

(5) (1851) 5 Ex. 792; 20 L J Ex. 14; 155 E R 347.

Salmond (Salmond on the Law of Torts, Edn. 8, p. 259) says that the rule in *Jeffris v. Williams* (5) and *Bibby v. Carter* (6), the latter case followed *Jeffris v. Williams* (5) — cannot be extended,

"to cover all cases of the *de facto* enjoyment of servitudes. It cannot be the law that a mere trespasser who has been in the habit of crossing another man's land can sue a stranger for an act which obstructs his use of this *de facto* easement. Nor can it be supposed that a poacher can sue a stranger who by polluting the water of a stream has interfered with his practice of catching fish therein."

Having put the question as to what forms of *de facto* possession the principle recognised in *Jeffris v. Williams* (5) does apply, Salmond submit that the true principle is this : (p. 259) :

"As against strangers the possessor of land is entitled to the use and enjoyment of it free from all harmful interference due to acts done on the adjoining land; and all such interference by a stranger is actionable, even though had it been done by the lawful owner of the adjoining land it would have been *damnum sine injuria* because of the absence of any acquired servitude making it illegal. Where, on the other hand, the act complained of has produced no harmful effects upon the plaintiff's land, it is necessary for him to plead and prove, even against a stranger, that he has a legal right to the benefit of which he complains that he has been deprived."

In dealing with wrongs to easement and other incorporeal rights in property, Pollock says : (Edn. 14, p. 299).

"The enjoyment which may in time ripen into an easement is not possession, and gives no possessory right before the due time is fulfilled," and proceeds to quote the passage from Holmes which says, "a man who has used a way ten years without title cannot sue even a stranger for stopping it." Later he says (Edn. 14, p. 300) :

"*De facto* enjoyment does not even provisionally create any substantive right, but is material only as an incident in the proof of title."

There are here strong expressions of opinion that where the right of way has been enjoyed for less than the prescriptive period the person enjoying it cannot bring an action against a stranger who obstructs the use of the *de facto* easement, the principle being that a person cannot assert even against a trespasser a right which does not really interfere with enjoyment of his own property. It is conceivable that a case might arise where the principle involved in *Jeffris v. Williams* (5) could be appropriately applied, but it would be a very exceptional one. Take for instance, the case where as the result of some catastrophe access to land could only be obtained over the land of another. If a stranger attempted to prevent the possessor of the land so cut off from gaining access to his land the Court would surely

(6) (1859) 4 H & N 158; 28 L J Ex. 182; 7 W R 1573; 19 E R 795.

interfere, as the stranger would be interfering with enjoyment of the land.

At this stage it will be convenient to refer to two decisions of this Court which are in conflict and in consequence have given rise to this reference. In *Kondappa Rajan Naidu v. Dewarakonda Suryanarayana* (3), Benson and Krishnaswami Ayyar, JJ. after observing that it was well settled law that if any trespasser was in enjoyment of land for less than the statutory period he would be entitled to protect that possession against any one but the true owner, went on to say that they did not think that there was any distinction in principle, because the right to be protected was in the nature of an incorporeal right in process of acquisition. This statement is certainly open to strong criticism and it was criticized in *Narasappayya v. Ganapati Rao* (2), but as pointed out in that case, *Kondappa Rajan Naidu v. Dewarakonda Suryanarayana* (3) can be supported on the ground that the plaintiff was in possession of the channel which had been obstructed and having a possessory title had a cause of action against the defendant for obstruction. In *Narasappayya v. Ganapati Rao* (2) Miller and Sadasiva Ayyar, JJ. held that mere enjoyment of an easement for any length of time short of the full period of prescription gave no right of action against a person obstructing the user. In that case the plaintiff sought an injunction preventing the defendants from cutting a channel from a tank from which he watered some of his fields, so as to deprive him of the water. The District Munsif granted the injunction, but this was dissolved by the District Judge, who held that the plaintiff had no right to the water of the tank, though he had been in the habit of taking the water through a channel for some years. A second appeal was filed to this Court and the learned Judges upheld the decision of the District Judge. I regard the decision as being a correct decision. It was not a case where the plaintiff was in physical possession of the channel from the tank, but a case where the defendants were claiming a right to water which they did not possess.

In my opinion where a right of way has not been acquired by enjoyment for the prescriptive period there is ordinarily no right of action for interference. In a very exceptional case where access to the plaintiff's land would otherwise be cut off altogether a suit might be maintained against a stranger on the principle propounded in *Jeffries v. Williams* (5) but not otherwise. The answer that I would give to the question

referred in its altered form is that an action cannot be maintained in ordinary circumstances. It can only be maintained if the obstruction to user will have the effect of substantially depriving a person of the enjoyment of his property. To avoid any misunderstanding I would add that the Court is not dealing with the rights of the villagers to pass over *gramakantam* land.

Venkataramana Rao, J.—I agree.

Horwill, J.—I also agree.

N.-S.

Answer accordingly.

CALCUTTA HIGH COURT

Suit No. 593 of 1927

June 7, 1940

MCNAIR, J.

UPENDRA NATH DAS AND ANOTHER—
APPLICANTS

versus

DURLAV CHANDRA KUNDU AND OTHERS
—OPPOSITE PARTY

Charge—Charge for allowances granted under will may attach to general estate although testator had not provided for their payment out of specified properties.

A charge for allowance granted under a will may attach to the general estate although the testator in his will may not make provision for the charge or allowances to be paid out of specified properties.

A will provided that the testator's two sons should each get at the rate of Rs. 50 a month from his estate month by month "for defraying the expenses of maintenance etc., of their sons, daughters, wives and their own selves" after the testator's death. There was a further provision that the sons should get "at the rate of Rs. 2,000" from the testator's estate for defraying the expenses of the marriage of each of their daughters. The will further provided for a monthly allowance at the rate of Rs. 8 a month to be paid to the testator's youngest daughter, who was a widow, out of the testator's estate so long as she lived:

Held, that even though the testator did not provide that the allowances were to be paid from specific property, the allowances granted by the will formed charges.

Messrs. B. C. Ghosh and D. N. Sen, for the Applicants.

Mr. B. N. Ghosh, for the Opposite Party.

Order.—This is an application by the auction-purchaser to set aside a sale by the Registrar on the ground that good title has not been made out. The applicant contends that the property is subject to charges under the will of Krishna Das Kundu which have never been disclosed. The will was not mentioned in the abstract of title, nor in the conditions of sale, and it is alleged that the existence of the charges were deliberately suppressed. The mortgagee contends that the charges do not exist. The will was dis-

covered after searches. Probate has never been granted. The will in cl. 3 provides that the testator's two sons who are the mortgagees shall reach get at the rate of Rs. 50 a month from his estate month by month "for defraying the expenses of maintenance etc., of their sons, daughters, wives and their own selves" after the testator's death. There is a further provision that the sons shall get "at the rate of Rs. 2,000" from the testator's estate for defraying the expenses of the marriage of each of their daughters. Clause 4 provides for a monthly allowance at the rate of Rs. 8 a month to be paid to the testator's youngest daughter, who was a widow, out of the testator's estate so long as she lives. These are the material portions of the will, and the question before me is whether the allowances granted by the will form charges. For the mortgagee it is contended that no charges will be created unless the testator provides that the allowances are to be paid from a specific property. That is by no means clear, and it appears from Theobald on Wills, Edn. 7 p. 508 that an annuity may be given without words creating an express charge. If the annuity is given in general terms and there is then a gift of residue, the annuity is charged upon the corpus.

In *Bridges v. Hinxman* (1) the testator by his will devised certain property to his son for life and after his death to the first, second, third and fourth son and so on "paying" to the testator's wife "£ 16 a year of lawful money of Great Britain," also to the testator's daughter £ 10 a year of lawful money quarterly for life. The Vice-Chancellor held that the word "paying" created not a trust but a charge or condition. The matter was dealt with recently by the Division Bench of this Court in *Bhola Nath Banerjee v. Sarbamangala Debi* (2). There a Hindu testator created two successive life estates and gave the remainder to the defendants who were his grandsons. He further provided that monthly allowances should be paid to his granddaughter out of the estate left by him, and whoever was in possession of the estate would be bound to pay. There it was argued as the property was not specified no valid charge could be created, but the Court held that the charge would attach to the corpus of the estate which was bequeathed by the testator successively to the two ladies and then to the daughter's sons who were the defendants in that case. It is clear therefore on these decisions that a charge may

attach to the general estate although the testator in his will may not make provision for the charge or allowances to be paid out of specified properties. In any event whether the allowances form charges or not it is quite clear that this possibility should have been brought to the notice of the prospective purchaser, and since that was not done the purchaser is entitled to have the sale set aside. Order in terms of prayers (a), (b), (c), (d), and (e). The mortgagee (Mr. B. N. Ghose's client) to pay the costs of the application to the auction-purchaser and the mortgagee will add those costs to his claim.

D.

Order accordingly.

MADRAS HIGH COURT

Civil Revision Petition No. 15 of 1939

July 23, 1940

WADSWORTH, J.

SUNDARA REDDIAR—PETITIONER

versus

ALAGAPPA CHETTIAR BY AGENT
VEERARAGHAVA AYYANGAR—

RESPONDENT

Madras Agriculturists Relief Act (IV of 1938), s. 20.—Father not following up his stay application with application under s. 19 but dying before expiry of sixty days—His son impleaded as legal representative, if can file fresh application under s. 20.

Where a father did not follow up his stay application under s. 20, Mad. Agri. Relief Act with an application under s. 19, but died just before the expiry of the sixty days, time allowed under s. 20, his son who is impleaded as his legal representative cannot file a fresh application under s. 20.

C. R. P. to revise the order of the Sub-Judge, Cuddalore, in M. P. No. 534 of 1938.

Mr. T. E. Ramabhadrachariar, for the Petitioner.

Mr. S. Panchanadha Mudaliar, for the Respondent.

Order.—Petitioner is the son and legal representative of defendant No. 19 against whom the decree was being executed when he got a stay by means of an application dated April 9, 1938 under s. 20, Act IV of 1938. Defendant No. 19 did not follow up his stay application with an application under s. 19, but he died on June 4, 1938, just before the expiry of the sixty days time allowed under s. 20. Petitioner was impleaded as legal representative on October 19, 1938 and on that day asked for time to oppose the execution. On December 14, 1938 he filed a fresh application under s. 20. I am of opinion that the application does not lie. The petitioner succeeds to the rights and liabi-

(1) (1847) 16 Simon's Reports 71.

(2) A I R 1940 Cal. 93; 186 Ind. Cas. 843; 44 C W N 221; 12 R C 525.

lities in the litigation of his father. His father had already exhausted his remedy under s. 20 and by the express terms of that section the decree must be executed against him as it stands. The legal representative is subject to the same liability. The petition is dismissed with costs.

N.-S.

Petition dismissed.

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Civil Appeal No. 10-5 of 1940

December 11, 1940

ALMOND, J. C. AND MIR AHMAD, J.

Mst. ZAMO AND OTHERS—DEFENDANTS—

APPELLANTS

versus

HABIB KHAN QADIR AND OTHERS—

PLAINTIFFS AND OTHERS—DEFENDANTS—

RESPONDENTS

N.-W. F. P. Law and Justice Regulation (VII of 1901), s. 34—Land in suit valued at Rs. 388-2-0 and other property at Rs. 1,900-8-0—Two values, if can be combined—Second appeal, if maintainable—N.-W. F. P. Muslim Personal Law (Shariat) Application Act (VI of 1935), s. 27—Succession—Questions coming up before Court after Act came into force—Muhammadan Law must be applied irrespective of fact whether succession opened after or before Act.
The value for jurisdiction, of the land in suit, was Rs. 388-2-0 and the like value of the other property was Rs. 1,900-8-0:

Held, that the value of each portion of the suit being below the prescribed limit, the two values could not be combined to make the case liable to further appeal under s. 34, N.-W. F. P. Law and Justice Regulation.

All questions of succession which come up before the Courts after Act VI of 1935 has come into force, must be decided according to Muhammadan Law irrespective of the fact as to whether the person whose estate is in dispute had died before that Act came into force or after. 192 Ind. Cas. 343 (1), followed.

C. A. from the judgment and decree of the Additional Judge, Peshawar, dated December 22, 1939.

Mr. Pir Bakhsh, for the Appellant.

Mr. Abdur Rab Nishtar, Kazi Abdul Wahab and Pandit Anup Chand, for Respondents Nos. 1 to 5.

Mir Ahmad, J.—The facts of this case have been given in great detail in the judgment of the trial Judge and have also been briefly noticed by the lower Appellate Court. One Sherdil Khan died in 1933 leaving a widow Mst. Bibi Aisha, a married daughter, Mst. Zamo Jan, a married sister, Mst. Nawab Jan and an unmarried sister, Mst. Babo Jan. His wife died in 1933-34. The property left by Sherdil was mutated

in the name of Mst. Babo Jan, his sister, who died in 1937. Some collaterals of Sherdil have brought this suit for possession of their customary law share in the property left by him. One of the defences taken was that the Shariat Act (VI of 1935) having come into force on December 6, 1935, the plaintiffs had no *locus standi* to bring the suit because the daughter and the sister of Sherdil were his only heirs under the Muslim Personal Law. The trial Judge gave decree to the plaintiffs for 23/32 share in the estate left by Sherdil. An appeal was preferred by the daughter of Sherdil, her husband and the sister of Sherdil to the District Court at Peshawar. The District Judge agreed with the Original Court and dismissed the appeal. The same persons have come up on further appeal to this Court.

A preliminary objection was taken that no appeal lies. The value for jurisdiction of the land in suit is Rs. 388-2-0 and the like value of the other property is Rs. 1,900-8-0. According to s. 34, Law and Justice Regulation, the value in a land suit should be Rs. 1,000 or upward and in an unclassified suit it should be Rs. 2,500 or upward in order to entitle a party to a further appeal. In this case the value of each portion of the suit is below the prescribed limit. Judicial Record Volume I Case No. 76 is the authority for the view that the two values cannot be combined to make the case liable to further appeal. We consequently hold that the appeal does not lie and we treat it as an application for revision. A Bench of this Court has held in the ruling reported in *Fazal Haq Dilzada v. Dawar Shah* (1); that all questions of succession which come up before the Courts after Act VI of 1935 has come into force shall be decided according to Muhammadan Law irrespective of the fact as to whether the person whose estate is in dispute had died before that Act came into force or after. The rule of decision, therefore, in this case would be Muhammadan Law and we have to see whether the plaintiffs can bring a suit for possession of a portion of the estate of Sherdil as heirs under Muhammadan Law. The plaintiffs are distant collaterals and have under that law no right to inherit the property left by Sherdil in preference to his daughter and sister. This is not denied by the learned Counsel who appeared for the respondents. The plaintiff-respondents have therefore, no right to maintain the suit.

(1) A I R 1940 Pesh. 52; 192 Ind. Cas. 343; 13 R Pesh. 37.

The two Courts below have wrongly decided this case. They have committed a material irregularity in applying custom. We therefore, accept the petition, set aside the order of the two Courts below and dismiss the suit of the plaintiffs-respondents with costs throughout.

D.

*Petition accepted.***CALCUTTA HIGH COURT**

Criminal Revision No. 526 of 1940

July 17, 1940

EDGLEY, J.

HARI RAKSHAK DUTT—ACCUSED—**PETITIONER***versus***CHAIRMAN, DISTRICT BOARD,****BIRBHUM—OPPOSITE PARTY**

Bengal Food Adulteration Act (VI of 1919), s. 6 (1) and (3)—Accused taking consignment of mustard oil at Railway Station for sale—Sanitary Inspector taking sample while goods were still on railway premises—Oil found adulterated—Accused, if can be convicted—Fact that accused had no time to examine goods, if good defence.

The accused took delivery of some tins of mustard oil at the Railway Station for the purpose of selling them. On the same day while the goods were actually on the railway premises a sample was taken from these tins by the Sanitary Inspector and it was found that the mustard oil contained therein was adulterated.

Held, that although the goods had not actually left the railway premises, they were nevertheless being stored for sale by the accused within the meaning of s. 6 (1) of the Bengal Food Adulteration Act. The requisite initial onus had been discharged by the prosecution. The accused came into physical possession of the consignment as soon as he took delivery thereof at the Railway Station and from the moment that he took such delivery until the goods were actually exposed for sale in his shop there could be no doubt that he was actually storing them with a view to their ultimate disposal by sale. The fact that he could have had no opportunity to examine the nature of the goods between the time when he took delivery of them and the time when a sample was taken was no defence in view of s. 6 (3). 188 Ind. Cas. 398 (1), distinguished.

Messrs. Jitendra Mohan Banerjee and Hari Prasanna Mukherjee, for the Petitioner.

Messrs. Satindra Nath Mukherjee and Samarendra Nath Mukherjee, for the Opposite Party.

Order.—The petitioner in this case has been convicted under s. 6 (1) read with s. 21, Bengal Food Adulteration Act (Ben. Act VI of 1919). It appears that, on October 17, 1938, the petitioner took delivery of some tins of mustard oil at the Bolpur Railway Station. On the same day a sample

was taken from these tins by the Sanitary Inspector and it was found that the mustard oil contained therein was adulterated. The petitioner and certain other persons were subsequently prosecuted and the petitioner was convicted. It is said that the prosecution did not discharge the onus which lay on the Crown to show that the adulterated goods had actually been stored for sale within the meaning of s. 6 (1) of the Act and it is also contended that any presumption which may have arisen under s. 6 (4) of the Act was rebutted by reason of the fact that the goods were actually on the railway premises at the time when the sample was taken by the Sanitary Inspector. The finding contained in the judgment of the lower Appellate Court is that there can be no doubt that the petitioner had taken delivery of this consignment of the oil for the purpose of selling it. This being the case, it would follow that although the goods had not actually left the railway premises, they were nevertheless being stored for sale by the petitioner within the meaning of s. 6 (1) of the Act. It followed that the requisite initial onus has been discharged by the prosecution. In this connection it may be mentioned that in *Sachi Nandan Piri v. Chairman, Midnapore District Board* (1), I pointed out that :

"In my view, in a case in which a person is prosecuted for storing adulterated food for sale, it must ordinarily be proved affirmatively that such food is actually being stored, and in my opinion, such storage cannot be taken to include transit to a place of storage unless the adulterated food in question is actually in the physical possession of a person to whom sub-s. (4) of s. 6 expressly applies."

That case related to the prosecution of a certain person in respect of a consignment which was found in the possession of his carter. On the facts of that case, if the petitioner himself had been in physical possession of the consignment, the position would have been different. In the case with which we are now dealing the petitioner came into physical possession of the consignment as soon as he took delivery thereof at the railway station and from the moment that he took such delivery until the goods were actually exposed for sale in his shop there can be no doubt that he was actually storing them with a view to their ultimate disposal by sale. It is argued that it would be unreasonable to convict the petitioner in this case in view of the fact that he could have had no opportunity to examine the nature of the goods between the time when

(1) I L R (1940) 1 Cal. 333; 188 Ind. Cas. 398; A I R 1940 Cal. 213; 41 Cr. L J 582; 44 C W N 173; 13 R C 10.

he took delivery of them and the time when a sample was taken. This argument is, however, answered by sub.s. (3) of s. 6 of the Act which is in the following terms :

"In any prosecution under this section it shall be no defence to allege that the vendor, manufacturer or storer was ignorant of the nature, substance or quality of the article sold, exposed for sale, or manufactured or stored for sale by him."

In cases of this nature, it is obviously necessary that all dealers and consignees of goods such as those which are mentioned in s. 6 of the Act should exercise greatest caution as to the persons with whom they deal. In my view, the petitioner has been properly convicted, but if he considers that he has a grievance against the person who supplied him with these goods, it will be for him if so advised, to consider the propriety of instituting a suit for damages against that person. This Rule must accordingly be discharged and the decision of the learned Magistrate is affirmed.

D.

Rule discharged.

SIND JUDICIAL COMMISSIONER'S COURT

Suit No. 164 of 1936

March 14, 1940

LOBO, J.

KHEMCHAND DAYARAM—PLAINTIFF
versusDAYARAM JESSOMAL AND OTHERS—
DEFENDANTS.

Hindu Law—Partition—Mothers' share—Suit for partition of joint family property—Claim by member for certain property belonging to him and said to have been entrusted by him to plaintiff personally cannot be made in such suit—Plaint claiming partition, withdrawn—Plaint, if evidence of intention to separate—Partition suit—Defendant, if can claim his share without paying ad valorem court-fee on his share—Every person interested in property is plaintiff in partition suit—Manager, if can be called upon to render general account of his dealings—His duty—Maintenance—Claim for future maintenance and residence—Question of limitation—Joint family property—Presumption, that any particular property in hands of one co-parcener is joint family property—Co-sharers—Adverse possession—Manager denying rights of co-owner—Possession of junior member, whether enures for benefit of co-owner in repelling plea of adverse possession—Possession of one co-sharer, when adverse—Title by adverse possession, if can originate during minority of person sought to be defeated by adverse possession—Minor—Natural guardians—Religious endowment—Temple—Public or private—Private temple becoming public—Dedication should be proved—Trusts Act (II of 1882), ss. 94, 95—Co-owner in possession of entire estate held in co-ownership, whether constructive trustee of minor co-owner in respect of his share—Limitation Act (IX

of 1908), Art. 120—Suit for accounts by one co-owner against another—Art. 120, applies—Right to sue when accrues.

On partition, the mother is entitled to share equal to that of the son.

In a suit for partition of joint family property a claim by a member for certain property belonging to him and said to have been entrusted by him to the plaintiff personally is a separate and distinct matter, and it can find no room in a suit for partition. [p. 139, col. 2.]

The institution of a suit for partition by a member of a joint family is an unequivocal intimation of his intention to separate and there consequently is a severance of his joint status from the date when it was instituted. A decree may be necessary for working out the results of the severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate whether he obtains a consequential judgment or not. A plaintiff claiming a partition even if withdrawn would unless explained afford evidence that an intention to separate had been entertained. [p. 150, col. 1.]

[Case-law referred to.]

A defendant in a partition suit need not pay *ad valorem* court-fees on the share he claims in such a suit. [p. 153, col. 2.]

In a partition suit every person interested in the property to be partitioned whether ranged as plaintiff or defendant is a plaintiff. [p. 154, col. 1.]

In a suit for partition the manager of a joint family as such cannot be called upon to render a general account of his dealings with the joint family property. He is however bound to satisfy the Court what property is available for partition, and on this point his *ipse dixit* is not to be accepted, especially when it is alleged that he has secreted and done away with much property. [p. 155, col. 2.]

[Case-law referred to.]

A claim by widows for future and present maintenance and residence arises from day to day and there can be no question of limitation.

There is no presumption that any particular property in the hands of one of the coparceners is joint family property and the burden therefore is upon the person who alleges that these properties are joint family properties liable to partition, to prove it. [p. 152, col. 1.]

Where after the partition a co-owner has chosen to mix his separate movable property with property held in co-ownership the burden lies heavily upon him to prove that the immovable properties acquired after the partition were acquired from his own separate funds and not out of the income of the property held by him in co-ownership. [p. 153, cols. 1 & 2.]

Possession by one of the junior members of the joint family is the possession of the manager of the family and can give manager's co-owner no advantage when the manager or *karta* of the family denied, or in any case is not proved to have admitted that co-owner's rights. [p. 143, col. 1.]

Possession of a co-owner in law is the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster can bring about the result. It is not necessary to show that adverse possession was brought to the knowledge of the person against whom it was claimed. It is sufficient that the possession was adverse and without any attempt at concealment; so that the person against whom time was running ought, if he exercised due vigilance, to have been aware of what was happening. Non-participation by one of two co-owners in the possession and enjoyment of the property belonging to them as co-owners for an extended period, coupled with

the absence of any claim or demand for participation, may amount to ouster of such co-owner; whether it does or not, depends upon the facts and circumstances of each individual case. If in the circumstances of any particular case such non-participation and absence of demand cannot be interpreted by themselves as exclusion or ouster, it is necessary for the party claiming title by adverse possession to prove some further specific act or specific acts of ouster. Such ouster must in its nature be an open assertion of a hostile title, such that actual or constructive knowledge thereof is clearly attributable to the party intended and sought to be excluded. Adverse possession will then start from the date of such act or acts. [p. 144, col. 1; p. 148, col. 1.]

[Case-law discussed.]

Title by adverse possession cannot originate during the minority of the person sought to be defeated by adverse possession. To acquire adverse possession there must be acts of exclusion or ouster amounting to open assertion of hostile title, knowledge of which must be attributable to the person sought to be excluded so as to enable him to resist the acts. A minor is not in a position to know of or to resist acts of ouster and there can be no overt acts amounting to open assertion of a hostile title against a minor. 70 Ind. Cas. 678 (27), dissented from. [p. 148, col. 2; p. 149, col. 1.]

It is only the father and mother who are the natural guardians of a minor.

While it is possible that a private temple should be so dealt with that in the course of years it becomes dedicated to the public as a public temple, dedication requires to be proved. 185 Ind. Cas. 305 (38), relied on. [p. 151, col. 2.]

A co-owner in possession of the entire estate held in co-ownership is constructive trustee of the minor co-owner in respect of his share. Sections 94 and 95, Trusts Act, are clearly applicable to such a case. [p. 148, col. 1.]

A suit for accounts by one co-owner against another co-owner in sole possession of property belonging to the co-owners is governed by Art. 120, Lim. Act, and the right to sue accrues only when there is a demand for accounts and a refusal to render them. Where there has been no demand for accounts and refusal to render the same the plaintiff is entitled to an account from the defendant for the entire period during which the defendant was in sole possession of the property. [p. 154, col. 2; p. 155, col. 1.]

[Case-law relied on.]

Mr. Jamiatrai Lalchand, for the Plaintiff.
Messrs. Kodumal Lekhraj, Srikishindas H. Lulla, Sunderdas Jethanand, A. P. Fonseca, Saganlal Hassanand, and Dingomal Narainsing, for Respondents Nos. 1 and 3, 2, 4, 5, 6 and 7, respectively.

Judgment.—The judgment in this case really begins with an order made by me on December 20, 1938 in which I decided in the affirmative the preliminary issue: "Whether there was a separation between the two branches of Dayaram and Wadhuram." In that order, Ex. 49, I have set out in great detail the history of the family involved in this litigation and the facts leading up to the present suit, and have generally cleared the ground for the reception of evidence on and the determination of the other issues in the suit. Issues 15 in number, were originally framed on August 13, 1937, as under:

"(1) Was the joint status of the parties severed in 1934 by the filing of suit No. 179 of 1934?"

(2) What is the family property liable to be partitioned and in whose possession is the said property?

(3) Is defendant No. 3 entitled to a share as claimed by her or to maintenance only as alleged in para. 5 of the plaint? If to the latter, to what maintenance is she entitled?

(4) Are defendants Nos. 4 to 6 or any of them entitled to any share in the properties in suit? If not are they entitled to maintenance? If so, at what rate?

(5) Are the claims, if any, of defendants Nos. 4 to 6 or any of them barred by limitation?

(6) Are defendants Nos. 4 to 6 or any of them estopped from claiming their shares and/or maintenance?

(7) Can the claim, if any, of defendants Nos. 4 to 6 or any of them be determined in this suit?

(8) Had defendant No. 5 deposited cash, ornaments and gold with the plaintiff? If so, of what value?

(9) To what relief, if any, is defendant No. 5 entitled on this account?

(10) Can defendant No. 5 claim the things mentioned in issue No. 8 from the plaintiff in this suit? If so, can she do so without first paying courts-fee on the amount claimed by her?

(11) Is the suit properly framed?

(12) Is the plaint sufficiently stamped?

(13) To what shares are the various parties entitled in the joint family property?

(14) To what relief are the parties entitled?

(15) General."

To these I added the preliminary issue referred to above by an order Ex. 30 dated November 30, 1938. After the decision of this preliminary issue another order Ex. 50 was passed by me on January 19, 1939 in which, after hearing the learned Advocates for the parties, I laid down the procedure I proposed to adopt in the further hearing of the suit. This hearing however was resumed only on November 24, 1939; between February and May 1939 no progress could be made because of holidays and more urgent work, and from July to October I was officiating as Judicial Commissioner. It soon became apparent that the decision on the preliminary issue which at one stroke threatened to deprive Dayaram's branch of the family of one-half of the family property had fallen upon defendants Nos. 1 to 3 as an unexpected blow, and the cross-examination of Khemchand, the plaintiff, and the evidence of Dayaram quite clearly betrayed a desire on the part of Dayaram to minimize the loss his branch of the family appeared likely to sustain. A distinction began to be made between those immovable properties set out in the schedule to the plaint which were with the family prior to the partition held to have taken place on July 30, 1905, and those subsequently acquired, and the learned Advocates for defendants Nos. 1 to 3 made no secret of the fact that they proposed to contend that in any case Kesarbai, defendant No. 4, could claim no share in or benefit from those of the 31 properties set out in

the schedule to the plaint which had been required subsequent to July 30, 1905. To meet this situation defendant No. 4 filed an application to amend her written statement so as specifically to embrace in her claim partition, accounts and mesne profits of all the properties mentioned in the schedule to the plaint at whatever time they had been required. The application was of course strenuously opposed on behalf of defendants Nos. 1 to 3 but was allowed by me in an order, Ex. 57, recorded on December 4, 1939.

The operative part of that order reads :

"I am therefore of opinion that the amendment should be allowed. An amended written statement to be filed within 3 days and a copy thereof supplied to the plaintiff and each of the other defendants. Further written statement or rejoinder by the other parties to be filed within 10 days thereafter. Further issues, if any, to be framed on December 21, next."

Defendants Nos. 1, 2 and 5 filed further written statements and on February 6, 1940 he following additional issues were framed:

"(1) Is defendant No. 4 entitled to a share in any of the immovable properties shown in the schedule annexed to the plaint? If so, what properties?"

(2) Can she claim a share in the suit properties without paying *ad valorem* court-fees on her share?"

(3) Were the various immovable properties shown in para. 1 of the further written statement of defendant No. 1 dated December 19, 1939 or any of them acquired and built upon by defendant No. 1 after the alleged partition with Hiranand in 1905 from his own monies or from the alleged joint funds comprising of the rents of other joint immovable properties?"

(3A) Is defendant No. 4 entitled to a share in any of the said properties?"

(4) What amounts if any were spent by defendant No. 1 on the development, improvement and repairs of the various immovable properties mentioned in para. 2 of the said further written statement of defendant No. 1?"

(5) Can defendant No. 4 get her share in the said properties without paying her share of the monies so spent by defendant No. 1?"

(6) Is defendant No. 4 entitled to an account of the rents and profits of the immovable properties shown in the schedule annexed to plaint or any of them?"

(7) Is her claim for such accounts for more than 3 years prior to November 1936 barred by limitation?"

(8) Is her claim for accounts of the sale proceeds of the Hyderabad property and Malir garden referred to in para. 2 of her amended written statement barred by limitation?"

Of the 23 issues which now appear on the record, original issues Nos. 6, 11 and 12 have been abandoned. Issues Nos. 3, 8, 9 and 10 of the original set are easily disposed of and I proceed to do so. Issues Nos. 13 to 15 are general and will be dealt with at the conclusion of this judgment. The additional issues will most of them be capable of simple answers once issues Nos. 4 and 5 are disposed of.:

"Issue No. 3. Is defendant No. 3 entitled to a share as claimed by her or to maintenance only as alleged in para. 5 of the plaint? If to the latter, to what maintenance is she entitled?"

In the course of final arguments, it was conceded by the learned Advocates for all the parties that Gomibai defendant No. 3 was on partition entitled to a share equal to that of the plaintiff or of each of defendants Nos. 1 and 2. This is clearly the law and there is no evidence on the record to support the plaintiff's contention in para. 5 of the plaint "according to the customs of the community to which the parties belong the mother is entitled to a reasonable allowance for maintenance only out of the family property but not to any share." I hold accordingly.

Issue No. 8. "Had defendant No. 5 deposited cash, ornaments and gold with the plaintiff? If so, of what value?"

Issue No. 9. "To what relief, if any, is defendant No. 5 entitled on this account?"

Issue No. 10. "Can defendant No. 5 claim the things mentioned in issue No. 8 from the plaintiff in this suit? If so, can she do so without first paying court-fees on the amount claimed by her?"

Paragraph 5 of the written statement of defendant No. 5 Hetibai, widow of Tikamdas, reads thus :

"This defendant further submits that she had with her large cash, ornaments and gold all of the value of Rs. 60,000 which she deposited with the plaintiff and has been lying with him in trust. She is entitled to the account of the said claim and payment thereof."

Now this is a suit for partition of joint family property and though by holding that there was a partition on July 30, 1905 Kesarbai becomes entitled to a share therein, and defendant No. 1 representing the joint family consisting of himself and plaintiff and defendants Nos. 2, 3, 7 and 8 must be held to be co-owners with Hiranand and after his death with Kesarbai, the suit still remains in substance a suit for partition of family property. The claim in para. 5 of the written statement of defendant No. 5 is a claim for certain property belonging to her and said to have been entrusted by her to the plaintiff personally. Such a claim is a separate and distinct matter, a matter between defendant No. 5 and the plaintiff only, and it can find no room in a suit for partition such as this is. It is open to defendant No. 5 to institute a separate suit against the plaintiff on this alleged cause of action if she so chooses. I therefore hold that defendant No. 5 cannot make such a claim in this suit even if she were to pay court-fees thereon. I decline to enquire into the merits of her claim embodied in para. 5 of the written statement. This disposes of issues Nos. 8 to 10.

"Issue No. 4. Are defendants Nos. 4 to 6 or any of them entitled to any share in the properties in suit? If not, are they entitled to maintenance? If so, at what rate?"

On July 30, 1905, there was a partition between the branches of Wadhuram and

Dayaram of the properties movable and immovable belonging to them jointly. Wadhuram himself had died in 1902 or 1903 and his son Tikamdas had died in April 1905; it was Hiranand who actually effected partition with Dayaram. Hiranand himself and his two sons Nenumal and Sugnomal died on 3 successive days in 1908. Sugnomal was the last of these three to die, and on his death the share of Wadhuram branch passed to Padmabai the mother of Sugnomal as the heir of the sole surviving member of one branch of a joint Hindu family. Padmabai died a few months later and the estate passed to Kesarbai, sister of the last male owner Sugnomal. The facts recited above are deposed to by the plaintiff Khemchand and the legal position is clear and has not been disputed. In these circumstances Kesarbai, defendant No. 4, who is alive is alone entitled to the estate which came to the Wadhuram branch as a result of the partition on July 30, 1905. Hetibai, defendant No. 5, widow of Tikamdas, and Thakribai, defendant No. 6, widow of Nenumal, are, under the Hindu Law, entitled to maintenance and provision for residence from Kesarbai only. This again is not seriously disputed. Defendants Nos. 5 and 6 have not gone into the witness box and have led no evidence as to their position and circumstances. No arguments on their behalf were advanced by their learned Advocates at the close of the case. I hold therefore, on this issue that defendant No. 4 Kesarbai is entitled to a share in the properties in suit, subject to the decision on other issues in the case, and that defendants Nos. 5 and 6, Hetibai and Thakribai, are entitled in law to claim maintenance and residence from defendant No. 4. Such a claim on their part arises from day to day and there can be no question of limitation; no past maintenance has been claimed by these defendants.

But I do not think that the further questions which arise in this connection can be conveniently or effectively dealt with in this suit. Even if I hold hereafter that Kesarbai's claim is not time-barred the quantum and nature of the property which will come to her share will not be ascertainable till the time of the final decree, and even then there will be no material on the record to determine whether the claims for maintenance and residence should in fact be allowed, or what rate of maintenance would be proper in the case of these defendants, or what provisions, if any, should be made for the residence of each. Defendants Nos. 5 and 6, as already stated, have

not gone into the witness box; they have led no evidence. There is no evidence on the record that either of these defendants at any time prior to the suit claimed maintenance and provision for residence from Kesarbai or from Dayaram. In these circumstances it will be proper only to make the declaration referred to above and to leave defendants Nos. 5 and 6 to enforce their claims for maintenance and residence in separate suits declining to determine these questions in this suit. Issue No. 5. "Are the claims, if any, of defendants Nos. 4 to 6 or any of them barred by limitation?" The question whether Kesarbai's claim to a share in the properties in suit is or is not barred by limitation has been by far the most debated question in the entire hearing of this suit. In order to understand and fully appreciate this matter and to determine the true legal position, it is necessary to set out the facts established on the record even though some repetition is inevitable. When in 1908 the tragedy occurred which left Kesarbai, defendant No. 4, the sole heiress of the large share in property movable and immovable which came to the Wadhuram branch of Jessomal's family in 1905, Kesarbai was an infant about a year old. The entire estate came under the management of Dayaram, defendant No. 1: he collected the rents of the immovable properties and managed them, he was in charge of the money-lending business. The evidence shows that Kesarbai, after the death in 1908 of her own mother Padmabai, found a mother in Thakribai, defendant No. 6, with whom she lived and by whom she was brought up in Shikarpur.

At an early age, between 12 and 15 she was married to one Gopaldas with whom she went to live at Jacobabad. Dayaram appears to have evinced no interest whatever in Kesarbai; he did not maintain her, he spent nothing on her marriage, he took no part in it. Khemchand, the plaintiff who at a remarkably early age had in 1902 or 1903 been sent by his father Dayaram to start a *hundi* business in Shikarpur, and who had settled there, alleges that he got Kesarbai married and incurred all the expense connected with the marriage. Khemchand admits he had in his hand considerable movable property inherited by Kesarbai from her father Hiranand. Gopaldas whom Kesarbai married was a man in a humble walk of life. About 1929 or 1930 he came to Karachi to take up employment in the firm of Lilaram Radhakishen, having secured the post of a Munim

probably through the good offices of the plaintiff Khemchand himself, a partner in the firm. Kesarbai alleges that Khemchand was then living in Sadar Bazar in a part of property No. 8 in the schedule attached to the plaint, and that for 5 or 6 months she, her husband and their three children occupied an adjoining tenement in the same property. Thereafter as her husband Gopal-das was working in the town, and living in town was more convenient, the family shifted to the town, but she retained possession of the tenement in Sadar Bazar by placing her lock on the door thereof and leaving therein some household goods. Kesarbai deposes that after she came to Karachi Khemchand, the plaintiff, for the first time revealed to her that she was in fact a co-sharer with Dayaram in the property in suit in a half share, that she went to Dayaram and demanded her share, that Dayaram did not deny her claim but merely put her off; that on about four occasions she has participated in the income of the property in suit by receiving from Dayaram sums of Rs. 100 each. Dayaram has denied that he gave any moneys to Kesarbai or ever admitted she had a share in the property in suit, and in the absence of any other evidence on these two points I cannot accept the uncorroborated testimony of Kesarbai interested as it is. In July 1934 Dayaram filed suit No. 179 of 1934 for partition impleading at first only his wife Gomibai and his two sons and their sons as defendants. In November 1935, however, he amended his plaint by joining the present defendants Nos. 4 to 6 as defendants Nos. 4 to 6. The amended plaint is Ex. 64, and para. 9 thereof reads:

"That defendants Nos. 4, 5 and 6 are joined on their own application as per Court's orders dated July 12, 1935 August 23, 1935, and October 25, 1935 respectively. The plaintiff denies that defendants Nos. 4, 5 and 6 have any interest in the property subject-matter of this suit."

It is clear therefore that it was in 1934 or 1935 during the pendency of suit No. 179 of 1934 that Kesarbai for the first time definitely and openly claimed a share in the family property. It is equally clear, excluding at the moment Kesarbai's allegation that she is in possession of a portion of one of the family properties since 1929 or 1930, that from the time of the death of Hiranand in 1908 till Kesarbai put forward her claim in suit No. 179 of 1934, Dayaram was in sole possession and enjoyment of the property in which Kesarbai was a co-owner with a half-share, that Kesarbai did not in any way participate in that possession or enjoy-

ment, and that she never at any time during a period of over 26 years demanded her share or participation in the enjoyment thereof. It is to be remembered however that Kesarbai was a minor till somewhere in 1924 or 1925, and that on her own showing she was entirely ignorant of her rights till Khemchand enlightened her after she came to Karachi in 1929 or 1930. According to Khemchand she came to Karachi in 1931 or 1932. In August 1908 Dayaram filed in this Court Suit No. 279 of 1908 against one Dipomal Pokarmal for the recovery of Rs. 4,300 on a mortgage. The plaint in the suit is Ex. 36. In the heading of the plaint Dayaram and his three sons Khemchand, Taroomal and Nevandmal (since deceased) are shown as plaintiffs; the plaint is signed and verified by Dayaram as manager and para. 6 of the plaint reads:

"That the said Jessomal Valiram died in February 1899 leaving him surviving his two sons named Wadhupal and Dayaram who were joint with him in business and estate. Thereafter, the said Wadhupal died leaving him surviving his two sons Hariomal and Tikandas who were joint with the said Dayaram. The said Hariomal and Tikandas, having since died leaving the plaintiffs alone as the survivors of the joint Hindu family."

Again in August 1910 Dayaram filed a similar suit in this Court against one Tharc walad Haji, suit No. 255 of 1910. The plaint in this suit is Ex. 37, Dayaram's son Nevandmal appears to have died between 1908 and 1910 for his name is not mentioned as a plaintiff in the heading of the plaint which is signed and verified by Dayaram. Paragraph 5 of this plaint reads:

"That Jessomal walad Valiram died in February 1899 and being a member of Hindu joint family with the plaintiffs, they by survivorship are entitled to the benefit of the aforesaid mortgage."

Defendants Nos. 1 to 3 place much reliance on Exs. 36 and 37 as evidencing clear and definite and overt acts of ouster against Kesarbai even apart from her exclusion from the possession or enjoyment of any share in the property in suit for a period of over 26 years. In 1921 or 1922 there was a re-survey of the city of Karachi and mutation in the Records of Rights after investigation by an enquiry officer. Exhibit 38 is an extract from the Record of Rights relating to one of the properties included in the schedule to the plaint. Column 8 of the extract showing the name of the holder reads:

"Dayaram wd. Jessomal, manager; Hindu joint family consisting of Dayaram Jessomal, Hiranand Wadhupal, Tikandas Wadhupal, Khiomal wd. Dayaram."

The "Remarks" column which purports

to have been filled in on December 12, 1922 reads :

"Two of the members Hiromal and Tekoomal died without male issue. Khionmal continues to be joint with his father and does not wish his name to be recorded."

Exhibit 38 is strongly relied on by defendants Nos. 1 to 3 as a further overt act of ouster of Kesarbai. Suit No. 179 of 1934 came to an abrupt end in this way. The present plaintiff, defendant No. 1 in that suit, applied under O. XI, r. 12, Civil P. C. for discovery of documents by the plaintiff Dayaram and an order for discovery was made. Plaintiff Dayaram failed to comply with the order, and persisted in such failure. Defendant No. 1 on July 6, 1936 filed an application under O. XI, r. 21 for the dismissal of plaintiff's suit for want of prosecution. On July 7, the plaintiff's Advocate stated in Court : "I do not oppose the application under O. XI, r. 21, Civil P. C., and let the suit to be dismissed..." The Court's order on that date which is Ex. 65 in this case reads: "Suit dismissed under O. XI, r. 21, Civil P. C." On July 28, 1936, just three weeks after, Khemchand filed the present suit impleading Kesarbai as defendant No. 4. In para. 5 of the plaint Khemchand explains why Kesarbai has been impleaded in these words :

"Defendant No. 4 is joined as a party as she claims to be entitled to a share in the property as the daughter and heir of Hiranand Wadhuram, Seth Wadhuram being an uncle of the plaintiff and a co-owner in properties with defendant No. 1 and his family."

For defendants Nos. 1 to 3 it has been argued that though on this Court's finding on the preliminary issue Kesarbai became in 1908 a co-owner with Dayaram and his branch of the family in the immovable properties belonging to the two branches of Jessomal's family and held by them till the partition as joint family property, at the date of this suit she had no existing title, that long before 1936 Dayaram representing the joint family consisting of himself, his sons and grandsons, plaintiff and defendants Nos. 2, 7 and 8 had acquired ownership of Kesarbai's share by adverse possession. The case for these defendants on the facts recited above is that exclusion from participation in possession and enjoyment of one co-owner by another for an extended period of time is strong evidence of ouster and may by itself amount to adverse possession, and that in the circumstances of this case it does. But even if the Court holds that it does not, Dayaram in 1908 and again in 1910 and again in 1921 or 1922 openly asserted a title adverse

to Kesarbai by acts which clearly amounted to ouster, and Dayaram's adverse possession of Kesarbai's share in the property had ripened into ownership long before she had in 1935 put forward a claim in suit No. 179 of 1934. It has been contended that ignorance of her rights on the part of Kesarbai is irrelevant and of no consequence. It has been urged that Kesarbai's minority might have availed against the plea of adverse possession had Kesarbai filed a suit within three years after she attained majority in 1924 or 1925, but it cannot be of any assistance to her in respect of a claim put forward for the first time in 1935. With the law that has been quoted in support of these various contentions I shall deal when examining Kesarbai's case on this point.

Mr. Sunderdas for Kesarbai has contended that no case of adverse possession against Kesarbai can arise. He has placed his arguments under four heads thus : (a) Kesarbai was at the time of the filing of this suit and for some years before in actual physical possession of part of the property in suit; she was therefore in joint possession and no question of adverse possession can arise. (b) Even otherwise Khemchand was admittedly in joint possession with defendant Dayaram and as he does not deny and never has denied Kesarbai's title as co-owner, his possession enures for the benefit of Kesarbai. There can be no ouster of one co-owner unless all the remaining co-owners deny his title. (c) Mere exclusion of a co-owner from participation in possession and enjoyment even for a long period cannot in the circumstances of this case amount to ouster; there must necessarily be other overt acts of ouster to the knowledge, actual or constructive, of Kesarbai, and such as she was in a position to resist. Kesarbai was a minor till 1924 or 1925, the overt acts relied on for ouster were acts done during Kesarbai's minority and cannot avail defendants Nos. 1 to 3, for Kesarbai could have had no knowledge of these acts and was unable owing to her minority to resist them (d) Dayaram was the nearest male agnate of Kesarbai, he was her agent and *de facto* guardian; in this fiduciary position he could not by any acts whatever acquire a title adverse to Kesarbai (After considering the evidence as to joint possession by Kesarbai, His Lordship concluded.) I hold on this point that Kesarbai has not proved actual physical possession of any part of the property in suit at any time whatever.

I cannot agree that Khemchand's admitted possession of a portion of the property in suit can enure for the benefit of Kesarbai. The co-owners in this case were Kesarbai on the one hand and Dayaram on the other, representing the joint Hindu family of which he was the manager of *karta*. Possession by one of the junior members of the joint family was the possession of the manager of the family and can in my opinion give Kesarbai no advantage when the manager or *karta* of the family denied or in any case is not proved to have admitted Kesarbai's rights. Besides, as has been pointed out by the learned Advocate for defendant No. 2, Khemchand has never at any time definitely admitted Kesarbai's rights as a co-owner in the property in suit. In para. 6 of his plaint he does not state that Kesarbai has a one-half share in the property in suit as co-owner. All he says is that Kesarbai is impleaded in the suit because "she claims" to be a co-owner. There is no evidence that Khemchand at any time before the filing of this suit admitted Kesarbai's rights as co-owner. He has not even done so definitely in his deposition in this case. I think, therefore that the second ground on which Mr. Sunderdas contended that there was no case of adverse possession against Kesarbai is without substance and cannot be accepted.

The third ground put forward by the learned Advocate for Kesarbai is a legal one. A large number of cases has been cited by the learned Advocate for defendant No. 4, Kesarbai, and by the learned Advocates for defendants Nos. 1 and 2 on this point, and it is necessary for me to examine all these cases and to record what in my opinion is the true legal position on this point to be gathered from the various authorities quoted. As to the facts, these have been set out in great detail above and are really not in dispute. What is in dispute is the nature of the legal inference to be drawn from these facts. The question is whether on the facts established in this case Dayaram, who was a co-owner with Hiranand till his death, and who became a co-owner with Kesarbai on the death of Hiranand and his sons in 1908, has thereafter acquired a title adverse to Kesarbai in consequence of which Kesarbai's claim to any part of the property in suit has been extinguished. The case of *Corea v. Appuhamy* (1) a decision of the

House of Lords reported in *Corea v. Appuhamy* (1) is in authoritative decision on the rights of co-owners and adverse possession between co-owners. At p. 236* of the report in this case their Lordships state:

"The principle recognized by Wood V. C. in *Thomas v. Thomas* (2) holds good: 'Possession is never considered adverse if it can be referred to a lawful title'."

Their Lordships proceed to state:

"The two learned Judges in the Court of Appeal did not adopt in its entirety the suggestion of the trial Judge. They both held that Iser is entered as "sole heir," and that his title has been adverse ever since he entered. They held that he entered as "sole heir," apparently because he had it in his mind from the first to cheat his sisters. But is such a conclusion possible in law? His possession was in law the possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about the result."

In the present case Dayaram who was a party to the partition in 1905 could not but have been aware that after the death of Hiranand and his sons on successive days in 1908, and the death of Padmabai a few months later, Kesarbai had by inheritance become a co-owner with him in the family property. He may have intended and probably did secretly intend to cheat his co-owner who was an infant entirely ignorant of her position, but in the words of their Lordships it was not possible for him to put an end to his possession as co-owner by any secret intention in his mind and nothing short of ouster or something equivalent to ouster could bring about that result. Mr. Lulla, on behalf of defendant No. 2, has contended that this decision of the House of Lords turned largely on the provisions of an ordinance applicable to Ceylon and cannot be regarded as an authority in the present case. No doubt the actual decision in the case turned to some extent on the wording of s. 3 of an Ordinance of 1871, part of the Law of Ceylon, but in the passage which has been cited above their Lordships are discussing the general law of acquisition of title by adverse possession as between co-owners. The case in *Corea v. Appuhamy* (1) was referred to by their Lordships of the Privy Council in *Hardit Singh v. Gurmukh Singh* (3). The judgment of the Board was delivered by Lord

(2) (1853) 2 Kay. & J 79; 25 L J Ch. 159; 1 Jur. (N.S.) 1160; 4 W R 135; 110 R R 107.

(3) 20 Bom. L R 1064; 47 Ind. Cas. 626; A I R 1918 P C 1; 64 P R 1918; 1 U P L R (P C) 8; 28 C L J 437; 24 M L T 389; 9 L W 123; (1919) M W N 1 (P O).

(1) (1912) A C 230; A I R 1914 P C 243; 81 L J P C 151; 105 L T 836.

Buckmaster who states :

"If by exclusive possession of joint estate is meant that one member of the joint family alone occupies it that, by itself, affords no evidence of exclusion of other interested members of the family. Uninterrupted sole possession of such property without more must be referred to the lawful title possessed by the joint holder to use the joint estate and cannot be regarded as an assertion of a right to hold it as separate so as to assert an adverse claim against other interested members.

If possession may be either lawful or unlawful, in the absence of evidence it must be assumed to be the former. The fact therefore that this village of Bhagsar has been occupied for many years by defendants and their predecessors is insufficient to prove exclusion of the plaintiffs without further evidence."

Their Lordships were dealing with a case of joint family property in the Punjab; but I do not think that that makes any material difference. The case of *Govindrao v. Rajabai* (4) a decision of their Lordships of the Privy Council reported in *Govindrao v. Rajabai* (4) was a case of tenants-in-common. Citing with approval the case in *Corea v. Appuhamy* (1) their Lordships held in this case that the rule that possession by one tenant-in-common cannot be adverse to another, meant that it cannot be so until ouster. Their Lordships held in that case that adverse possession had been established in the following circumstances: The plaintiff and the defendant belonged to two branches of the same family which were not joint. It appeared that plaintiffs' title to the property in question had never been expressly denied till 1912, but the two branches had separated long before and the plaintiff had never had possession or participation of profits since 1880, and when a predecessor of the defendant who had been managing the properties of the plaintiff during his minority handed them over on his coming of age more than 20 years before the suit this property was not included. In these circumstances it was held that in regard to the property in suit the action brought by the plaintiff in 1917 was barred by limitation, because the plaintiff must have known more than twelve years before the suit that his title was not admitted and the possession of the defendant had been adverse for more than the statutory period.

The case in *Baghbhari v. Khatun* (5), lays down the same principle as that enunciated by the House of Lords in *Corea v.*

Appuhamy (1), it was held in this case that possession or occupation of property by one co-sharer does not constitute adverse possession against any other co-sharer until there has been a disclaimer of the latter's title by open assertion of hostile title on the part of the former. Where a co-sharer deals with property in which some women are interested, there is a presumption that acts done by him are as manager and agent of the latter. In order to constitute adverse possession the possession must be actual, visible, exclusive, hostile and continued for the time necessary to create the bar of limitation. The same question of the acquisition of title by adverse possession by one co-sharer against another was again discussed by a Bench of our own Court in *Mangalmal Aganmal v. Muhamad Usif Bhoro* (6). It was there held that to constitute a title by adverse possession in one co-owner as against another there must be disclaimer by the one of the other's title by open assertion of a hostile title. It was not sufficient to show acts of possession. It was also held in this case that it was not necessary to show that adverse possession was brought to the knowledge of the person against whom it was claimed. It was sufficient that the possession was adverse and without any attempt at concealment; so that the person against whom time was running ought, if he exercised due vigilance, to have been aware of what was happening. This decision is of special importance in the present case, because every act of ouster set up by the learned Advocate for defendant No. 1 was an act done at a time when Kesarbai was a minor. In *Gobind Chandra v. Upendra Chandra* (7), it was held that :

"In order to establish adverse possession by one tenant-in-common against his co-tenants there must be exclusion or ouster and the possession subsequent to that must be for the statutory period.....What is sufficient evidence of exclusion must depend upon the circumstances of each case. Mere non-participation in rents and profits would not necessarily of itself amount to adverse possession but such non-participation or non-possession may, in the circumstances of a particular case, amount to adverse possession. Regard must be had to all the circumstances and a most important element is the length of time."

The learned Judges who decided the case in *Abdul Wahad v. Mohan Bashi Saha* (8),

(4) 35 O W N 438; 130 Ind. Cas. 673; A I R 1931 P C 48; 27 N L R 131; 58 I A 106; 60 M L J 386; 33 L W 439; Ind. Rul. (1931) P C 81; 53 C L J 313; 14 N L J 56; 33 Bom. L R 442 (P C).

(5) 16 S L R 25; 80 Ind. Cas. 118; A I R 1921 Sind 177.

(6) I L R (1939) Kar. 597; 185 Ind. Cas. 11; A I R 1939 Sind 315; 12 R S 151.

(7) 47 C 274; 56 Ind. Cas. 141; A I R 1920 Cal. 472; 30 C L J 512; 23 C W N 977.

(8) 34 C W N 246; 128 Ind. Cas. 103; A I R 1930 Cal. 166; Ind. Rul. (1931) Cal. 23.

perhaps go too far when they state :

"Merely to find overt acts of a notorious character unequivocally referable to an assertion of hostile title and that whether the co-sharer sought to be ousted knew of it or not, he would have known if he were diligent, would not therefore suffice. It is essential to find further his knowledge."

I am however bound by the decision of our own High Court reported in *Mangalmal Aganmal v. Muhamad Usif Bhoro* (6), where it has been held that actual knowledge need not be proved. It is sufficient if the acts of ouster relied on are overt acts so visible and publicly hostile to a co-sharer that he must have had knowledge of them. In *Jagadeshchandra v. Taiyab Sarab* (9), a Bench of the Calcutta High Court held that there can be no adverse possession by one co-sharer as against others until there is ouster or exclusion. The possession of a co-sharer becomes adverse to another co-sharer from the moment when there is an ouster; that is, after there is an assertion of a hostile title by one co-sharer against the other and to the knowledge of the latter, and the burden of proving the adverse possession or ouster was on the party who claims to defeat the title of his co-sharer by adverse possession. To the same effect is the decision of the Bombay High Court in *Chandbhai Mahamadbbhai v. Hasanbhai Rahimtoola* (10), where it was held by the Chief Justice and Shah, J. that :

"The sole possession by one of two joint owners itself is no evidence of his denial of the right of the other joint owner, and time does not run against the joint owner out of possession until the joint owner in possession has done some act to the knowledge of the other which amounts to a denial of the latter's right."

The decision cited above and reported in *Gobind Chandra v. Upendra Chandra* (7) and *Chandbhai Mahamadbbhai v. Hasanbhai Rahimtoola* (10), were referred to with approval in *Malhari Vaman v. Vinayak Ravji* (11), which is a decision of a single Judge of the Bombay High Court. In *Harcharan v. Bindu* (12), it was held that co-sharers who collect profits for other co-sharers are in a position similar to that of a *lambardar*. Where no adverse title has been set up, the mere fact that a co-sharer plaintiff has not received profits for more than twelve years before suit will not bar his claim.

(9) 61 C 377; 151 Ind. Cas. 464; A I R 1934 Cal. 644; 7 R C 123.

(10) 46 B 213; 64 Ind. Cas. 205; A I R 1922 Bom. 150; 23 Bom. L R 1033.

(11) 31 Bom. L R 640; 119 Ind. Cas. 779; A I R 1929 Bom. 323; Ind. Rul. (1929) Bom. 555.

(12) 32 A 389; 5 Ind. Cas. 559; 7 A L J 298.

Again in *Narsingh Das v. Gokul Chand* (13), it was held by a Bench of the Lahore High Court that in the case of co-owners in the absence of an open assertion of a hostile title by one to the knowledge of the others there can be no ouster, and that non-participation in the profits by one and exclusive occupation by the other do not establish adverse possession. In support of their decision, their Lordships have referred to the case in *Corea v. Appuhamy* (1) and to a decision of their Lordships of the Privy Council in *Lachmeswar Singh v. Manowar Hossein* (14). In *Munshi v. Beli Ram* (15), it was held that the possession of one co-sharer must be deemed to be the possession of all the other co-sharers, and in order to defeat the title of absentee co-sharers it is for the co-sharer in possession to prove that by some overt act he converted his possession into adverse possession to the knowledge of other co-sharers. The case in *Jagannath Marwari v. Chandni Bibi* (16), is a judgment of Mookerjee and Buckland, JJ., and is of special importance because it deals with a case of adverse possession against a minor co-sharer. In the judgment of Mookerjee, J. at p. 651* the following passage occurs :

"The fundamental rule is that in order to establish adverse possession as between co-sharers there must be evidence of an open assertion of a hostile title by one of them to the knowledge of others. Mere non-participation in the profits by one party and exclusive occupation by the other is not conclusive. Apart from this we have the important circumstances that in this case the rightful owner, the second plaintiff Ramnibas who when a child a few months old was taken in adoption in 1892, was a minor till at least 1910; it is thus difficult to appreciate how the contesting defendants began to hold adversely to the knowledge of the infant in 1901."

The learned Judge has relied on the cases in *Corea v. Appuhamy* (1), *Hardit Singh v. Gurmukh Singh* (3), referred to before, *Muttu Nayagam v. Brito* (17) and *Varada Pillai v. Jivaratnammal* (18), which, he says, emphasize the principle that if possession may be either lawful or unlawful, in the absence of evidence, it must be assumed

(13) 12 L 101; 132 Ind. Cas. 177; A I R 1931 Lah. 339; 32 P L R 316; Ind. Rul. (1931) Lah. 529.

(14) 19 O 253; 19 I A 48; 6 Sar. 133 (P C).

(15) 18 L 618; 174 Ind. Cas. 942; A I R 1937 Lah. 578; I L R (1937) Lah. 618; 40 P L R 427; 10 R L 637.

(16) A I R 1921 Cal. 647; 67 Ind. Cas. 31; 34 C L J 432; 26 C W N 65.

(17) (1918) A C 895; A I R 1918 P C 277; 87 L J P C 146.

(18) 43 M 244; 53 Ind. Cas. 901; A I R 1919 P C 44; 46 I A 285; (1919) M W N 724; 10 L W 679; 24 C W N 346; 38 M L J 313; 18 A L J 274 (P C).

*Page of A. I. R. 1921 Cal — [Ed.]

to be the former, or in the language of Wood, V. C. in *Thomas v. Thomas* (2), possession is never considered adverse if it can be referred to a lawful title. On the other hand a number of authorities have been cited and relied on by the learned Advocates for defendants Nos. 1 to 3. But if these are closely examined, it will be apparent that they lay down no principle contrary to those to be found in the authorities I have referred to above which were quoted and relied on by the learned Advocate for defendant Kesarbai. In the case in *Gangadhar Balvant v. Parashram Bhalchandra* (19), it was held by Sir Lawrence Jenkins and Batty, J. that

"to constitute an adverse possession as between tenants-in-common there must be an exclusion or an ouster. Sole possession by one tenant-in-common continuously for a long period without any claim or demand by any person claiming under the other tenant-in-common is evidence from which an actual ouster of the other tenants-in-common may be presumed."

Reliance has been placed in the judgment of Sir Lawrence Jenkins in this case on the case reported in *Fisher and Taylor v. Prosser* (20), in which Lord Mansfield left it to the jury to presume an actual ouster from the fact that for about forty years one tenant-in-common had been in sole possession of lands without any claim or demand by any person claiming under the other tenant-in-common, though no actual ouster was proved. The facts in this Bombay case however were entirely different. Not only was there no evidence to show that the plaintiffs or their fathers ever received their share of the property in question, but they had taken no steps to have their names entered as co-defendants in a redemption suit filed in 1892 by Vishnubhat Godbole against Ganesh, the party who claimed adversely to them. None of the plaintiffs in that suit besides were minors. The decision of our own High Court reported in *Aludomal Jhangimal v. Ali* (21) is not of much assistance. It was a second appeal and as the two lower Courts had found on the facts exclusion by adverse possession, the High Court refused to interfere. *Sardar Amarsingh v. Sardarni Shiv Datt Kaur* is a decision of a Single Judge of the Lahore High Court reported in *Amar Singh v. Shiv Datt Kaur* (22). The learned Judge held that "non-participation in rents and profits by a co-sharer for a very long time may justify an inference

of ouster. The fact was also evidence of abandonment, that is, of intentional quitting of possession by a proprietor coupled with an intention not to resume it." At p. 891* of the judgment the learned Judge states:

"The crucial point which seems to me to require decision in the case is whether the removal of plaintiff's name from the revenue records can or cannot be considered to be an overt act on the part of other co-sharers amounting to ouster.....I do not see why the removal of the name of Narainsingh should not be considered to be an overt act amounting to ouster. It was done openly and if the plaintiff had taken any interest at all in the land he could not have failed to learn about it for the records of right are attested every four years and there was also a settlement of the Lahore District about the year 1912-13."

A little further the learned Judge states:

"It is true that no notice is proved to have been given to the plaintiff or his father, but for reasons given above it seems to me that the removal of the plaintiff's name from a public record was bound to come to plaintiff's notice in the ordinary course if he took any interest in the land, and hence his knowledge of the adverse claim set up by the defendants may be reasonably presumed. It may be noted in this connexion that though plaintiff was a minor in 1907 he appears to have become a major in 1912 when his property was released from the Court of Wards. Plaintiff however took no action to assert his claim till 1930. The defendant's title therefore became perfected by adverse possession for over 12 years in the meantime."

The passages quoted sufficiently distinguish this decision from the present case. In the circumstances of that case the learned Judge held that the removal of Narainsingh's name was an overt act which must have come to his knowledge when he attained majority in 1912. The suit was not filed till 1930, eighteen years after Narainsingh attained majority. The decision of their Lordships of the Privy Council in the case in *Secretary of State v. Devandra Lalkhan* (23) is of no assistance, as it was not a case of adverse possession as between co-owners. Besides, their Lordships held that the person against whom adverse possession was being claimed had constructive knowledge of an act which constituted an open assertion of a hostile title. The case in *Anant Ganpati v. Vishnu Rambhau* (24) is a decision of a Single Judge who held that where a special relationship exists between persons, such as tenants-in-common or mem-

(23) 61 C 262; 147 Ind. Cas. 545; A I R 1934 P C 23; 61 I A 78; 6 R P C 49; 11 O W N 96; 66 M L J 134; (1934) M W N 165; 39 L W 257; 36 Bom. L R 249; 38 C W N 285; (1934) A L J 153; 59 C L J 56 (P C).

(24) A I R 1934 Bom. 273; 154 Ind. Cas. 824; 58 B 410; 36 Bom. L R 284; 7 R B 375.

(19) 20 B 300; 7 Bom. L R 252.

(20) (1774) 98 E R 1052.

(21) 5 S L R 49; 10 Ind. Cas. 554.

(22) A I R 1937 Lah. 890; 175 Ind. Cas. 605; I L R (1938) Lah. 367; 39 P L R 695; 11 R L 19.

bers of an undivided family, the Court will presume that possession held by one is possession held on behalf of all the co-owners or members of the family. It does not follow that because a tenant-in-common is out of possession, time immediately begins to run against him. The possession of one co-owner is in itself rightful and does not imply hostility as would the possession of a stranger. To constitute adverse possession as between tenants-in-common there must be an ouster, and exclusive receipt of profits continuously for a long period may point to an ouster if the Court is satisfied that such taking of profits is an indication of denial of right in the other co-tenant to receive them. It was also a Single Judge of the Madras High Court who decided the case in *Mariammal v. Augustine Roy* (25). It is there stated that

"if one co-tenant is in possession of property which belongs to him as well as to other tenants-in-common his possession should not be considered to be adverse unless there be circumstances from which the Court could come to the conclusion that the possession is adverse; but the question is not one of pure law but it is a question of fact. If from the circumstances the Court should come to the conclusion that the possession of one tenant-in-common was not on behalf of other tenants-in-common, the Court is entitled to do so notwithstanding the fact that the possession of one co-tenant is not necessarily adverse to the others. An undisturbed and quiet possession for a long time is a sufficient ground to presume actual ouster."

The case in *Ram Dulari v. Sher Bahadur Singh* (26) was quoted in support of the contention that adverse possession may be acquired against a minor. It is the decision of a Single Judge who states:

"It cannot be said that there can be no adverse possession during the continuance of minority. Section 6 does not prevent the possession being adverse or the running of limitation against a minor. It only gives an extension of limitation in favour of the minor after the cessation of disability on the death of the person subject to it."

This was not a case between co-owners, and the possession of *Mst. Ram Dulari* was not on behalf of the minor *Inderjitsingh* as it would have been if *Ram Dulari* and *Inderjitsingh* had been co-owners. The learned Judge has relied on the decision of the Madras High Court in *Seetaramaraju v. Subbaraju* (27) but as I will show later this decision of a Bench of the Madras High Court is strongly in favour of the defendant *Kesarbai* in the present case. The case in

Shidlingava Sadeppa v. Rajava Tanesahab (28) is the judgment of a Single Judge of the Bombay High Court. It is not of any assistance, as it was not a case of adverse possession between co-owners. This brings me to the last of the cases cited by the learned Advocates for defendants Nos. 1 to 3 which is of special importance, namely, the case in *Seetaramaraju v. Subbaraju* (27). In the judgment in this case the question of acquisition of title by adverse possession against a minor has been discussed at great length. After referring to the case in *Smjth v. Byrne* (29) and the case in *In re Biss; Biss v. Biss* (30) and the case in *Thomas v. Thomas* (2) the learned Judges state:

"We do not think it can be stated as a general proposition that there could be no adverse possession of property which belongs to a lunatic or a minor during the continuance of the lunacy or minority of the owner. The question has in each case to be decided with reference to the anterior relationship between the person taking possession and the minor or lunatic, and to whether any circumstances exist which would entitle the Court to hold that the person who entered into possession did so under circumstances which would in law make him only an agent or bailiff of the minor or lunatic. The scheme of the Lim. Act shows that though time begins to run against minors and lunatics an extended period of limitation is given. Section 6 provides that where a person entitled to institute a suit or make an application for the execution of a decree is at the time from which the period of limitation is to be reckoned, a minor, or insane or an idiot, he may institute the suit or make the application within the same period after the disability has ceased as would otherwise have been allowed from the time prescribed therefor in col. 3 of Sch. I to the Act, and that where the disability continued up to the death of such person his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed; and where the legal representative is also under disability at the date of the death he will have the same privileges as are conferred by cls. 1 and 2 to s. 6. Section 8 provides that the period within which any suit must be instituted or application made will not be extended to more than three years from the cessation of the disability or the death of the person affected thereby. Section 9 provides that when once time has begun to run no subsequent disability or inability to sue stops it. Article 144 provides a period of 12 years from the date when the possession becomes adverse to the plaintiff. It seems to us from the provisions of the Lim. Act that lunacy or minority would not by itself prevent limitation from running as against a lunatic or minor and that in cases where it is clear that the person entering into possession was under no duty to the lunatic or minor and entered into possession for his own benefit and in assertion of a title hostile to that of the lunatic or minor, limitation would begin to run from the date when he so took possession though the lunatic

(25) A I R 1927 Mad. 170; 98 Ind. Cas. 278.

(26) A I R 1928 Oudh 481; 113 Ind. Cas. 258; 5 O W N 832.

(27) 45 M 361; 70 Ind. Cas. 678; A I R 1922 Mad. 12; 42 M L J 262; (1922) M W N 136; 30 M L T 128; 15 L W 382.

(28) 33 Bom. L R 603; 134 Ind. Cas. 366; A I R 1932 Bom. 23; Ind. Rul. (1931) Bom. 478.

(29) (1914) 1 Ir. Rep. 53.

(30) (1903) 2 Ch. 40; 72 L J Ch. 473; 88 L T 403; 51 W. R 504.

would be entitled to file suit within three years from the date when his disability ceases."

The learned Advocate for defendant Kesarbai should feel himself indebted to Mr. Lulla the learned Advocate for defendant No. 2 for referring me to this case; because it helped me to overcome the one great difficulty I had in my mind on the point I am discussing. Unlike the alienees in this Madras case Dayaram in the present case did not enter into possession without any anterior relations with the defendant Kesarbai against whom he claims adverse possession. He was a co-owner with the infant Kesarbai's father, and he entered into possession and continued in possession of the entire estate held in co-ownership under circumstances which would in law make him the constructive trustee of the minor Kesarbai in respect of her share. Sections 94 and 95, Trusts Act, are clearly applicable to the position of Dayaram in these circumstances. It appears to me from a careful consideration of all the authorities cited above that the following propositions of law are clearly deducible:

(a) Non-participation by one of two co-owners in the possession and enjoyment of the property belonging to them as co-owners for an extended period, coupled with the absence of any claim or demand for participation, may amount to ouster of such co-owner; whether it does or not, depend upon the facts and circumstances of each individual case; (b) if in the circumstances of any particular case such non-participation and absence of demand cannot be interpreted by themselves as exclusion or ouster, it is necessary for the party claiming title by adverse possession to prove some further specific act or specific acts of ouster; (c) such ouster must in its nature be an open assertion of a hostile title, such that actual or constructive knowledge thereof is clearly attributable to the party intended and sought to be excluded; (d) adverse possession will then start from the date of such act or acts; (e) minority is no bar to acquisition of title by adverse possession if the person claiming such adverse possession does not bear to the person against whom he claims it any anterior relationship such as that of agent, bailiff, trustee, etc.

Applying these principles to the established facts of the case before me I have no hesitation in holding that Kesarbai's non-participation in the possession and enjoyment of the property in suit from 1908 to 1934 and her failure to claim or demand such participation did not in the circumstances

of this case amount to ouster or exclusion. Dayaram's position was that of a co-sharer in respect of Kesarbai's share of the property and the rents and profits collected in respect thereof; he was in law a constructive trustee. Kesarbai was a minor till 1925 and the 12 years' period for acquisition of title by adverse possession had not elapsed between the date of Kesarbai's attaining majority and her definitely claiming her share in suit No. 179 of 1934. Besides it is clear on the evidence on the record that Kesarbai was entirely ignorant of her rights up to the time of the filing of suit No. 179 of 1934. If Dayaram then is to succeed in his plea of adverse possession against Kesarbai, he must necessarily prove some further act or acts of ouster of the nature stated above. Exhibits 36 and 37 are undoubtedly not such acts of ouster. Suits Nos. 279 of 1908 and 255 of 1910 were filed against certain mortgagors, strangers to the family. Kesarbai, even if she had been a major could not have had knowledge and cannot be expected to have had knowledge of statement made in the plaints by Dayaram as plaintiff in those suits. Even as a major she could not be fixed with knowledge actual or constructive of the statements relied upon as overt acts asserting a hostile title; but in fact Kesarbai was an infant and Exs. 36 and 37 cannot, in these circumstances, be held to amount to acts of ouster or an open assertion of a hostile title.

There is no evidence on record as to the circumstances in which the entry relied upon in Ex. 38 came to be made. The earliest date which can be attached to this entry is December 12, 1922, and Kesarbai was on that date still a minor. Exhibit 38 therefore is of no greater value than Exs. 36 and 37 as an act of ouster. Further, though it is not clear on the record, it would appear that within twelve years of December 12, 1922, Kesarbai had asserted her title and claim in suit No. 179 of 1934, for, she was added as a party in that suit by reason of an order dated July 12, 1935, and there is good reason for believing that the application on which that order was made must have been filed before December 1934. Indeed speaking for myself, and with all respect to the learned Judges who decided the case in *Seetaramaraju v. Subbaraju* (27), I cannot see how title by adverse possession can originate during the minority of the person sought to be defeated by adverse possession. To acquire adverse possession there must be acts of exclusion or ouster amounting to open assertion of hostile title,

knowledge of which must be attributable to the person sought to be excluded so as to enable him to resist the acts. A minor is not in a position to know of or to resist acts of ouster and I cannot therefore understand how there could be overt acts amounting to open assertion of a hostile title against a minor.

I hold therefore that at the time of the filing of this suit Kesarbai had a subsisting title to the share of the family property which came to her by inheritance from her father Hiranand and in which she became a co-sharer with Dayaram, and that Dayaram and his branch of the family had not acquired title by adverse possession against Kesarbai in respect of that share. It is unnecessary in view of this to discuss at any length the fourth head under which Mr. Sunderdas for defendant Kesarbai placed his arguments on the question of adverse possession. I do not think, however, there is much substance in this fourth line of argument. Dayaram was indeed the nearest male agnate of Kesarbai but he was not her guardian in law or *de facto*. He was not her guardian in law for under the Hindu law it is only the father and the mother who are the natural guardians of a minor. He was not a *de facto* guardian because he had never placed himself in the position of one or evinced any concern whatever in the minor Kesarbai. It is not therefore necessary for me to refer to the cases relied on by the learned Advocate for Kesarbai on this point, namely the decisions reported in *Sreeramulu Naidu v. Andalammal* (31) *Vasudeo v. Eknath* (32), *Fakir Gowda v. Dyamava Gowdappagowda* (33) and *Mahalakshamma v. Suryanayana* (34). I hold on issue No. 5 that the claim of Kesarbai is not barred by limitation. I have already held that defendants Nos. 5 and 6 are only entitled to maintenance, that they have not claimed past maintenance and that a claim for present and future maintenance is one which arises from day to day and is not barred by limitation.

Issue No. 7.—“Can the claim, if any, of defendants Nos. 4 to 6 or any of them be determined in this suit?” I have already held that defendants Nos. 5 and 6 in respect of their claim to maintenance and suitable residence can in this suit have merely a

declaration which I have given them. They have not chosen to place any material on record to enable the Court to determine whether they should be granted maintenance and a provision for residence, or the amount that should be allowed, or the nature of residence that should be determined and therefore they will have to enforce their claim by separate suits against Kesarbai if they so desire. The claim of Kesarbai, defendant No. 4, must undoubtedly be determined in this suit for there cannot be a partition between the plaintiff and defendants Nos. 1 to 3 without its being determined whether Kesarbai is entitled to one-half of the property of which partition is sought by the plaintiff against defendant Nos. 1 to 3. In respect of defendant No. 4 therefore I hold on Issue No. 7 in the affirmative. I come now to Issue No. 1 of the original issues.

Issue No. 1.—“Was the joint status of the parties severed in 1934 by the filing of suit No. 179 of 1934?” Before dealing with the authorities on this point which are mainly decisions of their Lordships of the Privy Council, it is necessary to be clear about the facts. Suit No. 179 of 1934 filed by Dayaram in July 1934, was a suit for partition of joint family property. The suit did not ripen into a decree. It was not withdrawn with the common consent of the parties thereto. What actually happened has been set out by me in an earlier part of this judgment and is to be found in Ex. 65, the proceedings in Court on July 7, 1936, when the suit was dismissed with costs. The plaintiff in that suit, Dayaram, had contumaciously refused to comply with the order of the Court to file an affidavit of documents, and in answer to an application by Khemchand, defendant No. 1, under O. XI, r. 21, Civil P. C. Dayaram's Advocate stated in Court “let the suit be dismissed.” The learned Advocate who appeared for Khemchand, defendant No. 1 in that suit, strenuously opposed the dismissal of the suit for non-prosecution under O. XI, r. 21. He stated:

“My submission is that the suit should not be dismissed on this ground. I should be permitted to withdraw this application.”

The Advocate who appeared for the added defendant Kesarbai claimed his costs. It is clear in these circumstances that the dismissal of the suit by the order of the Court on July 7, 1936, was not with the concurrence of, but in spite of the wishes of, the defendants in the suit. The Court was entitled to pass the order which it did and the defendants in the suit had no power to prevent it from doing so. But that they did

(31) 30 M 145; 17 M L J 14.

(32) 35 B 79; 8 Ind. Cas. 639; 12 Bom. L R 956.

(33) 57 B 488; 145 Ind. Cas. 262 (2); A I R 1933 Bom. 287; 35 Bom. L R 418.

(34) 51 M 977; 117 Ind. Cas. 113; A I R 1928 Mad. 1113; 55 M L J 733; 28 L W 919.

not assent is clear not only from Ex. 65 but from the fact that within three weeks Khemchand, defendant No. 1 in that suit, filed the present suit for partition. Reliance has been placed by the learned Advocate for defendant No. 1 upon a statement of Khemchand in his deposition to the effect:

"In 1934 Dayaram filed suit No. 179 of 1934 for partition. I did not desire partition, but in the written statement I filed I did claim a share."

I prefer however to rely upon Ex. 65 as indicating Khemchand's state of mind in connection with suit No. 179 of 1934 and the dismissal thereof. Dayaram's intentions in permitting the suit to be dismissed may well be gauged from the following passage in his evidence:

"In 1934 I filed a suit for partition against Khemchand and Tarachand. The suit was dismissed. I did not mind the dismissal as there was going to be great trouble (*rola*); since Khemchand and Kesarbai put forward a claim by Kesarbai, I did not mind the suit being dismissed."

In Mulla's Hindu Law at p. 391 the learned author states:

"The institution of a suit for partition by a member of a joint family is an unequivocal intimation of his intention to separate and there consequently is a severance of his joint status from the date when it was instituted. A decree may be necessary for working out the results of the severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate whether he obtains a consequential judgment or not. But if the suit is withdrawn before trial the plaintiff not desiring separation there is no severance of the joint status."

In a note below this paragraph the learned author states:

In *Palani Ammal v. Muthuvenkatachala Moniagar* (35), the Judicial Committee observed that a plaintiff claiming a partition even if withdrawn would unless explained afford evidence that an intention to separate had been entertained."

In the present case though the plaintiff Dayaram deliberately allowed the suit to be dismissed. His explanation is not that he did not desire partition, or that the other members of the joint family agreed to the withdrawal of the suit, he states that he withdrew the suit because he apprehended trouble. Kesarbai had appeared on the scene and he was in no mood to allow the claim of Kesarbai to be investigated. There is therefore no such explanation as would lead to an inference that the parties did not desire separation. The case of *Palani Ammal v. Muthuvenkatachala Moniagar* (35) is reported in 48 Mad. 254 (35). It was referred to in

(35) A I R 1925 P C 49; 87 Ind. Cas. 333; 52 I A 83; 1 M 254; 48 M L J 83; 6 P L T 133; 21 L W 439; (1925) M W N 330; 3 Pat. L R 126; 27 Bom. L R 735; 29 C W N 846; 23 A L J 746; L R 6 A (P C) 143 (P C).

Shagun Chand v. Data Ram (36) decided by a Bench of the Allahabad High Court and reported in 49 All. 664 (36). Ashworth, J. who refers to *Palani Ammal's case* (35) states: "The bringing of a suit for partition is only presumptive evidence of separation and that evidence may be rebutted by other evidence such as the fact of the withdrawal of the plaintiff on the ground that separation had not taken place or was not desired; but not by evidence merely of withdrawal of the plaintiff."

In *Jethanand Udhandas v. Kewalram* (37) it was held by a Bench of this Court that

"it is open to a member of a joint Hindu family to effect a division of status by a clear and unequivocal expression of intention to do so without the necessity of any concurrence on the part of the other coparceners, and the filing of a plaintiff in a suit for partition is such an unambiguous and unequivocal manifestation of intention."

and again,

"When an adult Hindu files a partition suit, it effects severance of the joint status from the date when the suit was instituted."

I am clearly of the opinion that in the circumstances of this case there was a severance of the joint tie in July 1934 when suit No. 179 of 1934 was filed and it is unnecessary for me therefore to refer to the other authorities which have been cited at the bar. The entire law on this subject has already been discussed by me at great length in the order dated December 20, 1938 by which I have disposed of the preliminary issue. I accordingly answer issue No. 1 in the affirmative.

"Issue 2:—What is the family property liable to be partitioned and in whose possession is the said property?"

I deal with this issue in its application to plaintiff and defendants Nos. 1 to 3. As regards defendant No. 4 Kesarbai, I will deal with it when I come to the additional issues which have special reference to this defendant. With regard to immovable property there is little dispute. The plaintiff has set out in the schedule annexed to the plaintiff thirty-one immovable properties. Defendant No. 1 claims that of the properties shown in this Schs. 11 and 15 are charitable, dedicated to public charitable purposes and therefore not liable to partition. As regards movable property the position is this: The plaintiff in the schedule attached to his plaint says that there is available for partition a sum of Rs. 4,00,000 (four lakhs) in the hands of defendant No. 1 and in his own hand Rs. 6,000. Defendant No. 1 denies the possession of Rs. 4,00,000 admitting only a

(36) 49 A 664; 101 Ind. Cas. 868; A I R 1927 All. 465; 25 A L J 369.

(37) 20 S L R 295; 97 Ind. Cas. 505; A I R 1926 Sind 216.

sum of Rs. 35,000 invested in *hundis*. He alleges on his part that the plaintiff is in possession of Rs. 45,000 in cash, and ornaments, sovereigns, gold, silver, etc. of the value of Rs. 55,000, and claims that these are liable to partition. Defendant No. 2 alleges that plaintiff is in possession of cash to the extent of rupees one lakh and this amount is liable to partition. His learned Advocate has further contended that partition is to be effected also of two immovable properties purchased by the plaintiff at Shikarpur in the name of his wife, and of the plaintiff Khemchand's share in the business of Dilaram Radhakishen in which he was a partner. In regard to properties Nos. 11 and 15 in the schedule attached to the plaint alleged to be charitable properties Dayaram Ex. 36 states :

"Two of the properties shown in the schedule to the plaint are dedicated to charity. They are survey Nos. 186 and 206 Sadar Bazar. There are shrines of Lord Shiva in each of these properties. The shrines are open to the public. Rents are realized from portions of these properties ; about Rs. 180 from both a month. These rents are used for the purposes of the shrine. They were so used till the receiver took possession. No other use was made of these rents. The expenses of the shrines are pay of the *pujari*, his clothing and food, the cost of feeding Brahmans and other miscellaneous matters including articles for the ritual of worship. The shrine on property No. 206 existed in my father's time."

In cross-examination Dayaram has stated :

"The rents of properties Nos. 186 and 206 Sadar bazar used to be entered in the same books as the rents of other properties."

This is all the evidence that Dayaram has led on the point. On the other hand Khemchand, the plaintiff Ex. 20, states :

"In two properties there is an image of Shiva in one of the rooms in a space as large as this witness-box. These are private chapels. Rents are realized from the rest of each of these properties. These are utilized like the rents of all the other properties."

Again in another part of his evidence he states :

"The other property shown as charitable bears No. 206. So far as I know the temples in both these properties are for the use of the members of the family only."

Tarachand, Ex. 69, defendant No. 2, has apparently not been asked anything about these shrines. Dayaram has not produced any books of account. He has not called in evidence the *pujari* who he alleges is in charge of these shrines. He has not called any member of the public to depose that the shrines are places of public worship. I cannot, in these circumstances, accept his bare statements and hold that properties Nos. 11 and 15 in the schedule attached to the plaint are properties dedicated to public charity. As was held by their Lordships of the Privy Council in the recently reported case in

Bhagwandin v. Gir Har Sarup (38), "while it is possible that a private temple should be so dealt with that in the course of years it becomes dedicated to the public as a public temple dedication requires to be proved."

So far as immovable property is concerned therefore, all the thirty-one immovable properties specified in the schedule attached to the plaint are liable to partition. They are admittedly in the possession of the defendant No. 1. If defendant No. 1 desires to maintain the shrines referred to, it is for him to arrange at the time of actual partition that properties Nos. 11 and 15 should be allotted to him as part of his share. The plaintiff has led no evidence to prove the possession by defendant No. 1 of a sum of rupees four lakhs as liable to partition. All that has been argued on his behalf is that defendant No. 1 was alone in receipt of the rents and profits of the immovable properties and of the money-lending business from the very start up to date and he has to render an account in respect of his management in the sense that the burden is on him to prove what movable property there now exists liable for partition in this suit. The plaintiff admits that an item of property liable to partition in this suit is the *hundi* business carried on by him in Shikarpur in connection with which he admits he received a sum of Rs. 35,000 from his father, defendant No. 1. Defendant No. 2 has led no evidence that plaintiff is in possession of a sum of rupees one lakh which is liable to partition in this suit. As regards the two immovable properties, admittedly purchased by Khemchand in the name of his wife now deceased, Khemchand has deposed thus :

"In the schedule of immovable properties attached to the plaint I have not shown one property in Shikarpur which stands in the name of my wife. I had purchased it in her name therefore it belongs to her. I purchased it in 1981 or 1982. I had invested the money I got from my maternal grandmother with the firm of Dilaram Radhakishen in 1984. It was that money with which I purchased the property. I received the money from my maternal grandmother in 1961 or 1962. Between then and 1984 I invested the money in *hundis*. I have kept no account of this money received from my maternal grandmother.....I paid about Rs. 4,200 for this property."

Again Khemchand states :

"I purchased two properties in the name of my wife not one, for Rs. 1,800 and Rs. 2,350. They are one in Dadwai quarter, the other in Jumakhan Mandi. The latter is an open plot. The former has a shop on it..... The property costing Rs. 1,800 I purchased in 1985. The one costing Rs. 2,350 I purchased in 1988. What

(38) 41 C W N 294; 185 Ind. Cas. 305; A I R 1940 P O 7; I L R (1940) Kar. P C 25 Sup.; 15 Luck 1; 67 I A 1; 1939 O W N 1078; 6 B R 179; 12 R P C 89; 1939 O L R 729; (1940) 1 M L J 1; 51 L W 4; (1940) M W N 3; 42 Bom. L R 190; 71 C L J 169; 42 P L R 457; (1940) A L J 533 (P C).

I have stated before as to the date of purchase is wrong. The wife whom I have referred to and who is dead was named Lilawati."

Now neither Dayaram nor Tarachand had in suit No. 179 of 1934 claimed these properties as being liable to partition. Dayaram has not mentioned them in the schedule attached to the plaint, Ex. 64. Tarachand has not referred to them in his written statement, Ex. 67. In his written statement and evidence in the present suit, Dayaram has not referred to these properties at all and the claim that these properties are liable to partition in this suit is made by Tarachand alone. Now, these properties admittedly purchased by Khemchand, the plaintiff, were either purchased out of family property in his hands in connection with the *hundi* business carried on by him at Shikarpur, or out of his own private funds as he alleges. There is no presumption that any particular property in the hands of one of the co-parceners is joint family property and the burden therefore is upon Tarachand, defendant No. 2, who alleges that these properties are joint family properties liable to partition to prove it. He has offered no evidence on the point. It seems to me, however, that at the present stage it is premature to decide whether the two properties in question at Shikarpur are liable to partition in this suit. Khemchand is liable and will be directed to render an account of his *hundi* business. If on an examination of that account it is found hereafter that Khemchand has accounted for all moneys that came into his hands in connection with this business, there is no ground for holding that the two properties which he purchased in the name of his wife were purchased from joint family funds. If he fails to account for the moneys in his hands the evidence he has given with regard to the purchase of these two properties from his private funds will have to be assessed in the light of his failure to account to that extent for joint family funds. This point will therefore have to be left open for the present. In the same way the questions whether Khemchand, the plaintiff's investment and share in the firm of Lilaram Radhakishen is or is not liable to partition in this suit, will have to be left over till Khemchand has rendered an account of the joint family funds in his hands in connection with his *hundi* business at Shikarpur. Khemchand has stated that Rs. 8,800 which he invested in 1984 in the firm of Lilaram Radhakishen was his own private money inherited by him from his maternal grandmother. There is no evi-

dence to the contrary and it is only upon an examination of the account which the plaintiff will hereafter furnish that it can be decided whether his evidence on this point is or is not to be accepted.

I hold, therefore, for the present on issue No. 2 that the family property liable to partition in this suit so far as plaintiff and defendants Nos. 1 to 3 are concerned is the immovable property specified in the schedule attached to the plaint. What other movable and immovable property there is liable to partition in this suit will depend upon the accounts which the plaintiff and defendant No. 1 will hereafter be directed to render. It may be that on a taking of those accounts movable property may be found in the possession of defendant No. 1 liable to partition in the suit; it may be that movable and immovable property is found in the possession of plaintiff liable to partition in this suit. These matters must however be determined later. (After examining evidence regarding certain safe his Lordship concluded) I entirely discard the whole of this evidence and hold it not proved that there exists any safe with valuable contents liable to partition as part of the property in this suit. I now come to the additional issues framed on February 6, 1940, after defendant Kesarbai had been permitted to amend her written statement and the other parties had been given an opportunity to file, and filed rejoinders.

"Additional Issue No. 1—Is defendant No. 4 entitled to a share in any of the immovable properties shown in the schedule annexed to the plaint. If so, what properties?"

It is common ground that out of the 31 properties set out in the schedule attached to the plaint, all were acquired by the family before the partition of July 1905, except Nos. 11, 30, 31 and half of property No. 24. These were acquired after the partition. It is not contested that if Kesarbai's claim is held to be within time she is entitled to a partition of immovable properties acquired before the partition. It is contended however that she is not entitled to any share in the properties acquired after the partition. The argument of the learned Advocate for defendants Nos. 1 and 2 is that after the partition Dayaram was in possession of separate movable property and a thriving money-lending business of his own. He could well have acquired properties Nos. 11, 24, 30 and 31 out of his separate funds. It is argued that there is no presumption that any item of property

in possession of any one member in a coparcenary is joint family property and that similarly there is no presumption that any particular item of property in possession of one co-sharer is the joint property of himself and his co-sharers. It appears to me however that in the circumstances of this case these arguments cannot prevail. Dayaram's own case is that after the death of Hiranand his (Dayaram's) branch of the family were the sole survivors of a joint Hindu family and that he managed the family property upon that basis. He has stated in his evidence:

"The household expenses were entered in the books of the money-lending business. New rent account books were not started after Hiranand's death. Account books were continued till they were finished and then new books were started. The money spent on repairs, re-building of properties, for taxes etc., were entered in the books of the money-leading business. The rents collected and entered in the rent account books were carried over into the books of the money-leading business periodically.

It is clear therefore that Dayaram kept no separate sets of accounts, that there was one account in respect of the entire property of the family and all the income of the family was thrown into one fund. By the partition of July 30, 1905, Dayaram became a co-owner with Hiranand and thereafter with defendant No. 4 Kesarbai, but nevertheless he has throughout the years treated the entire property as belonging to himself and the members of the joint family consisting of himself, his sons and grandsons. I am of opinion that the case falls under ss. 94 and 95, Trusts Act, which provides:

"In any case not coming within the scope of any of the preceding sections where there is no trust but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest or the residue thereof, as the case may be, to the extent necessary to satisfy their just demands;"

and s. 95 proceeds to stated :

"The person holding property in accordance with any of the preceding sections of this chapter must so far as may be perform the same duties and be subject so far as may be to the same liabilities and disabilities as if he were a trustee of the property for the persons for whose benefit he holds it."

I feel no doubt that Dayaram was a constructive trustee for the defendant Kesarbai of her share of the property held in co-ownership and of the income of that property. If Dayaram had any separate movable property of his own after the partition he has chosen to mix it up with property held in co-ownership. There has been on his part a deliberate mingling of funds, and in these circumstances the burden lies heavily upon him to prove that the immov-

able properties acquired after the partition were acquired from his own separate funds and not out of the income of the property held by him in co-ownership with defendant Kesarbai. His evidence on the point is not worth the paper on which it is recorded. I refuse to accept it uncorroborated as it stands. Reference has been made to the case in *John Kennedy v. Mary Annette de Trafford* (39), in which it has been held by the House of Lords that

"there is no fiduciary relationship between tenants-in-common of real estate as such. Nor can one tenant-in-common of real estate by leaving the management of the property in the hands of his co-tenant impose upon him an obligation of a fiduciary character."

I have read this case very carefully and it is entirely distinguishable. Besides, in India we are governed by the provisions of Indian Trusts Act and the provisions of ss. 94 and 95 thereof which I have set out above are clearly applicable. Reference has also been made to the case in *Abdul Rahman v. Haji Mahomed Idris* (40), where it was also held by a Bench of our Court that

"no presumption can be drawn from the fact that the head of a family has acquired property that it is joint family property as understood in Hindu Law."

This case, again, is entirely distinguishable. It was held as a fact that Haji Umer who after the death of the propositus had acquired agricultural lands had no joint funds in his hands and was in position to purchase the agricultural land for himself. Reference has also been made to the case in *Shakrulla v. Zohra Bibi* (41). A perusal of the case however shows that it is of no assistance. I therefore hold that in the circumstances of this case defendant No. 4 is entitled to partition of the immovable properties belonging to the family before the partition of 1905 as well as of the properties acquired after that date, and of the entire income of those properties.

"Additional issue No. 2.—Can she claim a share in the suit properties without paying *ad valorem* court-fees on her share?"

My answer is in the affirmative. The defendant Kesarbai is a defendant in a partition suit and I can see no reason why she should pay court-fees on the share she claims in such a suit. She will have to pay her share of stamp duty on the decree in respect of the property allotted to her at

(39) (1897) A C 180.

(40) 23 S L R 461; 118 Ind. Cas. 207; A I R 1929 Sind 212; Ind. Rul. (1929) Sind 175.

(41) A I R 1932 All. 512; 143 Ind. Cas. 230; 54 A 916; (1932) A L J 1039; Ind. Rul. (1933) All. 207.

partition. It is argued that though defendant No. 4 is ranged as a defendant, in respect of her claim she is for all practical purposes a plaintiff. There is no substance in the argument: in a partition suit every person interested in the property to be partitioned whether ranged as plaintiff or defendant is a plaintiff.

Additional issue No. 3.—Were the various immovable properties shown in para. 1 of further written statement of defendant No. 1 dated December 19, 1939, or any of them acquired and built upon by defendant No. 1 after the alleged partition with Hiranand in 1905 from his own moneys or from the alleged joint funds comprising of the rents of other joint immovable properties?

I have, for all practical purposes already answered this issue. There is no evidence whatever that can be accepted to show that the properties acquired after 1905 were acquired or rebuilt out of the separate funds of Dayaram and his family. The burden of proof on this issue was on Dayaram, defendant No. 1, and he has failed to discharge it. No further finding is necessary on this issue in view of my finding on Issue No. 1 above:

"Additional issue No. 3.—Is defendant No. 4 entitled to a share in any of the said properties?"

My answer is in the affirmative for reasons stated above.

"Additional issue No. 4.—What amounts, if any, were spent by defendant No. 1 on the development, improvement and repairs of the various immovable properties mentioned in para. 2 of the further written statement of defendant No. 1?"

This is a matter of accounting and will be covered by the directions to be given hereafter in regard to accounting to be done by the plaintiff and defendant No. 1:

"Additional issue No. 5.—Can defendant No. 4 get her share in the said properties without paying her share of the moneys so spent by defendant No. 1?"

As I have held that there is no proof that the income of the property held in co-ownership by Dayaram and Kesarbai was not utilized in whole or in part for the acquisition and development of properties after the partition of 1905, there is no reason why defendant No. 4 should have to pay her share of the moneys expended in acquisition and development, etc. I answer this issue in the affirmative.

"Additional issue No. 6.—Is defendant No. 4 entitled to an account of rents and profits of the immovable properties shown in the schedule annexed to the plaint or any of them?"

Additional issue No. 7.—Is her claim for such accounts for more than three years prior to November 1936 barred by limitation?

Additional issue No. 8.—Is her claim for accounts of the sale proceeds of the Hyderabad property and Malir Garden referred to in para. 2 of her amended written statement barred by limitation?"

These three issues must be dealt with together. It is not disputed that defendant

No. 4 in the view that I have taken of her case is entitled to claim accounts of the property held in co-ownership from defendant No. 1 or that Dayaram is only accountable to her as the *karta* or manager of a joint Hindu family. In the view that I have taken of the case, Dayaram, defendant No. 1, is accountable to defendant Kesarbai in regard to her share of the rents and profits of the property held in co-ownership as a constructive trustee. The point really in dispute in connection with this accounting is the period for which defendant No. 1 is liable to account to defendant Kesarbai. It is common ground that the article of limitation applicable is Art. 120 of Sch. I to the Limitation Act. But whereas on the one hand it is contended for defendants Nos. 1 to 3 that Kesarbai is entitled to accounts only for a period of six years prior to the date when she first put forward her claim in this suit, it is contended for defendant No. 4 that the right to sue in such cases accrues only when there has been a demand and refusal thereof. In this case Dayaram has stated:

"I have never at any time paid anything to Kesarbai out of the rents and other moneys received by me. She has never at any time made any demand on me. I have always considered myself the owner of the entire income."

The learned Advocate for defendant No. 4 in these circumstances contends that no question of limitation arises and defendant No. 4 is entitled to an account from defendant No. 1 for the entire period during which he was in sole possession of the property belonging to the co-owners and in sole receipt of the rents and profits thereof. As pointed out in B. B. Mitra's Commentary on the Lim. Act, there is a great conflict of decisions of the various High Courts as to what article of Sch. I, Lim. Act, applies in a case such as this, where one co-owner is demanding an account from another. The applicability of Arts. 62, 89, 109 and 120 has been debated in innumerable rulings of the various High Courts. I feel however that I will be on safe ground if I follow the view taken by a Full Bench of the Madras High Court in *Yerukola v. Yerukola* (42). That was a case between co-owners or tenants-in-common and it was held by the learned Judge who decided that case that Art. 120 of Sch. I, Lim. Act, was applicable and the right to sue accrued only when there was a demand for accounts and a refusal to render them. This decision of the Full Bench of

(42) 45 M 648; 71 Ind. Cas. 177; A I R 1922 Mad 150; 42 M L J 507; (1922) M W N 215; 30 M L T 279; 15 L W 595 (F B).

the Madras High Court has been followed in 1933 by Madhavan Nair J., who decided the case in *Lervai Rowther v. Syed Ammal* (43). It has also been followed in two decisions of the Bombay High Court in *Babasaheb Bhairojirao Chorpade v. Gopal Hanmant Kulkarni* (44) and *Jaffar El Edrus v. Mahomed El Edrus* (45). The learned Advocates for defendants Nos. 1 to 3 have referred me to the decision of their Lordships of the Privy Council in *Midnapur Zamindari Co. Ltd. v. Naresh Narayan Roy* (46) and the same case at p. 270 of the same report *Midnapur Zamindari Co. Ltd. v. Naresh Narayan Roy* (47) where their Lordships allowed mesne profits for 6 years only prior to the date of suit. That was however an entirely peculiar case not between co-owners or tenants-in-common and it must be taken that their Lordships in so holding in that case were not laying down any general principle but were merely determining the rights of the parties in the special circumstances of that case.

I have been referred also to the case in *Pateal Siddalingana Gowd v. Tatna Gowdra Bhimana Gowd* (48), but that case lays down no different principle. Article 120 of Sch. I, Lim. Act, was held to apply and the case in *Yerukola v. Yerukola* (42) was cited with approval. I hold therefore that Art. 120 applies in this case. There has been no demand for accounts and refusal to render the same, and defendant No. 4 is therefore entitled to an account of the nature I have specified before for the entire period referred to from defendant No. 1. I accordingly answer Issue No. 6 in the affirmative and Issue No. 7 in the negative. As regards Issue No. 8 it follows from what I have decided on Issues Nos. 6 and 7 that defendant No. 4 is entitled to an account of the sale proceeds of the Hyderabad property and Malir Garden which were sold by defendant No. 1 after the partition of July 30, 1905 and I hold accordingly. There remains the

question of the accountability of the plaintiff and defendant No. 1, and of the nature of the accounts that they should be required to render. In this connection, I would first deal with the question of the books of account. I have already in my order Ex. 49 on the preliminary issue expressed the opinion that the account books relating to the money-lending business carried on by defendant No. 1 and the rents and profits of immovable properties belonging to the family have been deliberately suppressed by defendant No. 1. The evidence recorded after the date of that order and the documents which have been exhibited merely confirm my view in this matter. (After considering evidence his Lordship proceeded further.) There is no dispute as to the accounts which the plaintiff has to render. He carried on *hundi* business in Shikarpur from 1902 or 1903 up to 1936; he has filed his books of account in Court. No suggestion has been made by any of the parties to the suit that he has not filed all the account books in connection with the business. The plaintiff has declared his willingness to render an account in respect of his entire business.

It is only in the case of Dayaram that the question of the nature of accounts to be filed needs special consideration. In regard to Kesarbai, defendant No. 4, he was, I have held, a constructive trustee, and therefore from the date of Hiranand's death in 1908 up to the date in 1936 when the Official Assignee as Receiver took charge of the properties in suit he must file a full and true account of all incomings and outgoings in connection with the immovable properties. In regard to plaintiff and defendants Nos. 2 and 3 however Dayaram's position is somewhat different, at least in the abstract, for he was the *karta* or manager of a joint family. As such, in a suit for partition, he cannot be called upon to render a general account of his dealings with the joint family property. He is however bound to satisfy the Court what property is available for partition, and on this point his *ipse dixit* is not to be accepted, especially when it is alleged that he has secreted and done away with much property. The law on this point presents no difficulty. In Mulla's Hindu Law, English Edition, at p. 267, the law is stated thus:

"238 (1). In the absence of proof of misappropriation or fraudulent and improper conversion by the manager of a joint family estate, he is liable to account on partition only for assets which he has received, not for what he ought or might have received if the family money had been profitably dealt with. Further, in

(43) A I R 1933 Mad 200; 142 Ind. Cas. 708; Ind. Rul. (1933) Mad. 241.

(44) 30 Bom. L R 917; 113 Ind. Cas. 254.

(45) 39 Bom. L R 277; 169 Ind. Cas. 232; A I R 1937 Bom. 217; 10 R B 1.

(46) 29 C W N 34; 80 Ind. Cas. 827; A I R 1924 P C 144; 51 C 631; 51 F A 293; 26 Bom. L R 651; 47 M L J 23; 35 M L T 169; (1924) M W N 723; 20 L W 770; L R 5 A (P C) 137; 23 A L J 76; 3 Pat. L R 193; 6 P L T 750 (P C).

(47) 29 C W N 270; A I R 1925 P C 93 (1).

(48) 68 M L J 487; 156 Ind. Cas. 640; A I R 1935 Mad. 731; 41 L W 138; (1935) M W N 107; 8 R M 30.

the absence of any such proof, a co-parcener seeking partition is not entitled to require the manager to account for his past dealings with the family property. All that he is entitled to is an account of the family property as it exists at the time he demands a partition. But it is open to him to show that the expenditure which the manager alleges he has incurred has not in fact been incurred, or that more properties are available for partition than those disclosed by him. (2) Since the institution of a suit for partition amounts to a severance of joint status, the manager is, from and after the date of such a suit, strictly bound to account for all receipts and expenses, and can take credit only for such expenses as have been incurred for the benefit or necessity of the estate, and the net income after deducting such expenses is to be divided among the co-parceners according to their shares."

In *Sri Ranga Thathachariar v. Srinivasa Thathachariar* (49), it was held that :

"In an ordinary suit for partition, in the absence of fraud or other improper conduct, the only account the *karta* or manager is liable for is as to the existing state of the property divisible and the parties have no right to look back and claim relief against past inequality of enjoyment or other matters; but it is open to the plaintiff to prove specifically fraud, misrepresentation or other improper conduct on the part of the manager with respect to such management.....but subsequent to the date of suit, the plaintiff and the defendant (the manager) are only tenants-in-common or co-sharers, and therefore the manager is strictly bound to account for all receipts and expenses....."

The dictum of Jwala Prasad, J. in *Jyoti-bati Chaudhurn v. Lakshmeshwar Prasad* (50), was clearly not intended to enunciate the law on this point. The question in that case was one of court-fees, and the learned Judge decided, there could be no suit for accounts against the *karta* of a joint Hindu family; such a suit was essentially a suit for partition and court-fees were payable on this basis. In *Sukhdeo v. Basdeo* (51), a Bench of that High Court decided that :

"In the absence of proof of misappropriation or fraudulent or improper conversion by the manager of a joint family a co-parcener seeking partition is not entitled to call upon the manager to account for his past dealings with the family property. The co-parcener is entitled only to an account of the joint family as it exists on the date he demands partition."

The case in *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma* (52) a judgment of their Lordships of Privy Council, was also referred to in argument by the learned Advocate for defendant No. 1, but that judgment, a very long one indeed, deals with the question of the validity of an

adoption and I have been unable to find in it any passage relevant to the point under discussion. In *Damodardas Manehlal v. Uttamram Manehlal* (53) a very strong Bench of the Bombay High Court held that :

"A manager of a Hindu family cannot refuse to render any account whatever of his management on the occasion of a partition, or require the other members of the family to accept his *ipso dixit* as to the property subject to partition. What that account should be so as to discharge him from his liability to account as manager, and what objection the other members of the family can take to it, must depend upon the conduct of the manager and the other members of the family, and cannot be stated in definite terms."

I think it would be hard to find a clearer statement of the law on this point and it is therefore unnecessary for me to refer to the other cases cited, e. g., those reported in *Perrazu v. A. Subbarayadu* (54), *Tam-mireddi v. Gangi Reddi* (55) and *Rammath Chhoturam v. Goturam Radhakisan* (56). In the present case, considering the fact that defendant No. 1 has suppressed the books of account, and the fact that he has for a period of over 30 years been in sole management of a vast estate and of a thriving money-lending business, there is no question of accepting his *ipso dixit* as to the property available for partition. From the date of the filing of suit No. 179 of 1934 Dayaram has to file a regular and complete account. For the period prior to that he must file an account showing the income of the immovable property and business and how he has disposed of it.

(Original) Issue No. 13.—"To what shares are the various parties entitled in the joint family property?" On my findings on the issues in the suit defendant No. 4 is entitled to a one-half share in the immovable properties in the schedule to the plaint. She is also entitled to one-half share in the net rents and profits of these immovable properties and a half share in the net sale proceeds of the Hyderabad and Malir properties. Of the remaining one-half share of the immovable properties the plaintiff and defendants Nos. 1, 2 and 3 are each entitled to a one-fourth share. They are also each entitled to a one-fourth share in half the net rents and profits of the immovable pro-

(53) 17 B 271.

(54) 44 M 656; 61 Ind. Cas. 690; A I R 1922 P C 71; 48 I A 280; 19 A L J 621; 34 C L J 56; 41 M L J 33; 23 Bom. L R 920; (1921) M W N 510; 34 P L R (P C) 46; 14 L W 270; 26 C W N 1; 3 P L T 1; 30 M L T 1 (P C).

(55) 45 M 281; 70 Ind. Cas. 337; A I R 1922 Mad. 236; 42 M L J 570; 30 M L T 323; 16 L W 55.

(56) 44 B 179; 54 Ind. Cas. 115; A I R 1920 Bom. 236; 21 Bom. L R 1179.

(49) 50 M 866; 104 Ind. Cas. 472; A I R 1927 Mad. 301; 53 M L J 189; 26 L W 125; 39 M L T 234.

(50) 8 Pat. 818; 120 Ind. Cas. 770; A I R 1930 Pat. 1; 10 P L T 491; Ind. Rul. (1930) Pat. 82.

(51) A I R 1935 All. 594; 157 Ind. Cas. 1013; (1935) A L J 582; 57 A 949; 1935 R D 229; 1935 A L R 889; 8 R A 244.

(52) 22 M 389; 26 I A 113; 21 A 460; 3 C W N 427; 9 M L J 67; 1 Bom. L R 226; 7 Sar. 330 (P C).

perties and the sale proceeds of the Hyderabad and Malir properties. In the money-lending business carried on by defendant No. 1, Kesarbai has no interest. The plaintiff and defendants Nos. 1 to 3 therefore will be entitled each to a one-fourth share therein, on the accounts of the said business being taken. Similarly the plaintiff and defendants Nos. 1 to 3 are each entitled to a one-fourth share of the *hundi* business carried on by the plaintiff in Shikarpur on the accounts thereof being rendered by the plaintiff. Two matters will, for the present, stand over: (1) the two immovable properties in Shikarpur purchased by the plaintiff in the name of his deceased's wife, Lilavati, and (2) Khemchand's investment of Rs. 8,800 in the firm of Lilaram Radhakishen. The shares in movable properties, which I have held above the parties to be entitled to, are of course all dependent upon the accounts which defendant No. 1 will furnish in accordance with directions given hereafter in this judgment.

(Original) Issue No. 14.—“To what relief are the parties entitled?”

Defendant No. 4 is entitled to a partition and separate possession of one-half share in the immovable property in suit set out in the schedule attached to the plaint. She is also subject to the accounts to be rendered by defendant No. 1, entitled to a one-half share of the net rents and profits of those immovable properties on the same being ascertained after accounts have been rendered by defendant No. 1, and to a one-half share in the net sale proceeds of the Hyderabad and Malir properties. Plaintiff and each of defendants Nos. 1 to 3 are entitled to partition and separate possession on one-eighth share in the immovable properties in suit and in the net rents and profits thereof after the same have been accounted for by defendant No. 1, and of a one-eighth share in the sale proceeds of the Hyderabad and Malir properties. They are also each entitled to one-fourth share in the money-lending business carried on by defendant No. 1 on behalf of the joint family and of the *hundi* business similarly carried on at Shikarpur by the plaintiff on the accounts of these businesses being rendered by defendant No. 1 and the plaintiff respectively. Defendants Nos. 5 and 6 are in law entitled to claim maintenance and suitable provision for residence from defendant No. 4; but they will have to do so in separate suits. Defendants Nos. 7 and 8 have filed their own separate suit for partition against the plain-

tiff, their father, and are not entitled to any relief in this suit.

The plaintiff is directed within two months from the date of this judgment to file in Court a detailed account of the *hundi* business carried on by him at Shikarpur from its very inception in 1902 or 1903 till the closing of that business in 1936 and in respect of properties Nos. 30 and 31 in the schedule to the plaint and the rents and profits thereof and to supply a copy of that account to each of defendants Nos. 1 to 3. Defendants Nos. 1 to 3 are directed to file objections to that account if they so desire within a month thereafter. Defendant No. 1 is directed to file the following accounts within two months of this date: (a) an account showing the movable property in his hands liable to partition on the date of the filing of this suit and thereafter till the date of this judgment. This account must show the amount received by him at the partition of July 30, 1905 and the income received by him from August 1, 1905 and on the other side expenditure incurred by him during the same period; (b) a separate account from August 1, 1905 relating to the immovable properties shown in the schedule attached to the plaint and the property in Hyderabad disposed of by him and the Malir Garden sold by him. This account must show on one side all receipts of rents and profits till the Receiver took possession and on the other all items of expenditure connected with the immovable properties.

Copies of these accounts of defendant No. 1 to be supplied to plaintiff and defendants Nos. 2 to 4 and objections by them, if any, to be filed in a month thereafter. A preliminary decree to be drawn up in terms of this judgment. The question of costs is for the present reserved. I have made no reference in this judgment to a point raised by the learned Advocate for defendant No. 2 in his final arguments. He contended that as by the document, Ex. 72 Kesarbai, defendant No. 4, had assigned 10/16ths of her share in the property in suit to an alienee, she could not get a decree in this suit for more than 6/16ths of her half share. This point was not taken in the written statement filed by defendant No. 2 even in February 1940. No issue was sought on the point and I have not permitted the learned Advocate to press this point in his final arguments. One other remark requires to be made. I have held that defendant No. 3 is entitled to a share on partition equal to that of the plaintiff or each of defendants Nos. 1 and 2. The nature of her estate in that share

is a matter of law with which I am not concerned at this stage. I have held defendant No. 4 entitled to a half share. How this claim to a half share is to be satisfied and by which of the parties to the suit is a matter which will have to be determined before the final decree is prepared. This point is therefore not referred to in this judgment.

D. Preliminary decree ordered.

OUDH CHIEF COURT

Criminal Miscellaneous Application No. 140
of 1940

March 28, 1941

YORKE AND AGARWAL, JJ.

ANIS AHMAD ABBASI AND ANOTHER—

APPLICANTS

versus

Hakim Qari NASIR AHMAD—

OPPOSITE PARTY

*Contempt of Courts Act (XII of 1926), s. 2—
Articles in newspaper—Test to see, whether amount
to contempt of Court.*

In considering whether articles published in newspaper amount to contempt of Court, what the Court has to see is, whether the publications had a tendency to prejudice the public or the Court for or against any party before the cause was finally heard. If they had such a tendency, the editor is guilty of contempt of Court.

Cr. Misc. App. an application dated November 26, 1940 filed by the above named applicants under s. 2 of the Contempt of Courts Act, the following order was passed by this Hon'ble Court.

Mr. K. P. Misra, for the Applicants.

Mr. Siraj Husain, for the Opposite Party.

Judgment.—This is an application under s. 2 of the Contempt of Courts Act.

The applicant Anis Ahmad Abbasi is the Editor of the paper named Haqiqat, and the other applicant Maulvi Mohammad Idrees is the Printer of that paper. The opposite party Hakim Qari Nasir Ahmad is the Editor, Printer and Publisher of another paper Hamdam.

An account of an interview between certain Punjab Khaksar leaders and a Sunni leader, Maulana Abdul Shakur, was published in the Hamdam of July 23, 1940.

An article over the signature of one Shaikh Mohammad Kamil was published in the Haqiqat of July 25, 1940. The heading of that article was 'Lies told by the Hamdam, King of liars', and it was alleged in it that the whole account of the interview in the

Hamdam of July 23, 1940 was a fabrication. On July 30, 1940 the Editor of the Hamdam filed a complaint in Court against the Editor and the Printer of the Haqiqat under s. 500, I. P. C. A paragraph was published in the Hamdam of August 1, 1940 the heading of which was :

'Challenge to those who call Hamdam a liar. Criminal proceedings started by the Editor of the Hamdam against Haqiqat newspaper. Our opponents must come to the Court and prove that the news in the Hamdam was false, or they will go to jail. The well-known barrister of Lucknow Mr. Nasir Ullah Beg has filed a case in the Court of the City Magistrate of Lucknow.'

It was stated in this paragraph that Shaikh Mohammad Kamil had contradicted in the paper Haqiqat the news published by the Hamdam and had abused it to his heart's content and accused it of publishing lies and that the Editor of the Hamdam had filed a defamation suit in the Court of the City Magistrate of Lucknow. It was also stated in it—

'We challenge those who by their insinuations and malicious fabrications mislead the public against the Hamdam to come to the Court and prove that any news published in the Hamdam is false'.

A letter purporting to be sent by Akram Ahmad, the leader of the deputation of Khaksars was also published in the Hamdam of August 1, 1940. He wrote in that letter that the report of the interview between Maulvi Abdul Shakur and the Khaksar leaders published in the Hamdam of July 23, 1940 was word by word true. The heading of this letter was 'Truth about those who make false accusations against Hamdam.' The Haqiqat published a short editorial paragraph in its issue of August 3, 1940 with the heading '*jhootaun ke badshah ka dawa. Haqiqat ke khilaf muqadma.*' (Complaint by the King of liars. Case against the Haqiqat.) It was stated in this editorial paragraph that the case brought by Hamdam would be fought, and if it was proved that Hamdam was a liar there would be a suit for damages and costs by Haqiqat, and that the Haqiqat gladly accepted the challenge which had been thrown to it. The Editor of the Hamdam made a complaint to this Court under s. 2 of the Contempt of Courts Act against the Editor and the Printer of Haqiqat on September 13, 1940 in respect of the editorial paragraph published in the Haqiqat of August 3, 1940. Both the Editor and the Printer were found guilty of contempt of Court, and the Editor was fined Rs. 200 and the Printer Rs. 100 and they were further ordered to pay Rs. 50 as costs to the Editor of Hamdam. The judgment in that case was pronounced on

October 28, 1940. On October 30, 1940, Hamdam published a paragraph with the heading

'God's *lathi* on the head of the opponents of Hamdam. Haqiqat called Hamdam a liar. Prosecution instituted by the Editor of the Hamdam. Prosecution aside, God took such a vengeance that by reason of the abusiveness of the Haqiqat a prosecution for contempt of Court was launched in the Chief Court and ended in a fine of Rs. 300 besides costs of the suit. The Court decided that it was a case of heinous offence of contempt of Court'.

It was stated in that paragraph that the Editor and the Printer of the Haqiqat were both fined Rs. 200 and Rs. 100 respectively, and it was ordered that they should pay all the legal expenses incurred by the Hamdam and also the amount of Rs. 50 to Mr. Nasir Ullah Beg. This paragraph also contained the following —

"The facts of the case are that the newspaper Haqiqat which bears senseless enmity towards Hamdam and its Director and which has taken the biggest part in adverse propaganda against the Director of Hamdam published an article by Mohammad Kamil in which the Hamdam was dubbed as 'King of liars'."

Another paragraph appeared in the Hamdam of October 31, 1940, with the heading 'God's curse on the opponents of Hamdam'. Another paragraph appeared in the Hamdam of November 1, 1940 under the heading 'As one sows so shall he reap'. This complaint had been made in respect of the two publications in the Hamdam, dated August 1, 1940, and the three other publications in it, dated October 30, 1940, October 31, 1940 and November 1, 1940.

We have to see whether the publications had a tendency to prejudice the public or the Court for or against any party before the cause was finally heard. If they had such a tendency, the opposite party is guilty of contempt of Court.

We take first the paragraph appearing in the Hamdam, dated August 1, 1940, in which a challenge was thrown out to those who called Hamdam a liar. We think that it was not contempt to throw out a challenge to the Haqiqat to prove that the news in the Hamdam was false. It is said that the Hamdam committed contempt by publishing that in case the news was not proved to be false, the opponents would go to jail, because the result of the complaint was thereby anticipated. We think that this did not amount to contempt of Court. Neither the Magistrate in whose Court the defamation complaint was pending nor the public could be prejudiced thereby about the merits of the case. Everybody knew full well that it was within the province of the Magistrate only to decide what punishment

he should give. We think that there is nothing in this paragraph which can make the Editor of the Hamdam liable for contempt of Court.

Next we come to the letter of Maulvi Akram Ahmad published in the Hamdam of August 1, 1940. This letter goes to show that the publication in the Hamdam of July 23, 1940, was true. That was no doubt, a point in the defamation suit, but we are not satisfied that the letter could tend to prejudice the Court or the public. We also think that the intention of the opposite party was not to prejudice anybody, but it was only to reply to the letter of Shaikh Mohammad Kamil in which it had been said that the account given in the Hamdam of July 23, 1940 was untrue. This letter was published on August 1, 1940 that is only two days after the complaint was made by Hamdam and before any date had been fixed in the case. It was held under similar circumstances in *Ketra Moni Dasi v. Shamal Dhong Dutt* (19 Indian Cases, page 539), (1) that the accused was not guilty of contempt of Court. The applicants themselves did not think that the letter would prejudice the trial, because they did not take any step till the present application was made on November 26, 1940 though an application was made on behalf of the opposite party on September 13, 1940, for contempt of Court in respect of a publication in the Haqiqat of August 3, 1940. The present applicants did not say even in reply to the application of the opposite party that he had himself committed contempt of Court. That might have been a factor in determining the punishment. We are of opinion that the opposite party did not commit contempt of Court by reason of publishing this letter.

It is said that in the publication, dated October 30, 1940, the Hamdam published that the Court awarded full legal expenses incurred by the Hamdam and the amount of Rs. 50 more to the Counsel, but it was wrong, and the Court had awarded Rs. 50 in all. We are not prepared to say that it was an intentional mis-stating of the result of the application. It could not prejudice the trial of the defamation case. It was stated in this paragraph that

"the Haqiqat which bears senseless enmity towards Hamdam and its Director and which has taken the biggest part in adverse propaganda against the Director of the Hamdam, published an article by Shaikh Mohammad Kamil in which the Hamdam was dubbed as 'King of liars'."

One could understand this to mean that

the Haqiqat published an article of Shaikh Mohammad Kamil on account of the enmity towards Hamdam and not because it was true. This could prejudice the public and the Court, and so it was a contempt of Court but not of any serious nature. The other words objected to are

'God's *lathi* on the opponents of Hamdam... God took such a vengeance that by reason of the abusiveness of the Haqiqat a prosecution for contempt of Court was launched in the Chief Court and ended in a fine of Rs. 300 besides costs of this suit.'

These words imply that those who oppose Hamdam are punished by God. This might possibly deter witnesses from giving evidence on behalf of Haqiqat against Hamdam, and therefore, we think that the opposite party is guilty of contempt of Court but not of serious type. Such writings are not taken very seriously by anybody.

The heading of the paragraph in the Hamdam, dated October 31, 1940, is 'God's curse on the opponents of Hamdam'. It was stated in it that Mian Anis Ahmad, Editor of the Haqiqat, had grown so reckless by indulging in constant abuses against the Director of the Hamdam that he published the news of the case instituted by the Editor under the caption 'Case by the King of Liars,' that the Real Avenger avenged this in this manner that in spite of the fact that the Editor and the Printer of the Haqiqat tendered humble apologies to the Court, the Chief Court held the offence to be so heinous that it inflicted very hard sentences against the Editor and the Printer of the Haqiqat. Similarly the letter published in the Hamdam, dated November 1, 1940, is to the effect that every one who attacks Hamdam becomes victim to divine punishment. A reference to the sentence pronounced by the Chief Court on the Haqiqat is also made.

These publications of October 31, 1940, and November 1, 1940, were meant to impress on the public that those who oppose Hamdam are punished by God. They were with reference to the controversy between the Hamdam and the Haqiqat. The effect of these publications also could be to deter the witnesses from giving evidence on behalf of Haqiqat, therefore they amounted to contempt of Court though not of a serious nature. We think that the opposite party is guilty of contempt of Court in respect of the publications, dated October 30, 1940, October 31, 1940 and November 1, 1940 only, but he has withdrawn his complaint for defamation, and the contempt was not at all serious. He has tendered an unqualified apology in writing to the Court, and under

the circumstances of the case we think we ought to accept it.

We hold that the opposite party is guilty of contempt of Court, but we accept the apology tendered by him. No order as to costs.

S.

Apology accepted.

LAHORE HIGH COURT

Criminal Revision No. 1599 of 1940
December 13, 1940

SKEMP, J.

SAT PAL TARA CHAND—CONVICT
—PETITIONER

versus

LAHORE MUNICIPALITY—RESPONDENT

Punjab Pure Food Act (VIII of 1929), s. 13 (1)
(a)—Conviction under—When can be had.

For a conviction under s. 13 (1) (a) Punjab Pure Food Act, it is essential to prove *inter alia* that the ghee was sold. Conviction cannot be based on the fact that the ghee was exposed for sale.

Cr. R. case reported by the Acting Sessions Judge, Lahore.

Facts.—The accused stated that he got the ghee from the *arhitis* and the sample was taken from his shop. His plea therefore was not of guilty. No evidence whatsoever was recorded by the Magistrate.

Report.—*The proceedings are forwarded for revision on the following grounds:* The conviction is not based on any evidence whatsoever. The Inspector, who took the sample, did not come into the witness-box. The certificate of the analyst does not have the impression of the two seals with which the sample was alleged to be sealed. The printed form of the certificate simply stated that the impression on the invoice was hereto attached, though not actually attached. It therefore cannot be said without evidence if the certificate related to the sample taken by the Inspector. In the absence of the impressions of the seal, it cannot be said if the samples were taken by the Inspector in accordance with s. 10, Punjab Pure Food Act, VIII of 1929. It is accordingly, recommended that the conviction and sentence be set aside and the fine, if paid, refunded.

Mr. Des Raj Sawhney, for the Petitioner.

Mr. Hamid Ullah Siddiqi, for the Respondent.

Order.—This order will dispose of two references by the learned Acting Sessions Judge of Lahore recommending that convictions under s. 13, Punjab Pure Food Act, VIII of 1929, be set aside and fines be refunded. The proceedings before the Magis-

trate were sketchy in the extreme. I take first the record of proceedings in serial No. 27, which is as follows:

Offence complained of: Offence proved: Plea of the accused and his examination, if any: Finding: Sentence:	13.—Pure Food Act; selling adulterated ghee with 10 per cent. foreign fat. 13.—Pure Food Act. States that they get the ghee from the <i>arhtis</i> and this sample was taken from his shop. Is guilty of selling adulterated ghee and deserves no leniency. Has another <i>challan</i> pending against him. Fined Rupees fifty."
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The proceedings in the next case No. 28 are similar but the offence complained of is "selling ghee with 25 per cent. foreign fat and the finding is:

"It is only rarely that these ghee sellers are caught. They have reaped large profit at the expense of the poor suffering public and deserve no leniency. Fined Rs. 200."

The Acting Sessions Judge, after notice to the Crown but not to the Municipal Committee recommended that the convictions and fines be set aside. When the cases came up before me I found that notice was issued to the Crown which was not interested and not represented, but not to the Committee. I issued notice to the Committee and have heard their case. The Food Inspector at whose instance these prosecutions were launched, has given evidence before me. On December 24, 1939, he went to the shop and found a boy of 13 or 14 named Satya Pal, son of the owner, selling ghee. He inspected various tins of ghee, thought that two of them were bad or adulterated and took samples from those two tins. He complied with the law by taking and sealing three different samples of the ghee from each tin: one for the shop-keeper, one for the public analyst, and one for the Inspector, and calling in an independent witness to testify to the proceedings. The case was then challaned before Diwan Somer Nath, Magistrate of the first class, exercising summary powers. The Inspector did not appear. According to routine these cases are conducted by a "Court clerk." The proceedings bristle with irregularities. The record does not state what the conviction is more than s. 13, Pure Food Act. Mr. Hamid Ullah representing the Committee before me says that the conviction was under s. 13 (1) (a), which says:

"No person shall sell any adulterated food unless he has complied with such rules as may be prescribed in this behalf."

For a conviction under this sub-section, it is necessary to prove *inter alia* that the ghee was sold and from the Food Inspector's statement before me no sale is proved. It merely appears that the ghee was exposed for sale. I entirely fail to understand why there were two prosecutions and two convictions. The reasoning which permits these two convictions would have permitted 20 convictions if the same amount of ghee had been in 20 small canisters instead of two large ones. The petitioner before me is a schoolboy now 13 or 14 years of age and at the time a year younger. It is said that the owners leave agents or servants in possession of their shops and disappear at sight of the Inspector. But clearly it would have been more satisfactory to prosecute the boy's father the owner of the shop and the real offender. It is proved that ghee adulterated in one tin with ten per cent. of foreign fat, in another tin with 25 per cent. of foreign fat was exposed for sale so conviction does not offend against natural justice; but why should there be two convictions? Why was one fine so much heavier? Did the Magistrate realise that both samples were taken at the same time? Why was the Inspector not examined? The procedure of the Committee in prosecuting such cases and of the Magistrate in trying them are most unsatisfactory. The trial was a travesty. I set aside these convictions and the fines which have been paid are to be refunded.

D. Convictions set aside.

ODDH CHIEF COURT

Second Civil Appeal No. 333 of 1937

March 18, 1941

YORKE, and GHULAM HASAN, JJ.

Mst. MUNIA—APPELLANT

versus

MANOHAR LAL AND OTHERS—

RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XLI, r. 27 (1) (c) and (1) (b), s. 11—Additional evidence, when admitted—"For any substantial cause," meaning of—Documents sought to be produced under r. 27 (1) (b)—Non-production due to negligence—If can be admitted—Court trying previous suit not competent to try subsequent suit—Previous decision, if res judicata—Evidence Act (I of 1872), ss. 21, 116—Estoppel—Wrong admission made in ignorance of legal rights—Binding effect—S. 116, scope and application—Term of tenancy expiring—Section does not apply—Hindu Law—Joint family—Brothers succeeding to stridhan property—They are tenants-in-common.

It is only when the Appellate Court requires, in other words finds it needful, that additional evidence can be admitted. The words "for any other substantial cause" must be read as *ejusdem generis* with

the previous portion of cl. (c). namely "the Appellate Court requires." 132 Ind. Cas. 721 (1), relied on. [p. 163, col. 2.]

Where the non-production of the documents sought to be produced under O. XLI, r. 27 (1) (b) is due to the negligence of the appellant or his Counsel, it is neither desirable nor proper to allow the appellant to fill up the lacuna in the evidence produced in the Court below and to patch up the weak points of the case. [*ibid.*]

The decision in the previous suit does not operate as *res judicata* in a subsequent suit, when the Court which decided the previous suit was not competent to try the subsequent suit.

Wrong admissions made in ignorance of legal rights have no binding effect.

Section 116 of the Evi. Act confines the operation of the doctrine of estoppel against a tenant during the continuance of the tenancy. This section has no application where the term of the tenancy has already expired. [p. 164, col. 2.]

Where brothers succeed to the *stridhan* property of a woman, they take it as tenants-in-common and not as joint tenants. *Raja Chelikani Venkayamma Garu v. Raja Chelikani Venkataramanayamma* (3) and 169 Ind. Cas. 1 (4), referred to.

S. C. A. against the order of the District Judge of Lucknow, dated May 1, 1937.

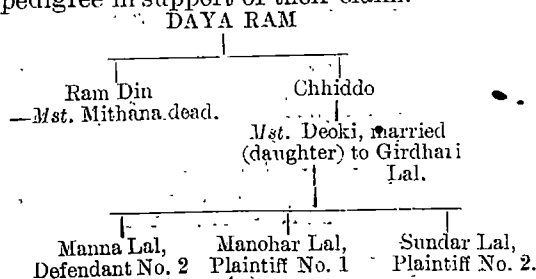
Messrs. R. B. Lal and Suraj Sahai, for the Appellant.

Messrs. Hyder Husain and B. K. Mathur, for Respondents Nos. 1 and 2.

Mr. Mohammad Naziruddin, for Respondent No. 3.

Judgment.—This is a second civil appeal by the defendant arising out of a suit for a declaration which has been decreed by both the Courts below.

The plaintiffs set up the following pedigree in support of their claim.

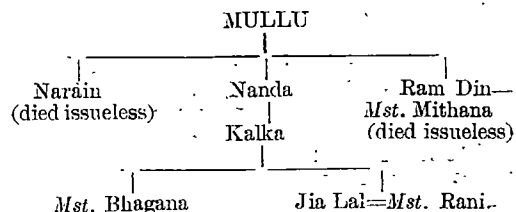


The name of Daya Ram did not find a place in the pedigree given in the plaint but the fact that Daya Ram was the father of Ram Din was proved by the evidence and is no longer disputed.

The plaintiffs' case as set out in the plaint was that Mst. Mithana was the absolute owner of a house situate in *Muhalla Bazar Kali-ji*, Lucknow. Mst. Mithana died sometime in 1919 leaving the plaintiffs and the defendant No. 2 as her heirs, the latter being the daughter's sons of the brother of her husband. The defendant No. 1 having filed a suit for ejectment and arrears of rent

against defendant No. 2 on April 4, 1935, on the ground that the house in suit belongs to her there was a cloud on the plaintiffs title which rendered it necessary for them to bring the present suit for a declaration to the effect that they, along with defendant No. 2, are the absolute owners in possession of the property in suit and that the defendant No. 1 had no right whatsoever, in the same. Manna Lal, the brother of the plaintiffs, was impleaded as defendant No. 2 in the suit.

The defendant No. 1 set up a counter pedigree which may be set out below :



The defence of the defendant No. 1 Mst. Munna was that the house was owned by her sister, Mst. Rani, and upon her death she and Mst. Bhagana became the owners of the assets left by Mst. Rani, and as a result of certain arrangement the house in suit came into the possession of defendant No. 1 while another house owned by Mst. Rani fell to the share of Mst. Bhagana. The plaintiffs' title to the house was denied. It was pleaded that even if Mst. Mithana was held to be the owner in the house in suit and the plaintiffs be held to be Mithana's heirs, Mst. Rani had become the owner by adverse possession. It was also pleaded in the written statement that the defendant No. 2 as the elder brother and *karta* and manager of the Hindu joint family consisting of himself and the two plaintiffs was the first tenant of the house in suit on behalf of Mst. Rani, in whose favour he had executed a *sarkhat*, and that after her death he was the tenant of the defendant No. 1, and a suit for ejectment and arrears of rent filed by the defendant No. 1 against defendant No. 2 had been decreed.

In oral pleadings before the Court the defendant's Counsel denied that Chhiddo was the brother of Ram Din. On August 20, 1936 Counsel for the defendant stated that if the plaintiffs proved that Ram Din and Chhiddo were brothers the plaintiffs will be the nearest heirs of Mst. Mithana.

The defendant No. 2 admitted the claim.

The trial Court held that the house in

suit had been purchased by *Mst. Mithana* and that she was the absolute owner thereof. It further found upon a consideration of the entire evidence that the plaintiffs had proved that *Ram Din* and *Chhiddo* were brothers and in this view of the matter they were the heirs of *Mst. Mithana*. The adverse possession pleaded by defendant No. 1 was negatived and the plea of estoppel was also overruled. As a result of the findings arrived at by the trial Court the suit was decreed.

The lower Appellate Court in appeal confirmed the decision of the trial Court. Hence the second appeal.

Learned Counsel on behalf of the appellant has frankly conceded that upon the materials on the record it is not open to his client to assail the finding of fact of the lower Appellate Court on the question of title. He has, however, filed an application before us (Civil Misc. Application No. 337 of 1939) under O. XLI, r. 27 of the Civil P. C. praying for admission of five documents mentioned in the application on the ground that documents Nos. 2 to 5 which relate to a certain litigation of 1885 were not after the exercise of due diligence within the knowledge of the applicant at the time when the decree was passed by the trial Court. These documents were sought to be filed before the lower Appellate Court on a similar application made to that Court more than a month after the admission of the appeal. Another application was filed on the same day for the amendment of the written statement by removing the name of *Mullu* from the pedigree and substituting the name of *Daya Ram* for the apparent object of bringing it into conformity with the fresh evidence. The lower Appellate Court rejected both the prayers on the ground that the appellant was represented by two senior Counsel in the trial Court, the case went on for more than a year and as many as 54 documents were filed in the case on behalf of the appellant. Two of the documents, Exs. A-49 and A-50, were the old documents and related to the year 1885. The lower Appellate Court was not satisfied that with the exercise of due diligence the evidence which the appellant wished to produce could not have been discovered during the trial and consequently rejected the application. One of the grounds of appeal relates to the rejection of the appellant's prayer for the admission of the aforesaid documents. As regards the document No. 1, which is a copy of an *abadi khasra* the trial Court, it is stated, declined per-

mission to file the same presumably on the ground of delay.

We have heard learned Counsel in support of the prayer for the admission of the additional evidence and see no reason to dissent from the conclusion arrived at by the lower Appellate Court. Reference has been made on both sides to a decision of their Lordships of the Privy Council in *Parsotim Thakur v. Lal Mohar* (L. R. 58 I. A., 254)(1) where it was held that under r. 27 (1) (c) of O. XLI of the Civil P. C. it is only when the appellate Court requires, in other words finds it needful that additional evidence can be admitted. The words "for any other substantial cause" must be read as *ejusdem generis* with the previous portion of cl. (c) namely, "the appellate Court requires". It seems to us quite clear that the finding of fact arrived at by the lower Appellate Court is supported by sufficient evidence of a satisfactory character and it is not necessary for this Court to require the production of any document within the meaning of r. 27 (1) (c) of O. XLI of the Civil P. C. We are further of opinion that the appellant has not complied with the conditions prescribed by sub-cl. (b) of r. 27 (1) added by this Court. This clause runs thus:—

"(b) the evidence sought to be adduced by a party to the appeal, which after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order under appeal was passed or made."

The lower Appellate Court has given adequate reasons for holding that the appellant had not satisfied the Court that the documents sought to be produced in appeal were not within the knowledge of the appellant or after the exercise of due diligence could not be produced by her in the trial Court. Whether the non-production of these documents is due to the negligence of the appellant or her Counsel, it is neither desirable nor proper to allow the appellant to fill up the lacuna in the evidence produced in the Court below and to patch up the weak points of the case. We accordingly reject the application.

The next point which was argued on behalf of the appellant relates to the question of estoppel. This plea is founded on the basis of two leases, Exs. A-36 and A-37, executed by defendant No. 2 in favour of *Mst. Rani* and a statement (Ex. A-32) made by defendant No. 2 in the ejectment case.

(1) 58 I. A. 254; 132 Ind. Cas. 721; A I R 1931 P C 143; 33 Bom. L R 1015; (1931) A L J 513; 35 C W N 786; Ind. Rul. (1931) P C 209; 13 L W 76; 54 C L J 1; 12 P L T 683; (1931) M W N 929; 10 Pat. 654; 61 M L J 489 (P C).

The Courts below have considered these pieces of evidence in conjunction with the other evidence in the case and have come to the conclusion that the admissions contained in these documents were not true and were mistaken. In view of the positive evidence, which has been accepted by both the Courts below on the question of the plaintiffs' pedigree, it is clear that the aforesaid admissions were wrong in point of fact and were evidently made in ignorance of legal rights. These admissions were rightly rejected by the Courts below as having no binding effect on the plaintiffs' interests. It has, however, been contended on the strength of Exs. A-36 and A-37 that under s. 116 of the Indian Evi. Act the execution of these leases by defendant No. 2 as manager and *karta* of the joint family consisting of himself and his brothers, the plaintiffs, estopped all of them from denying landlord's title. Strong reliance has been placed upon a decision of their Lordships of the Privy Council in *Kumar Krishna Prosad Lal Singh Deo v. Baraboni Coal Concern, Ltd.*, (A. I. R. 1937 P. C. 251) (2) where it has been held that the words "at the beginning of tenancy" in s. 116 of the Indian Evi. Act do not give a ground for a contention that when a person already in possession of land becomes tenant to another, there is no estoppel against his denying his lessor's title. "Tenant who has occupied but not entered" is a difficult notion to thrust in s. 116 of the Act. It is urged that the fact that the defendant No. 2 and his brothers, the plaintiffs, were already in possession of the house before the execution of these leases, did not take the case out of the purview of s. 116 of the Indian Evi. Act as interpreted by their Lordships in the above-mentioned case. We are, however, of opinion that the present case does not fall within the mischief of the rule enacted under s. 116 of the Indian Evi. Act. Exhibit A-36 in a *sarkhat* executed on March 5, 1932, by defendant No. 2 in favour of *Mst. Rani* for a period of six months. The lease, therefore, must be deemed to have expired on September 5, 1932. Exhibit A-37 is a *sarkhat* executed by defendant No. 2 on February 5, 1933, in favour of *Mst. Rani* for a period of one year. This period must also be deemed to have expired on

(2) A I R 1937 P C 251; 169 Ind. Cas. 556; 1937 O L R 398; 1937 A L R 623; 10 R P C 38; 3 B R 700; 46 L W 201; (1937) 2 M L J 286; 1937 O W N 866; 65 C L J 563; 39 Bom. L R 1034; 18 P L T 739; 41 O W N 1253; (1937) A L J 1389; 64 I A 311; 31 S L R 625; 11 L R (1938) 1 Cal. 1 (P O).

February 5, 1934. The present suit was filed on September 3, 1935, long after the expiry of the terms of these leases. Section 116 of the Indian Evi. Act confines the operation of the doctrine of estoppel against a tenant during the continuance of the tenancy. As the term fixed by Exs. A-36 and A-37 expired before the filing of the present suit and as there is no evidence on the record as regards the continuance of the tenancy, we must hold that s. 116 of the Indian Evi. Act has no application to the present case.

As regards the question of adverse possession, we hold in agreement with the view taken by the Courts below that no such adverse possession is established. According to the plaintiffs, *Mst. Mithana* died about 17 years ago, while, according to the defendant No. 1, she died about 21 or 22 years ago (*vide* oral pleadings.) It is not disputed that the plaintiffs have all along been in possession during the said period and, beyond the fact that two *sarkhats* (Exs. A-36 and A-37) were executed by the defendant No. 1 in favour of *Mst. Rani* in the year 1932 and 1933, there is no evidence on the record that *Mst. Rani* ever came into possession of the property. As a matter of fact the plaintiffs are still in possession of the same property and they have filed the suit for a bare declaration which, according to the plaint allegations, was necessitated by reason of the ejectment suit against defendant No. 2. We, therefore, overrule the plea of adverse possession.

The plea of *res judicata* has been faintly pressed on behalf of the appellant. This plea is based upon the suit for ejectment filed by the defendant No. 1 against defendant No. 2 on April 4, 1935. The suit was decreed. This plea was not raised in the trial Court. We are, however, of opinion that there is no substance in this plea. The previous decision for ejectment was one by a Munsif while the present suit was decided by the Additional Civil Judge. It is clear therefore that the former Court was not competent to try the subsequent suit and consequently the present suit cannot be held to be barred by the principle of *res judicata*.

Lastly it has been argued that the plaintiffs, being the *stridhan* heirs of *Mst. Mithana*, must be held to have succeeded as tenants-in-common and the Courts below should not have decreed the suit for more than 2/3rds share in the house in dispute. This plea was not raised in the trial Court and the lower Appellate Court refused to

entertain this plea on the ground that it was one involving a question of fact and could not be allowed to be raised in appeal. It is admitted that the plaintiffs were claiming as the *stridhan* heirs of *Mst. Mithana*, who was alleged in the plaint to be the absolute owner of the property in dispute. This claim was denied by the defendant No. 1. In these circumstances we are of opinion that the property descended upon the plaintiffs and defendant No. 2 in distinct shares; in other words they succeeded as tenants-in-common and not as joint tenants. Reliance was placed on behalf of the plaintiffs respondents on *Raja Chelikani Venkayamma Garu v. Raja Chelikani Venkataramanayamma*, (L. R. 29 I. A., 156) (3). In that case two brothers living as members of a joint family inherited some property from their maternal grandfather. On the death of one of them leaving a widow a dispute arose as to whether his share in the property passed to his widow by succession or to his brother by survivorship. It was held that the property inherited by the two brothers was joint property in their hands and the undivided interest of the deceased passed on his death by survivorship to his brother and not by succession to his widow.

In a later case in *Muhammad Husain Khan v. Babu Kishva Nandan Sahai*, (A. I. R. 1937 P. C. 233) (4) their Lordships of the Judicial Committee held that the word "ancestor" in its ordinary meaning includes an ascendant in the maternal, as well as the paternal, line; but the 'ancestral' estate, in which, under the Hindu Law, a son acquires jointly with his father an interest by birth, must be confined, as shown by the original text of the *Mitakshara*, to the property descending to the father from his male ancestor in the male line. Hence the estate which is inherited by father from his maternal grandfather cannot be held to be ancestral property in which his son has an interest jointly with him. It was argued before their Lordships on the authority of the decision in L. R. 29 I. A., 156 (3) that the property inherited by a daughter's son from his maternal grandfather is ancestral property. Their Lordships repelled the con-

tention observing that the question formulated in the previous case was whether the property of the maternal grandfather descended, on the death of his daughter, to her two sons jointly with benefit of survivorship, or in common without benefit of survivorship and their Lordships decided that the estate was governed by the rule of survivorship, and the claim of the widow was, therefore, negatived. Their Lordships proceeded to explain that the question whether the property which a daughter's son inherits from his maternal grandfather is ancestral property in the technical sense that his son acquires there in by birth an interest jointly with him, was neither raised by the parties nor determined by the Board, and the phrase "ancestral property" was used in its ordinary meaning, namely, property which devolves upon a person from his ancestor, and not in the restricted sense of the Hindu Law which imports the idea of the acquisition of interest on birth by a son jointly with his father. That being the view enunciated by their Lordships of the Privy Council, it seems to us to follow clearly from the facts of the present case that the plaintiffs succeeded to the *stridhan* property left by *Mst. Mithana* along with defendant No. 2 as tenants-in-common and not as joint tenants. In this view of the matter the plaintiffs are not entitled to a decree for more than 2/3rds share in the house in dispute. There is an additional reason why the plaintiffs are not entitled to a larger decree. Defendant No. 1 has already obtained a decree for ejectment and arrears of rent against defendant No. 2 which has become final and binding between the parties thereto. That being so, our decision will lead to absurd legal results if we maintain the decree in respect of the entire property in favour of the plaintiffs.

The result, therefore, is that we allow the appeal in part, and in lieu of the decree passed by the lower Courts, decree the suit for 2/3rds share in the property in dispute, with proportionate costs in all the Courts.

s.

Appeal allowed in part.

(3) 29 I. A. 156; 25 M. 678; 4 Bom. L. R. 657; 7 C. W. N. 1; 12 M. L. J. 299; 8 Sar. 286 (P. C.).

(4) A. I. R. 1937 P. C. 233; 169 Ind. Cas. 1; 1937 O. L. R. 369; 1937 A. L. R. 527; 3 B. R. 603; 10 R. P. C. 1; 1937 O. W. N. 573; (1937) M. W. N. 683; 46 L. W. 1; 18 P. L. T. 495; 41 C. W. N. 1029; (1937) 2 M. L. J. 151; 39 P. L. R. 698; I. L. R. (1937) All. 655; 65 O. L. J. 438; 39 Bom. L. R. 979; 64 I. A. 250; (1937) A. L. J. 1032; 31 S. L. R. 590 (P. C.).

ALLAHABAD HIGH COURT

Civil Revision Application No. 9 of 1940

December 6, 1940

ALLSOP AND BRAUND, JJ.

DULHIN JANAK NANDINI KUNWARI

—PLAINTIFF—APPLICANT

versus

KEDAR NARAIN SINGH—DEFENDANT—

OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), O. XXXIX, rr. 2 (3) and 1, s. 24—O. XXXIX, r. 2 (3), applicability of, to injunction issued under r. 1—Injunction issued under r. 1—Proceedings for its enforcement, if transferable under s. 24—Proceedings to enforce injunction, whether proceedings for contempt—Transfer of suit—Transfer of all proceedings arising out of suit, is implied.

The provisions in sub-r. (3) of r. 2 of O. XXXIX, Civil P. C., must have been intended to apply to injunctions issued under that rule. Sub-rule (3) of r. 2 does not apply to injunctions issued under r. 1. Consequently the proceedings for enforcement of an injunction under r. 1 are transferable under the provisions of s. 24, Civil P. C., and the proper Court to enforce the injunction is the Court which at the time was seized of the suit in the course of which the injunction was issued.

[Case-law reviewed.]

It is doubtless convenient to speak of the proceedings to enforce the injunction as proceedings for contempt, but the terminology is not strictly accurate. There is doubtless an element of punishment in the provisions for the enforcement of an injunction, but the main object surely is to see that the order of the Court is carried into effect.

The transfer of a suit implies the transfer of all proceedings which arise out of the suit. Therefore, a Court which has passed an *interim* order which requires execution ceases to have jurisdiction in the matter of enforcing the order when the suit is transferred to another Court and consequently the power of enforcing the order lies in the Court to which the suit is transferred.

C. R. App. against the order of the Additional Civil Judge, Ballia, dated August 24, 1939.

Dr. K. N. Katju, Dr. K. N. Malaviya and Mr. M. N. Paul, for the Applicant.

Messrs. S. N. Verma, D. Sanyal, Shanker Sahai Verma and S. K. Verma, for the Opposite Party.

Allsop, J.—This is an application requesting this Court to set aside in revision an order passed by the learned Additional Civil Judge of Ballia on August 24, 1939. The applicant, Dulhin Janak Nandini Kunwari was the plaintiff in a suit in which she sought a declaration of her title to the Ausanganj Estate which was under the management of the Court of Wards at Ghazipur. In the course of this suit she made an application for the appointment of a Receiver upon the ground that the Court of Wards was about to deliver over the estate to the defendant, B. Kedar Narain Singh.

The Court fixed a date on which it proposed to dispose of the application and passed an order on March 25, 1939, restraining the defendant from taking possession of the estate in the meantime. It was alleged by Dulhin Janak Nandini Kunwari that B. Kedar Narain Singh disobeyed this order by making an application to the Court of Wards under s. 10, Court of Wards Act, to release the estate in his favour and she applied to the Court on April 15, 1939 to punish him for contempt. No final order had been passed on Dulhin Janak Nandini Kunwari's application when on August 4, 1939, this Court at the request of B. Kedar Narain Singh transferred the suit, from the Court of the Additional Civil Judge of Ballia to the Court of the Civil Judge of Benares. On August 24, 1939, Dulhin Janak Nandini Kunwari made another application to the Additional Civil Judge at Ballia in which she asserted that he still had jurisdiction, in spite of the order of transfer, to deal with the contempt of his injunction and prayed that he should pass orders on her previous application. The learned Additional Civil Judge passed an order in which he held that he had no jurisdiction and it is this order which we are now asked to set aside.

The learned Additional Civil Judge mentioned incidentally that the order of transfer passed by this Court contained observations which suggested that he no longer had jurisdiction. The order was passed by me and the reference is to a remark that the Court to which the suit was transferred would doubtless deal with the matter of contempt. I made that remark in reference to an argument that I should not transfer the suit because, if I did transfer it, B. Kedar Narain Singh would escape the consequences of his alleged disobedience of the injunction. I meant only to repel that argument on the ground that the transfer of the suit would not put an end to the proceedings for contempt. The question whether the transfer of the suit entailed the transfer of the contempt proceedings was not raised and I did not intend to decide it. The question is still open, although the learned Civil Judge acted quite properly in deferring to an apparent expression of opinion by this Court. It is argued on behalf of the applicant that it is only the Court which issued the injunction which can enforce it. Before dealing with this argument I should like to mention one point. It is doubtless convenient to speak of the proceedings to enforce the injunction as proceedings for contempt,

but the terminology is not strictly accurate because the Court of the Additional Civil Judge was not a Court of record and had no power to punish anyone for contempt. He had power only to enforce his order in the manner prescribed by the rules made under the provisions of the Civil P. C.

The applicant's argument is based on sub-r. (3) of r. 2 of O. XXXIX. In my judgment the sub-rule is not applicable because the injunction must have been issued under r. 1 and not under r. 2 of the order. I have no doubt that the provisions in sub-r. (3) of r. 2 must have been intended to apply to injunctions issued under that rule. If they had been intended to apply to injunctions issued under r. 1, they would have been contained in a separate rule and not in a sub-rule. There is undoubtedly some authority for the applicant's contention that the provisions of sub-r. (3) of r. 2 apply to injunctions issued under r. 1, but the question has apparently never come before a Court in quite the same way as it has come before us. The first case to which we were referred is the case in *Ram Prasad Singh v. Benares Bank Ltd.* (1). The question at issue was whether the High Court could punish disobedience to its injunction. The learned Judges said that they had no doubt that the provisions of O. XXXIX, r. 2 (3) would apply to an injunction which was not issued under r. 2, but they also said that the Court in any case could punish under its wide powers as a Court of record and, therefore, the expression of opinion was not a definite ruling.

The next case is *Adaikkala Thevan v. Imperial Bank, Madurai* (2). The learned Judges there followed the ruling of this Court which I have just mentioned but gave no other reasons for their conclusion that the sub-rule did apply. In *Muhammad Naziruddin v. Raja Ram* (3), a Single Judge of the Patna High Court followed the two rulings which I have already mentioned rather than a ruling of a Single Judge of this Court in *Balbhadar v. Balla* (4), in which a contrary opinion was expressed. The learned Judge preferred to follow the authority of two benches rather than that of a Single Judge. Then in

Krishnapur Mutt v. Vicar of Suratkal Church, 44 Ind. Cas. 56 (5), it was held that a Court could, under the provisions of O. XXXIX, r. 2, sub-r. (3), punish single acts of disobedience to an injunction, the ground being that there must be some method of enforcing an injunction. In *Jang Bahadur Singh v. Chhabila Koiri* (6), the opinion was again expressed that any injunction could be enforced under the provisions of O. XXXIX, r. 2 sub-r. (3). The argument was that r. 1 and r. 2 reproduced ss. 492 and 493 of the previous Civil P. C., and under that Code injunctions issued under s. 492 could be enforced under the provisions of s. 493. It is to be noted, however, that in s. 493 it was expressly stated that punishment could be inflicted for breaches of injunctions under a s. 493 and under s. 492, whereas in the present sub-r. (3) of r. 2 there is no reference at all to r. 1. Finally in *Salam Chand Kanayram v. Joogul Kishore Ramdeo* (7), there was a dictum that all interim injunctions could be enforced under O. XXXIX, r. 2, sub-r. (3).

It will be noticed that in these cases the question raised was either of no importance because the powers to be exercised were those of a Court of record, or the Courts in deciding the question merely purported to rely on authority, or the Courts were influenced by the impression which they had that there was no other means of enforcing an injunction. In *Jang Bahadur Singh v. Chhabila Koiri* (6), it was definitely pointed out that the interpretation which the Court was putting on sub-r. (3) of r. 2 was not the natural one. In *Bellary Press Co. Ltd. v. Venkata Rao*, 8 Ind. Cas. 7 (8), it was held that proceedings under O. XXXIX, r. 2, sub-r. (3) could not be transferred from one Court to another because it was only the Court which issued the injunction which could punish a breach of it under that sub-rule, but it was suggested that the Court to which the suit in the course of which the injunction had been issued had been transferred might be able to enforce the injunction under the provisions of s. 36 and O. XXI, r. 92, Civil P. C.

It has been argued before us that there is no reason to strain the meaning of

(1) 42 A 98; 58 Ind. Cas. 600; A I R 1919 All. 20; 17 A L J 1127.

(2) A I R 1926 Mad. 574; 95 Ind. Cas. 196; 50 M L J 401.

(3) A I R 1935 Pat. 274; 155 Ind. Cas. 619; 16 P L T 309; 7 R P 600.

(4) A I R 1930 All. 387; 127 Ind. Cas. 577 (2); Ind. Rul. (1930) All. 929.

(5) 44 Ind. Cas. 56; A I R 1918 Mad. 340; 7 L W 328.

(6) A I R 1936 Pat. 23; 160 Ind. Cas. 347; 15 Pat. 320; 17 P L T 61; 2 B R 187; 8 R P 355.

(7) A I R 1928 Cal. 462; 107 Ind. Cas. 65; 155 C 777; 32 C W N 114.

(8) 8 Ind. Cas. 7; 8 M L T 374; (1910) M W N 631; 21 M L J 829.

O. XXXIX, r. 2, sub-r. (3), if it is possible to enforce an injunction issued under r. 1 under the provisions of s. 36 and O. XXI, r. 32. Section 36 lays down that the provisions of the Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders. Under O. XXI, r. 32, injunctions contained in decrees can be enforced in certain ways and it seems to me that it is obvious that injunctions contained in orders can be enforced in the same way. I think therefore that there is considerable force in the argument placed before us that the enforcement of injunctions issued under O. XXXIX, r. 1 should be under the provisions of s. 36 and O. XXI, r. 32, Civil P. C. If that is so, the provisions of sub-r. (3) of r. 2 of O. XXXIX, would not apply and there would be no reason for holding that proceedings for the enforcement of the injunction should not be transferable to the Court which at the time was seized of the suit in the course of which the injunction was issued.

In my judgment it is in every way preferable that the enforcement of an injunction issued in the course of a suit should be in the hands of the Court which at the time is seized of the suit. After the transfer of the suit any new injunction could only be issued by the Court which was dealing with the suit and it is inadvisable that there should be two Courts which might deal with matters which are in effect identical. There is doubtless an element of punishment in the provisions for the enforcement of an injunction, but the main object surely is to see that the order of the Court is carried into effect. A Court may issue an injunction under O. XXXIX, r. 1 and then, after the suit is transferred, the Court to which it is transferred may have before it other applications of a like nature and a question may arise whether the injunction already issued should be withdrawn. The Court dealing with the suit would be the proper Court to decide whether the injunction should or should not be withdrawn. Both as a matter of principle and as a matter of the proper interpretation of the provisions of O. XXXIX, r. 2, sub-r. (3), I think that that sub-rule should not apply to injunctions issued under r. 1. I hold therefore that the proceedings for the enforcement of an injunction under r. 1 are transferable under the provisions of s. 24, Civil P. C.

The question then arises whether the proceedings arising out of a suit are transferred when the suit is transferred. In my judg-

ment the transfer of a suit implies the transfer of all proceedings which arise out of the suit. Under the provisions of s. 37, the execution of a decree where the Court which passed the decree has ceased to have jurisdiction is vested in the Court which would have power to entertain the suit at the time when the application for the execution of the decree is presented. On the analogy of this rule it seems to me that a Court which has passed an interim order which requires execution ceases to have jurisdiction in the matter of enforcing the order when it ceases to have jurisdiction to deal with the suit and consequently that the power enforcing the order lies in the Court which would deal with the *interim* proceeding if it began at that time. I hold therefore that the proper Court to enforce the execution of the *interim* injunction with which we are concerned is the Court in which the suit is now pending and I would therefore dismiss this application in revision with costs.

Braund, J.—I agree.

By the Court.—This application is dismissed with costs.

s. *Application dismissed.*

OUDH CHIEF COURT

Second Civil Appeal No. 388 of 1937

February 27, 1941

BENNETT AND GHULAM HASAN, JJ.
FIRM HET RAM PADAM CHAND
—DEFENDANT—APPELLANT

versus

FIRM SUBHAG CHAND RIKHAB DAS
AND OTHERS—PLAINTIFFS AND OTHERS
—DEFENDANTS—RESPONDENTS

Partnership Act (IX of 1932), ss. 59, 68—Registration of firm—Presumption arising from—Certificate of registration—Evidentiary value of—Proof of signature of member of firm on application for registration, if necessary—U. P. Agriculturists' Relief Act (XXVII of 1934), s. 7—Applicability—Suit to recover unsecured debt—One of debtors non-agriculturist—S. 7 does not apply—Limitation Act (IX of 1908), s. 19—Signature—Giving name of firm only, in statement of accounts—Whether amounts to signature.

The registration of a firm under s. 59, Partnership Act, raises a presumption that the parties shown as members of the firm and registered as such are actually members of it. The presumption is, however, rebuttable, and it is for the party denying the membership to rebut it. A certificate of registration is sufficient proof, in the absence of evidence to the contrary, that a person is the partner of the firm and it is not necessary to prove that the application for registration bore his signature. [p. 170, cols. 1 & 2.]

The provisions of s. 7, U. P. Agri. Relief Act have no application in a suit for recovering an unsecured loan. Where one of the debtors is a non-agricul-

turist, the onus lies upon the party claiming the benefit of this section; to prove that all the debtors are agriculturists. [p. 171, col. 1.]

It is customary in business circles in India to give the name of the firm only in statements of accounts, and this amounts to signature for the purpose of s. 19, Lim. Act. [p. 171, col. 2.]

[Case-law referred to.]

S. C. A. against the order of the District Judge, Lucknow, dated July 7, 1937.

Mr. M. K. Seth, for the Appellant.

Mr. H. D. Chandra, for Respondents Nos. Nos. 1 to 3.

Judgment.—This is a second civil appeal from the judgment, and decree dated July 7, 1937, of the learned District Judge of Lucknow, reversing in first appeal the judgment and decree dated November 3, 1936, of the learned Civil Judge of Mohanlalganj Lucknow.

The suit out of which the appeal arises was brought by the sons of Rikhab Das proprietors of the firm Subhag Chand Rikhab Das, against the firm Het Ram Padam Chand represented by *Mst. Phool Kuar*, widow of Het Ram, Keshari Chand son of Padam Chand, and *Mst. Inder Kuar* widow of Padam Chand, to recover a sum of Rs. 3,532-10 principal and interest on the basis of a *bahikhata* account.

The plaintiffs' case was that on February 5, 1931, one of the partners of this firm, namely, Padam Chand, borrowed Rs. 2,500 with interest at the rate of ten annas per cent. per mensem, agreeing to pay back the amount due to the plaintiffs at Lucknow. The plaintiffs are proprietors of the firm Subhag Chand Rikhab Das of Lucknow. The defendant firm were commission agents and grain merchants of Agra.

It was said in the plaint that an accounting had taken place on October 28, 1932, when a sum of Rs. 2,841-8 was found due from the defendants. This suit was alleged to be within limitation by reason of an acknowledgment made by Padam Chand on this date.

Rikhab Das proprietor of the plaintiff firm, died on March 13, 1934, Het Ram died in April, 1934, and Padam Chand in December, 1934. The suit was instituted on October 1, 1935.

Mst. Phool Kuar repudiated liability. She contended first of all that as she and her husband were agriculturists the suit should have been filed in the Agra Courts under s. 7 of the Agri. Relief Act. Secondly she denied that Padam Chand was a partner of her husband Het Ram. She

alleged that her husband had been on very friendly terms with Padam Chand's grandmother, and that being on this account well disposed towards Padam Chand himself he had allowed his shop to bear Padam Chand's name, although Padam Chand had no proprietary interest in it.

It was further alleged by *Mst. Phool Kuar* that Padam Chand got possession of the papers of the business and murdered Het Ram. Padam Chand and his father *Piarey Lal* were prosecuted for the murder.

Padam Chand died during the pendency of the case while his father *Piarey Lal* was convicted.

Mst. Phool Kuar also denied that her husband had any necessity to take any loan from Rikhab Das and alleged that any acknowledgment between Padam Chand and Rikhab Das was fictitious and collusive. Rikhab Das, it should be mentioned, was the father-in-law of Padam Chand.

The suit was not contested, by the other defendants.

The trial Court thought that the allegations of *Mst. Phool Kuar* were well-founded. It held that no loan was taken from the plaintiffs by the firm as Padam Chand was not a partner; that it was not established that the firm was in existence at the time of the alleged acknowledgment by Padam Chand and therefore the suit was not within limitation; and that Het Ram and his widow were proved by certain *khewats* to be agriculturists. At the same time it held that the suit was rightly brought in the Lucknow Court if Padam Chand was held to be a partner of the firm as the contract for borrowing the money was entered into at Lucknow.

In first appeal the District Judge of Lucknow did not agree with the Civil Judge about the non-existence of any partnership. He was of opinion that the certified copy of the registration of the firm was strong evidence of its existence. He also found that there was other evidence to show that the business was carried on both by Het Ram and by Padam Chand. He accepted the acknowledgment made by Padam Chand as an acknowledgment made by him on behalf of the firm. He did not think that the suit was barred by s. 7 of the Agri. Relief Act because there had been no allegation that Padam Chand was an agriculturist, and if Padam Chand, not being an agriculturist, had joined with Het Ram in the loan, neither Het Ram nor his widow would be entitled to the benefits of the Act.

The learned District Judge accordingly

allowed the appeal against the decree of the Civil Judge who had found that only the widow and the son of Padam Chand were liable. He passed a decree against the first defendant *Mst. Phool Kuar* also.

The learned Counsel for the appellants has first of all referred to the allegation that Padam Chand had murdered Het Ram and that there had been illicit connection between Het Ram and the grandmother of Padam Chand. There being no express finding on either point, we do not think that they affect the case. As the District Judge has observed, if on account of this alleged illicit connection Het Ram was well disposed towards Padam Chand, it is just as likely that he would have actually made him his partner as that he would have allowed him to hold himself out as his partner. Learned Counsel also referred to a finding in a previous case that no partnership existed between Het Ram and Padam Chand, but it is conceded that this finding is not conclusive for the purpose of the present case.

It was strongly argued that the certificate of registration is of no evidentiary value because it is not proved that the application for registration bore Het Ram's signature. But we see no reason to reject the view taken by the District Judge on this point that the registration of a firm raises a presumption that the parties shown as members of the firm and registered as such are actually members of it. The presumption is no doubt rebuttable, but the appellants made no attempt to rebut it. If in fact Padam Chand was not Het Ram's partner, there might have been some indication of this in Het Ram's private accounts, but those accounts were not produced.

Section 58 of the Indian Partnership Act provides that for the registration of a firm an application must be made to the Registrar in a certain form giving certain particulars, and the statement must be signed by all the partners, or their agents specially authorised in this behalf. Each person signing the statement must verify it in the manner prescribed.

Section 59 provides that when the Registrar is satisfied that the provisions of s. 58 have been duly complied with, he shall record an entry of the statement in a register called the Register of Firms, and shall file the statement.

Section 68 provides that a certified copy of an entry relating to a firm in the Register of Firms may be produced in proof of the fact of the registration of such firm

and of the contents of any statement intimation or notice recorded or noted therein.

We have given full consideration to the argument advanced by the learned Counsel for the appellants that nevertheless it was necessary for the respondents to prove that the application for registration bore Het Ram's signature, but we are unable to accept it. In our opinion, no further proof was necessary in the absence of any evidence to the contrary.

It was also argued for the appellants that the respondents should have indicated in the pleadings that Het Ram's widow was not entitled to the benefit of s. 7 of the Agri. Relief Act because Padam Chand was not an agriculturist. They would, then, it was submitted, have adduced evidence to prove that he was. All that the respondents did was to say that defendant No. 1 (*Mst. Phool Kuar*) was not an agriculturist, and that even if she was, the suit was not affected thereby. They did not indicate how it was not affected if she was an agriculturist. The answer to this argument is that the appellants could have obtained clarification of this plea from the respondents, if they considered it necessary, and that in any case it was for them to establish that both the defendants were agriculturists, if the plaintiffs did not admit that s. 7 was applicable.

We have considered the provisions of s. 7 of the Agri. Relief Act. It is provided therein that every suit for recovering an unsecured loan in which the defendant, or where there are several defendants, any of the defendants, is an agriculturist, shall be instituted and tried in a Court within the local limits of whose jurisdiction the agriculturist defendant or any of the agriculturist defendants where there are more than one such defendants, actually and voluntarily resides. It might be thought, in view of this provision, that it would be sufficient to attract the operation of this section for one of several defendants to be an agriculturist. But it is provided in the third proviso of the definition of "agriculturist" in cl. (2) of s. 2 of the Act that if a non-agriculturist joins with an agriculturist in any transaction of loan (save for the purpose of adding his name as security) the agriculturist shall not be considered as such for the purpose of that transaction. Consequently it cannot be held that in the present case any of the defendants is an agriculturist for the purpose of s. 7 assuming that Padam Chand was not an agriculturist. There is no inconsistency be

tween the proviso referred to and the provisions of s. 7, because it is possible for one of the defendants in a suit for recovering an unsecured loan to be an agriculturist and for other defendants to be non-agriculturists if the latter had not joined with the former as principals in the loan transaction.

We are clearly of opinion that the onus lay on the appellants to prove that both Het Ram and Padam Chand were agriculturists, and that as they failed to do this, the appellants are not now entitled to a finding that the suit should have been brought in the Agra and not in the Lucknow Court.

We come now to a legal point which does not appear to have been put forward in the lower Courts, or indeed in this Court in the grounds of appeal. We have mentioned that according to the plaint limitation was saved by an acknowledgment made by Padam Chand on October 28, 1932. This acknowledgment was made in a letter Ex. 2. This was denied by the appellants, but there was evidence to prove that this acknowledgment together with another acknowledgment, Ex. 1, and certain letters, Exs. 14 and 15, had been written by Padam Chand and it was held on this evidence that the acknowledgment in Ex. 2 had been proved.

It is not disputed in this Court that Ex. 2 was written by Padam Chand, but it is argued that the acknowledgment is ineffective for the purpose of s. 19 of the Lim. Act because it is not signed by Padam Chand.

The material portions of Ex. 2 as translated read as follows:—

"Compliments of Het Ram Padam Chand of Agra to Shahji Sahab Sobhag Chand Ji Rikhab Das of Lucknow. We have copied out your account and are sending it to you. Please check it and enter it in debit and credit account.

Payable to you *Miti Katik Badi* 6, 1988 *Sambat*.....2,640-9.

Interest at the rate of 10 annas. upto *Katik Badi* 14, 1989 *Sambat*.....200-15.

Payable to you upto *Katik Badi* 14, 1989 *Sambat*.....2,841-8."

The introductory words are repeated at the foot of the acknowledgment.

Learned Counsel for the appellants referred to certain authorities as showing that an acknowledgment is ineffective if not signed.

In *Ramasami v. Muttusami* (I. L. R. 15 Madras 380) (1) where an acknowledgment had been made in a will it was held that the acknowledgment was ineffective for the purpose of s. 19 of the Lim. Act, because the will, although in the testator's handwriting, was not signed.

In *Jaggi Lal v. Sri Ram* (I. L. R. 34 All. 464) (2) certain acknowledgments in an

(1) 15 M 380; 2 M L J 42.

(2) 34 A 464; 16 Ind. Cas. 146; 10 A L J 1.

account book were relied upon and it was said that they did not operate as an acknowledgment within the meaning of s. 19 of the Lim. Act because the plaintiffs had failed to show that the accounts bore the signature of the defendants or their authorised agent. It does not appear whether it was proved in this case that the accounts were in the handwriting of the defendants or their authorised agent.

In another Madras case, *P. L. A. Palaniappa Chettiar v. V. L. A. R. Veerappa Chettiar* (I. L. R. 41 Madras 446) (3), it was also held that the entries in the debtor's accounts could not be treated as an acknowledgment under s. 19 as they were not signed by the debtors.

Against this it is contended that it is customary in business circles in India to give the name of the firm only in such statements of accounts, and that this has been held by most of the High Courts to amount to signature for the purpose of s. 19.

In *Uma Shankar v. Gobind Narayan* (22 A. L. J. R. 807) (4) a Bench of the Allahabad High Court held that the name of a firm in the heading of a business letter is a good signature in law. Reference was made in this case to a previous decision of the Allahabad High Court, *Mathura Das v. Babu Lal* (I. L. R. 1 All. 683) (5) and to a decision of the Calcutta High Court *Mohesh Lal v. Busint Kumaree* (I. L. R. 6 Cal. 340) (6).

The Bombay High Court in *Ganga Dhar Rao Venkatesh v. Shidrampa Balapa Desai* (I. L. R. 18 Bombay 586) (7) expressed a similar view where certain letters admitting a debt were written by the authority of the debtor, it being proved that this was the usual mode of signing and authenticating letters among the class to which the defendants belonged.

In another Madras case, *Muthiah Chettiar v. Kuttayan Chetty*, (43 I. C. 20) (8), it was said that it is the custom and practice among Nattukottai Chetties not to sign their names at the foot of their letters but to begin them by saying that the letters are from such and such firm and that the name so written at the top is a sufficient 'signature' within the meaning of s. 19 of the Lim. Act.

In *Sadasook Agarwalla v. Baikanta Nath* (3) 41 M 446; 44 Ind. Cas. 466; 34 M L J 41; A I R 1918 Mad. 238.

(4) 22 A L J 807; 80 Ind. Cas. 6; A I R 1924 All. 855; 46 A 892; L R 5 A 638 Rev.

(5) 1 A 683.

(6) 6 C 340; 7 O L R 121.

(7) 18 B 586.

(8) 43 Ind. Cas. 20; A I R 1919 Mad. 952; 6 L W 790; (1918) M W N 42.

Baunia, (I. L. R. 31 Cal., 1043) (9) money. was lent on a *hatchitta* which bore at the head of it the name and signature of the debtor. Under an entry of a certain date on the debit side written by the debtor himself and stating that a certain amount was due as interest on the principal sum, occurred the words *likhitan khoob* or "writer self" also written by the debtor himself. It was held that this amounted to the signing of an acknowledgment within the meaning of s. 19 of the Lim. Act.

Again in *Jekisan Bapuji v. Bhowar Bhoga Jetha*, (I. L. R. 5 Bom. 89) (10), it was held that an account was sufficiently signed where it was written by a debtor himself with his name at the top of the entry.

Lastly the Rangoon High Court held in *P. R. M. P. Vellayappa Chettyar v. P. M. P. Somasundaram Chettyar*, (A. I. R. 1935 Rangoon, 160) (11), that where an acknowledgment is written by a duly authorised agent it is sufficient for the purpose of s. 19 if he affixes thereto the name of his principal in any position, even by impressing it with a rubber stamp.

It will, therefore appear that there is good authority for the view, which has been pressed upon us by the learned Counsel for the plaintiffs that the acknowledgment Ex. 2 written by Padam Chand, a partner in the firm Het Ram Padam Chand, constituted a valid acknowledgment for the purposes of s. 19, though it was not signed by him and we accept it as such.

There was some suggestion that even though there might have previously been a partnership between Het Ram and Padam Chand, that partnership had ceased to exist before the acknowledgment in question. The acknowledgment was made, however, some time before the registration of the firm of Het Ram Padam Chand on September 30, 1933 and in our opinion for the reasons which we have given it is proved that the partnership was in existence on that date.

Finally the learned Counsel for the appellants pointed out that the respondents asked in the plaint that a decree might be passed against the defendant firm, while no such decree has been passed either by the trial Court or by the lower Appellate Court. The trial Court passed a personal decree against Padam Chand's widow and son, while the lower Appellate Court added *Mst.*

Phool Kuar as a judgment-debtor in the same terms.

Learned Counsel for the respondents concedes that they are entitled to proceed against the three defendants to the extent only of the assets of the firm and that the decree should, therefore, be against them only to this extent and not against them personally.

We direct accordingly that the decree awarded against the three defendants be amended so as to operate against them in respect of the assets of the firm and not against them personally. In other respects the appeal is dismissed. We allow the respondents their costs in this appeal.

S. Order accordingly.

CALCUTTA HIGH COURT

Appeal No. 1569 of 1938

July 30, 1940

BISWAS, J.

HARAN CHARAN MANDAL AND ANOTHER
—APPELLANTS

versus

HIRALAL NASKAR AND OTHERS—
RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 100—Finding of fact based on untenable view of law is not binding in second appeal—Bengal Tenancy Act (VIII of 1885 as amended by Act IV of 1928)—Ss. 146-A, 170, 171, 174—All persons on rent roll not made parties—Decree obtained, if rent decree—Purchaser of non-transferable holding, whether has interest in holding—Whether can make deposit under s. 170—Whether entitled to statutory lien on property saved by his deposit.

The finding of fact based on a view of law which is manifestly untenable is not binding on second appeal.

Where the landlord has not joined as defendants in his suit all the persons whose names were borne in his rent-roll as tenants, the fundamental condition for invoking the principle of representation under s. 146-A, Ben. Ten. Act (as amended in 1928), is lacking, and the decree obtained would not be a rent decree. 19 Ind. Cas. 989 (1), distinguished. 90 Ind. Cas. 211 (2), referred to.

A purchaser of a non-transferable occupancy holding either in whole or in part, acquires an interest in the holding which is operative against the *raiyat* and against the rest of the world except only the non-assenting landlord. On the sale of the holding in execution of a rent decree, the interest of such a person would be extinguished. The purchaser comes within the category of persons whose interests are affected by the sale within the meaning of s. 170 or s. 171 as well as of s. 174, and is competent to make a deposit under s. 170 and can claim a statutory lien over the property which he saves by the payment, so that he can recover from the property itself, if not from the tenant personally for whose benefit he professes to act. 27 Ind. Cas. 61 (3) and 58 Ind. Cas. 353 (4), relied on. *Dayal-uddin Sirkar v. Azimuddin Mondal* (5), referred to.

(9) 31 C 1043; 9 C W. N. 83.

(10) 5 B 89.

(11) A. I. R. 1935 Rang. 160; 156 Ind. Cas. 589; 13 R 322; 8 R Rang. 28.

A. from appellate decree of the Additional District Judge, 24-Parganas, dated July 30, 1938.

Mr. Abinash Chandra Ghose, for the Appellants.

Messrs. Bhupendra Nath Das Gupta and Nalin Chandra Banerjee, for the Respondents.

Judgment.—The plaintiffs in this suit in effect claim a statutory lien on an occupancy holding by virtue of a payment made under s. 171, Ben. Ten. Act, to prevent a sale of that holding under Chap. XIV of that Act. The suit was dismissed by the trial Court, but on appeal the learned Additional District Judge of 24-Parganas has given the plaintiffs a decree virtually declaring their lien. The facts which it is necessary to state for the disposal of the appeal may be briefly set out: The holding is said to have been a non-transferable occupancy holding, and admittedly it was held at one time by one Ramanath Mandal. Ramanath died, leaving three sons and heirs, Kshetra, Haran and Paran. Paran died unmarried leaving his surviving brothers as his only heirs and legal representatives. After Ramanath's death therefore the holding came in course of time to be represented by Kshetra and Haran. It is said that in the year 1902 while Paran was still living, Kshetra, purporting to act for himself and as guardian of his two minor brothers, sold away half of the holding to one Nabin. The landlord, however, refused to recognize this transfer. The present plaintiffs are heirs of Nabin, and they have been treated in these proceedings as unrecognized transferees of a portion of the holding.

In 1930 the landlord instituted a suit for arrears of rent of this holding for the years 1333 to 1336 B. S., and in due course obtained an *ex parte* decree. The decree was afterwards sought to be put into execution under Chap. XIV, Ben. Ten. Act, whereupon the present plaintiffs, claiming to be persons whose interests were likely to be affected by the sale, deposited the decretal amount with costs in Court under s. 170. By virtue of such deposit they claim to have acquired a statutory lien over the holding, and also to be entitled to possession of it. It is said that they did obtain actual possession as such mortgagees, and in that capacity sued the tenants on the lands, defendants Nos. 4 to 6 for rent. The original tenants, the heirs of Ramanath being present defendants Nos. 1 to 3 also

brought a suit for rent against the same tenants and obtained a decree. This led the plaintiffs to institute the present suit, whereby they asked for a declaration that the decree obtained by defendants No. 1 to 3 against defendants No. 4 to 6 was fraudulent and collusive, and that in any case, it did not affect their interest as the holders of the statutory lien over the tenancy. The plaintiffs also asked for an injunction to restrain defendants Nos. 1 to 3 from executing their decree, and further prayed for a refund of a certain sum of money which they are said to have already recovered from the tenants under the decree. The lower Appellate Court, while granting the plaintiffs' prayer for declaration, has refused the injunction and the refund.

This decree is resisted by defendants Nos. 1 to 3 on the ground that s. 171, Ben. Ten. Act, has no application to this case. This position is sought to be supported on a two-fold basis. It is first contended that there was no rent decree at all which could be executed under Chap. XIV of the Act, and to avert which deposit could be made under s. 171. Secondly, it is urged that in any event, the plaintiffs being in the position of co-sharer tenants, though not recognized by the landlord, were not entitled to make a deposit under s. 170, or to claim the benefit of s. 171 by virtue of such deposit. Either of these grounds, if made out against the plaintiffs, would be enough to dispose of their claim.

Having heard the learned Advocates on both sides, I have come to the conclusion that the decree which the landlord obtained for rent of the holding was not a rent decree at all, and that it would not therefore attract the operation of any of the sections of Chap. XIV. The decree is Ex. A in the case, and on the face of it, it purports to be directed against "Ramchandra and Nabin Chandra Naskar, *sarbarahakar* Sree Kshetra Mandal". The learned Advocate for the respondents contends that it was a decree against Kshetra Mandal alone, and that the names of Ramchandra and Nabin Chandra Naskar were a mere description of the holding in respect of which Kshetra Mandal was said to be *sarbarahakar*. The learned Additional District Judge says that there is no evidence to show who these persons Ramchandra and Nabin Chandra Naskar are, or whether they are the names of living or dead persons, nor is there anything to show whether Ramchandra is a mistake for the name of the original tenant Ramanath, as the learned Munsif seems to think, or

whether Nabin Chandra Naskar is the person whose heirs the present plaintiffs claim to be. There is, again, no evidence to show when or how this tenancy, which admittedly belonged at one time to Ramanath, came to be held by Ramchandra and Nabin Chandra Naskar, as the learned Advocate for the appellants would have it. The materials on the record are in fact wholly insufficient to enable the Court to come to any definite conclusion as to whether the decree was at all obtained against Kshetra Mandal as a tenant, much less as the sole tenant.

Leaving aside speculation, and going upon the facts which have been found or are admitted, it seems, however, to be established beyond doubt that after the death of Ramanath, the original tenant, this Jama devolved on his sons, and that after the death of one of these sons, it came to be held by the two surviving sons, Kshetra and Haran. There can be no question that Haran did not lose his interest in this holding in the year 1930 when the landlord brought his rent suit. Haran was in fact joined as a defendant in a rent suit for a subsequent period. It follows therefore that at the date of the decree, Ex. A, Haran, at all events, was a person who was interested as a tenant in the holding, the other person so interested being his brother Kshetra. Now, on the face of it, the decree, if we are to accept the interpretation which is put upon it by the learned Advocate for the respondent, is not against Kshetra as a tenant but against him only as a *sarbarahakar*. Even if this description is supposed to be wide enough to implead him in his capacity as a tenant, the fact still remains that Haran is not made a party to the suit. It is urged that although Haran was a person interested, he might not still have been joined as a defendant inasmuch as Kshetra alone was capable of representing, and did actually represent, the entire holding. This is nothing more than a mere assumption, and does not cease to be such because of the *dakhilas* in which Kshetra is described as *sarbarahakar*. This much is clear, that at the date the landlord brought the suit for rent in 1930, it could not be said that the landlord was unaware of the fact that there were other heirs of the original tenant still alive who were therefore entitled to be made defendants in the suit, if the decree to be passed was to have the effect of a rent decree under Chap. XIV, Ben. Ten. Act.

Much reliance was placed on behalf of the respondents on a so-called finding of the

learned Judge in the Court below to the effect that the tenancy was fully represented in the suit against Kshetra. It is however not possible to accept this as a proper or legal finding of fact which is binding on me in second appeal. For one thing, it purports to be based on a view expressed by the learned Judge which is manifestly untenable. This is what he says:

"It does not appear that anyone else (besides Kshetra) was recognized as tenant when the rent suit in question was instituted. Nor does it appear that the landlord was bound to recognize anyone else as a tenant at that stage."

This wholly ignores the existence of Haran as a co-heir with Kshetra, and, in my opinion, it is quite enough to vitiate the finding on which the learned Advocate relies. Reference was made by him to a decision of Sir Lawrence Jenkins in *Chamatkarini Dasi v. Triguna Nath Sardar* (1) in support of the view that it is open to a landlord to implead only one of a number of tenants in a rent suit without losing his rights under Chap. XIV, when that tenant is put forward by the rest as their representative. It is enough for me to point out that the proposition laid down in this case rests on a foundation which no longer exists by virtue of later amendments of the Act, and particularly the enactment of s. 146-A. Apart from this, it is worthy of note that this is contrary to the spirit, if not the letter, of the decision of the Full Bench in *Jagan Mohan v. Brojendra Kumar* (2). In the present case, it is not shown that the landlord had actually joined as defendants in his suit all the persons whose names were borne in his rent-roll as tenants. The fundamental condition for invoking the principle of representation under s. 146-A was thus lacking. And in that view, the learned Judge, in my opinion, was wholly wrong in proceeding on the basis that the entire body of co-sharer tenants had been represented by Kshetra. The first ground urged by the appellants must, therefore, succeed, and as I have said, this is sufficient to dispose of the suit.

As the other point has, however, been argued by the learned Advocate for the appellants, I might just as well indicate my opinion, although it is not necessary for the purposes of my decision to express any final conclusion. I do not accept his view that the plaintiff, assuming that the sale of the holding was a sale under

(1) 17 C W N 833; 19 Ind. Cas. 989.

(2) 53 O 197; 90 Ind. Cas. 211; A I R 1925 Cal. 1056; 42 C L J 232; 29 C W N 1000 (F B).

Chap. XIV of the Act were not competent to make a deposit under s. 170 or claim the rights of statutory mortgagees under s. 171. I see no reason why, treating them as unrecognized transferees of a non-transferable holding, the transfer having taken place at a time when such holdings had not been made transferable by statute, they should not be held to come within the words "persons whose interests are affected by the sale." The Full Bench case in *Dayamoyi v. Ananda Mohan* (3) and the Special Bench case in *Chandra Binode v. Ala Bux* (4) leave no doubt that a purchaser of a non-transferable occupancy holding, either in whole or in part, does acquire an interest in the holding which is operative against the *raiyyat* and against the rest of the world except only the non-assenting landlord. It is also clear that on the sale of the holding in execution of a rent decree, the interest of such a person would be extinguished. That being so, it is difficult to see why the plaintiffs cannot be said to come within the category of persons whose interests are affected by the sale within the meaning of s. 170 or s. 171 as well as of s. 174, in which the same words are used. I may refer in this connexion to the decision of Mitter, J., in case reported in *Dayaluddin Sirkar v. Azimuddin Mondal* (5) where the same view has been held regarding the use of this expression in s. 174. Mr. Ghose on behalf of the appellants argued that the remedy of persons in the position of the plaintiffs really lay in a suit for contribution. Whether or not they can claim contribution is a somewhat debatable point which it is not necessary for me to discuss here but it is neither inequitable nor inconvenient to give such persons a statutory lien over the property which they save by their payment, so that they can recover from the property itself, if not from the tenant personally for whose benefit they profess to act. You may not thrust a benefit on an unwilling party, but you may fairly hold the property itself liable to the extent to which you have contributed to save it. However, I must resist the temptation of being enticed into a discussion of this interesting topic, which might possibly be reserved for a more suitable occasion.

The result is that this appeal succeeds on the first ground I have indicated, and the

(3) 42 C 172; 27 Ind. Cas. 61; A I R. 1915 Cal. 242; 20 C L J 52; 18 C W N 971 (F B).

(4) 48 C 184; 58 Ind. Cas. 353; A I R 1921 Cal. 15; 31 C L J 510; 24 C W N 818 (S B).

(5) 41 C W N 255.

judgment and decree of the learned Additional District Judge must, therefore, be set aside and those of the learned Munsif restored. The appellant will be entitled to the costs of this Court and of the lower Appellate Court.

D.

Appeal allowed.

OUDH CHIEF COURT

Civil Revision Application No. 28 of 1939

April 16, 1941

BENNETT, J.

SUKHPAL DASS—APPLICANT

versus

KEDAR NATH—PLAINTIFF

AND OTHERS—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), ss. 151, 54, O. XX, r. 18—Partition suit—Decree for possession of plaintiff's share—Application of plaintiff under s. 151 for proclamation in villages that plaintiff obtained certain share in them, allowed—Legality of procedure.

In a suit for partition of an estate a preliminary decree for possession of one-fifth share of the estate was passed in favour of the plaintiff. The Court allowed an application of the plaintiff under s. 151, Civil P. C., that it might be proclaimed in villages in which he had been given a share that he had obtained a decree for a fifth share in those villages.

Held, that the decree was not drawn up in proper form according to O. XX, r. 18 and the Court had no jurisdiction to pass such an order under s. 151 as the remedy was provided by the Code under s. 54 and O. XX, r. 18.

C. R. App. of the order of the Civil Judge, Sitapur, dated February 3, 1939.

Mr. S. N. Srivastava, for the Applicant.

Mr. Beni Madho Mehrotra, for Opposite Party No. 1.

Order.—This application under ss. 115 and 151 of the Civil P. C. arises from an order passed by the learned Civil Judge of Sitapur on February 3, 1939, on an application by one Kedar Nath who had obtained a preliminary decree for partition.

Kedar Nath was the son of one Debi Dayal. Debi Dayal had five brothers, one of whom died without issue. Kedar Nath sued after the death of his father Debi Dayal for partition of his share of the joint family property, this share amounting to one-fifth. A preliminary decree for a one-fifth share was passed by the Subordinate Judge of Sitapur on November 30, 1935, and this decree was upheld by a Bench of this Court in appeal on February 22, 1938.

No further action was taken by Kedar Nath on the preliminary decree apart from

an application made by him under s. 151 of the Civil P. C. This was an application that proclamation might be made at his expense in the two villages in which he had been given a share. He asked that it might be proclaimed in these villages that he had obtained a decree for a fifth share in those villages. This application was allowed by the learned Civil Judge.

It is contended in the present application in revision that the order of the Civil Judge was not warranted by any provision of law and that s. 151 of the Civil P. C. should not have been invoked. The decree passed was of a declaratory nature and therefore, it is submitted, the issue of a proclamation which is in the nature of an execution proceeding, is irregular and without jurisdiction.

It has been contended on the other side that Kedar Nath was entitled, if he so wished, not to proceed further with his preliminary decree. It was not obligatory on him, it is urged, to obtain a final decree partitioning the property. It had been declared that he was entitled to a one-fifth share and it was open to him, therefore, to require the tenants to pay him this share. And if this course was open to him it was also open to him to ask the Court to make a proclamation to this effect in the villages concerned. Learned Counsel also contended that the provisions of s. 151 were applicable to such a case because there is no specific provision in the Civil P. C. which provides for this contingency, and s. 151 empowers the Court to pass such orders as may be required where a remedy is necessary for the ends of justice.

Learned Counsel conceded that he could not support this contention by any authority. He explained that his client did not wish to proceed further with the actual partition of the property as he could not find the requisite funds, but he could not explain why his client could not obtain funds by disposing of a portion of the share in respect of which he had obtained a preliminary decree.

In my opinion the order of the Court below cannot be supported. No ground for action under s. 151 arises where a remedy is provided by the Code itself, in this case a final partition decree. Under s. 54 where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Govt., or for the separate possession of a share of such an estate the

partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf. Further under r. 18 of O. XX it is provided that where the Court passes a decree for the partition of property or for the separate possession of a share therein then,—

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Govt., the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf,

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may if the partition or separation cannot be conveniently made without further enquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

The property in the present case comes partly under cl. (1) and partly under cl. (2), but learned Counsel for the opposite party admits that the property in respect of which a proclamation is desired is revenue paying property to which the provisions of cl. (1) are applicable.

The decree awarded by the Subordinate Judge is headed "preliminary decree in partition suit", but it has not been drawn up according to the provisions of r. 18 or O. XX. According to the decree the plaintiff's suit is decreed for possession of his fifth share in certain properties. His learned Counsel conceded that the decree should not have been prepared in this form and that it should have made provision for further action to be taken by the revenue authorities in so far as the revenue paying land is concerned, and have given further directions in respect of the other property.

Learned Counsel for the opposite party conceded that the procedure adopted by his client was of a novel character for which he could find no precedent. I am clearly of opinion that s. 151 should not have been applied in such case and that the opposite party was not entitled to ask the Court to direct the making of a proclamation on his obtaining a preliminary decree in the partition suit. A preliminary partition decree is of a declaratory nature and it is implicit in it that further proceedings are

required to complete the partition. In my view it is not open to a party to stop at this stage and ask the Court to assist him in some other manner to obtain the share to which it has been held he is entitled. There is no provision of law which would warrant such procedure and the proper procedure is provided in the Civil P. C. I hold, therefore, that the Court below had no jurisdiction to pass this order.

I accordingly allow this application with costs, set aside the order passed by the Civil Judge and dismiss the opposite party's application.

s.

Application allowed

RANGOON HIGH COURT

First Appeal No. 29 of 1939

March 28, 1940

ROBERTS, C. J. AND BLAGDEN, J.
EUSOOF KARWA AND OTHERS—

APPELLANTS

versus

MRS. NIEMEYER AND OTHERS—

RESPONDENTS

Pleadings — Amendment — Proposed amendment should be submitted before leave is granted—Original claim based on renewal given to plaintiff of earlier pro-note in favour of deceased—Amendment suing on earlier pro-note as deceased's executor—Amendment, if alters suit—Civil Procedure Code (Act V of 1908), s. 52, O. VI, r. 17—Action by executor or administrator as such failing—Liability for costs—His Personal liability—Suit against him on liability of testator—S. 52, if protects him—Legal representatives—Claim against estate of deceased—Personal representative, if entitled to require strict proof of any claim against estate not within his personal knowledge—Cause of action—Party having complete cause of action alleging it imperfectly—Remedy—Suit premature—Remedy—Limitation Act (IX of 1908), s. 21—Mortgage by Muhammadan brother and sister—Payment by one, if saves limitation against other—Contract Act (IX of 1872), s. 62—Suit by mortgagee on subsequent mortgage executed in lieu of prior one—Prior mortgage, if can be set up—Pro-note in lieu of mortgage, whether extinguishes mortgage—Pro-note, value of.

It is usual and generally most desirable that a party desiring to amend his pleadings should submit his proposed amendments in explicit form before the leave sought is granted, that is, he should formulate and state in writing the exact amendments for which he asks. *Hyams v. Stuart King* (3), relied on. [p. 178, col. 2.]

The fundamental character of the suit is not altered where the plaintiff first bases his claim on a renewal given to him of a pro-note, executed in favour of the deceased and subsequently amends his pleadings and sues on the original pro-note as executor of the deceased. 63 Ind. Cas. 914 (2), distinguished. [p. 179, col. 1.]

In ordinary cases, that is unless the defendant has been guilty of some misconduct inducing the action, an executor or administrator who sues as such and fails is personally liable for the costs of the action.

It is true that if he is sued upon a liability of his testator he has the protection of s. 52, Civil P. C., but if he seeks to assert a claim, the fact that he possesses it by virtue of being sole executor and beneficiary of a deceased person puts the defendant at no disadvantage from which he would have been free if the claim had been brought otherwise than in a representative capacity. *Charles Boynton v. George H. Boynton* (4), relied on. [p. 178, col. 2.]

A personal representative is fully justified in requiring strict proof of any claim against the estate not within his personal knowledge, and entitled—may be bound if others than he are interested in the estate—to avail himself of any technical defence, which he may be advised, is open to him. [p. 181, col. 2.]

If a party at the moment he commences a suit has but an inchoate cause of action, nothing he thereafter does can entitle him to any relief in that suit. His only course is to discontinue it and, if possible, start afresh. A party who, having a complete cause of action, alleges it imperfectly may be helped by amendment; but a premature suit is incurable. 177 Ind. Cas. 63 (1), *Clayton v. Le Roy* (19), *Gulzar Singh v. Kalyan Chand* (20) and 52 Ind. Cas. 231 (21), relied on. [*ibid.*]

Although a mortgagee in a suit on a subsequent mortgage executed in lieu of prior mortgage cannot set up the prior mortgage, yet a fresh promissory note only provides evidence of the original loan and does not extinguish the mortgage. 171 Ind. Cas. 356 (5), relied on.

A payment by one of co-mortgagors (a Muhammadan brother and sister) cannot save limitation against the other. Nor can the brother be deemed to be his sister's agent for making payments to creditor in absence of proof of authority. 166 Ind. Cas. 106 (14) and 181 Ind. Cas. 490 (16), relied on.

[Case-law referred to.]

Mr. C. K. Ray, for the Appellants.

Messrs. Clark and Harmasji, for Respondent No. 1.

Roberts, C. J.—The two points urged before us in this appeal are, first that the suit ought not to have gone to trial upon the pleadings as amended, but that leave for the amendments should have been refused; and secondly, that upon the pleadings as amended the suit is barred by limitation. It appears that the plaintiff-respondent originally filed a suit for a preliminary mortgage decree based upon a promissory note for Rs. 8,000 given by Ismail Eusooif Jeewa Karwa and his sister Khatiza Bibi (whose heirs and legal representatives were the defendants) to Messrs. Balthazar & Son Ltd., on September 6, 1932. By way of security for this note there was a mortgage by deposit of title deeds and these had been delivered to the plaintiff and the promissory note endorsed to her for valuable consideration. There was an early amendment of the plaint averring that Messrs. Balthazar & Son Ltd., were the agents of the plaintiff; this was no doubt to avoid the objection that the mortgage debt could not be transferred by mere

indorsement of the promissory note. It was pleaded that for better security Messrs. Balthazar & Son Ltd., had executed a duly registered assignment of the debt. However, this assignment was made on November 18, 1936, after the debt of filing the suit, and could not complete an incomplete cause of action, nor entitle the plaintiff to any further relief in the existing suit: see *Smith v. Mrs. Heptonstall* (1). The cause of action in the plaint and amended plaint is stated to have arisen on September 6, 1932. The case proceeded to trial before Braund, J., who held that one of the stamps on the promissory note had not been cancelled and that as the mortgage debt was due upon the note and upon it alone the plaintiff could not succeed. He refused leave to amend the plaint by the averment of some obligation anterior to the note. The opportunity was given to the plaintiff's Advocate of withdrawing the suit with leave to bring a fresh suit under O. XXIII, but this was declined. By reason of s. 35, Stamp Act, this promissory note is inadmissible in evidence for any purpose whatever. Upon appeal a Bench of this Court held that the plaintiff

"should have been allowed to amend the plaint on the following lines: The first paragraph would have to be amended so as to omit reference to the promissory note, and to set out the existing liability, if any, which the two deceased persons owed to the plaintiff. Paragraph 3 would have to have omitted from it all references to the transfer alleged to have been made subsequent to the date on which the suit was filed and the amount due might require to be altered."

The plaintiff then filed an amended plaint on April, 23, 1938, in which she described herself for the first time as the sole executrix of the will of George Henry Smith deceased, late of Rangoon. She set up the plea that George Henry Smith lent Ismail Eusoof Jeewa Karwa and his sister Khatiza Bibi Rs. 8,000 on December 4, 1922, and that they gave a promissory note to Messrs. Balthazar & Son on that date, before Messrs. Balthazar & Son had become a limited liability company, and that there was a mortgage by deposit of title deeds with Messrs. Balthazar & Son on the same date. It was pleaded that the cause of action arose on December 4, 1922 and limitation was saved by reason of payment of interest as such. Objection was taken to these amendments as falling outside the scope of the leave given to amend. Shaw, J. allowed the amended plaint and in the course of his order referred to the Appellate Court's decision and said:

"The Court however not having the proposed amend-

(1) 1938 Rang. 6; 177 Ind. Cas. 63; A I R 1938 Rang. 134; 11 R Rang. 95.

ment before it could not visualize all the consequential amendments that would have to be made. To insist therefore that the plaint should only be amended exactly as stated and no more might lead to an absurd position. Leave having been given to fall back on the original debt of liability, it must, I think, follow that everything that goes with it must also be allowed to be pleaded so that the defendants may know clearly what case they have to meet."

When the case went to trial the learned Judge on the original side pointed out that so far as he was concerned the interlocutory order of Shaw, J. was final, but we are asked to say here that it ought not to have been made. The question before us is whether the plaintiff has gone beyond the leave to amend which was granted by the Bench. Mr. Ray says that the plaint as amended sets up an entirely new cause of action and that the subject-matter of the suit has been changed. The plaintiff is suing for the first time as executrix; and she is setting up a mortgage of 1922 by deposit of title deeds with a partnership firm; instead of a mortgage ten years later by deposit of title deeds with a limited liability company. Upon the authority in *Ma Shwe Mya v. Maung Mo Hnaung* (2), it is urged that such an amendment was never contemplated by the Appellate Bench and ought not to be entertained. Now it is usual and generally most desirable that a party desiring to amend his pleadings should submit his proposed amendments in explicit form before the leave sought is granted; that is, in the words of Farwell, L. J., in *Hyams v. Stuart King* (3), at p. 724 "to formulate and state in writing the exact amendments for which he asks". If he does so the trouble and expense of deciding later whether the amendment as made should be allowed to stand will be avoided. In this case the effect of the order of the Appellate Court, which of course is not open to criticism by us, has unfortunately been to pave the way to further controversy as to its scope.

It has been strongly contended by Mr. Ray that a suit by the plaintiff as executrix alters the whole character of the action. This seems to depend on the further contention that if she failed she would not be personally liable for the costs. But this latter contention is fallacious. In ordinary cases, that is unless the defendant has been guilty of some misconduct including the action, an executor or administrator who sues as such and fails is personally liable for the costs of the

(2) 48 C 832; 63 Ind. Cas. 914; A I R 1922 P C 249; 48 I A 214; 4 U B R 30; (1921) M W N 396; 30 M L T 28; 24 Bom. L R 682 (P O).

(3) (1908) 2 K B 696 (724); 77 L J K B 794; 99 L T 424; 24 T L R 675; 52 S J 551.

action: *Charles Boynton v. George H. Boynton* (4). It is true that if he is sued upon a liability of his testator he has the protection of s. 52, Civil P. C., but if he seeks to assert a claim, the fact that he possesses it by virtue of being sole executor and beneficiary of a deceased person puts the defendant at no disadvantage from which he would have been free if the claim had been brought otherwise than in a representative capacity. In the judgment of the Bench, which gave leave to amend there was quoted with approval a rule laid down by the commentator of Mulla's Civil Procedure Code that:

"Where a plaintiff bases his claim on a specific legal relation alleged to exist between him and the defendant, he may not be allowed to amend the plaint so as to have it on a different legal relation".

The fundamental character of the suit is not altered here merely because the claim rests upon a promissory note given in 1922 to the testator and not upon the note in renewal thereof given to the plaintiff, who is his executrix in 1932. Mr. Joakim in his evidence said that the note was renewed in 1932 but that there was no fresh deposit of title deeds, and the learned Judge accepted this evidence. Doubtless, if there had been two mortgages, the plaintiff could not have leave to set up the earlier one in her amended plaint, but as has been held in *Hirendra Nath Datta v. Noyes* (5), a fresh promissory note only provides evidence of the original loan and does not extinguish the prior mortgage. It has been urged upon us that in cross-examination Mr. Joakim assented to the suggestion that the recitals in the assignment of November 1936, represented the true state of affairs, and that in fact these recitals set out a fresh deposit of title deeds creating a new mortgage, but in view of his explicit denial in his examination-in-chief the explanation appears to me to lie in the fact that this part of the cross-examination was directed to the references to the promissory note; no further question was put to him on this point and I am satisfied from his evidence that there was only one mortgage.

The distinction between the present case and that in *Ma Shwe Mya v. Maung Mo Hnaung* (2), is that the latter case proceeded to trial upon unamended pleadings. The respondent sued for specific performance of an oral agreement made in 1912 with the appellant whereby she promised to transfer three specified sites of oil wells

allotted to her by Govt. and obtained by her in that year. This agreement was alleged in relation to an earlier contract in 1903, and when it was found that the agreement pleaded could not be established by the evidence the respondent ought to amend by alleging breach of the contract in 1903, but their Lordships held that the real controversy in question between the parties was the existence and character of an agreement made in 1912 for the delivery of certain sites of oil wells specified and identified by the numbers stated in the plaint which could only have been delivered in respect of that subsequent bargain and the Court could not permit a new case to be made. But here an amendment does no injustice to the defendant-appellants and does not set up a new and distinct cause of action, nor does it change the subject-matter of the suit. In my judgment therefore there is no ground for saying that it has in effect gone beyond the real question in controversy between the parties or has exceeded the extent of the amendment proposed to be allowed by the Appellate Court's decision.

Upon the question of limitation it has been pointed out in *U Ba Gyi v. U Than Kyauk* (6), that it is impossible for a creditor to make a fresh starting point for limitation. If payment by a debtor is to satisfy the statute and it is not distinctly stated by him that the payment is one of interest as such there must be evidence from which payment as interest may be distinctly inferred: *Kariyappa v. Rachappa* (7). Now here the learned trial Judge held that a specific payment of Rs. 60 by way of interest as such had been shown to have been made on December 30, 1927. He had before him a number of book entries made by the creditors which showed that on later dates the sum of Rs. 60 was paid whenever that amount of interest fell due. Mr. Joakim had said the payments of interest were regular. In my judgment an inference could clearly be drawn that in all the circumstances payment of interest as such had been made on this date. But a more difficult question arises when we consider whether the payment of interest as such was made in such circumstances as to bind each of the joint contractors within the meaning of s. 21 (2), Lim. Act. A payment made by one of the joint executants of a promissory note does not in itself operate to bind the other or others; in order

(4) (1879) 4 A C 733.

(5) 1937 Rang. 303; 171 Ind. Cas. 356; A I R 1937 Rang. 154; 10 R Rang. 147.

(6) 7 R. 522; 120 Ind. Cas. 897; A I R 1929 Rang. 339; Ind. Rul. (1930) Rang. 65.

(7) 24 B 493; 2 Bom. L. R 378. (81)

to do so there must be evidence from which it can be inferred that he was in effect acting as his or their agent. These co-mortgagors were brother and sister and it has been said that Khatiza Bibi was a *purdanashin* lady. Interest was reduced from 9 per cent. to 8 per cent. at the request of her brother Karwa, as appears from Mr. Joakim's evidence: this appears to have been some time after the payment to which I have referred. The inference has been drawn from the regularity of the payments of interest as such and from the circumstances of the case that they were made on behalf of both the joint contractors.

It would appear that the provisions of s. 21 (2), Lim. Act, were not dealt with in argument before the learned trial Judge. Mr. Clark contends that in the circumstances and from the relationship of brother and sister which subsisted between them a payment of interest may justify the inference that the person paying was impliedly authorized by the sister to act on her behalf. He cited *Janaki Ammal v. Srinivasan* (8) and *Achola Sundari Devi v. Doman Sundari Devi* 90 Ind. Cas. 774 (9), but in neither of these cases was the effect of s. 21 (2) considered. In *National Bank of Upper India, Ltd. v. Bansidhar* (10), their Lordships found no difficulty in implying authority to pay interest: indeed there was an agreement between the person who paid the interest and the respondent that the former would discharge the debt of the respondent to the bank in respect of both principal and interest. The decision is thus inapplicable to the facts before us here. In *Thayammal v. Muthukumaraswami Chettiar* (11), it was observed that in the case of several joint contractors the operation of s. 20 seems to be cut down or limited by s. 21 (2) of the Act, and that whatever the law was as to executors it was impossible to say of two joint contractors (which term had been held to include two mortgagors): see *Muthu Chettiar v. Muhammad Hussain* (12)—that one contractor was bound by the payments of the other. In *Jogesthendra v. Monindra*

Narain (13), it was decided that when interest on a debt is paid by one of the executants of a simple money bond before the expiry of a period of limitation, a fresh period of limitation shall not be computed from the time of the payment against the other executants of the bond who did not make the payment. Again in *Mohamed Taqui Khan v. Raja Ram* (14), at p. 283 a Full Bench of the Allahabad High Court said:

"So far as s. 20 stood alone there was certainly room for the view that the payment of a joint debt by one of joint debtors may amount to a payment of the debt within the meaning of that section so as to save limitation as against all the debtors, but the Indian law is in this respect different from the old English Law. We have a specific provision in s. 21, Lim. Act, which applies to both acknowledgments under s. 19 and to payment of interest and principal under s. 20. That section provides that 'nothing in the said sections renders one of several joint contractors, partners, executors, or mortgagees chargeable by reason only of a written acknowledgment signed or of a payment made by, or by the agent of, any other or others of them'. A Full Bench of the Madras High Court in *Narayana Ayyar v. Venkataramana Ayyar* (15), held that co-mortgagors come within the scope of the words 'joint contractors' and that this section is applicable to co-mortgagors as well."

And see also *Ram Kumar v. Hira Lal* (16). The decision by a Bench of this Court in First Appeal No. 53 of 1938 *U So Maung v. J. Thom* (17), had not been delivered at the time of the judgment made by the learned trial Judge in the present case. That Bench followed the trend of authority to which I have referred and held that no agency on behalf of his wife could be implied from the mere fact that a Burmese Buddhist husband paid interest upon the debt due under a promissory note secured by a joint mortgage by deposit of title deeds. Section 21 (3) (b) deals with liabilities which have been incurred by, or on behalf of, a Hindu undivided family as such. But where the liability has been incurred by co-mortgagors, they are joint contractors. In *Lakshmi Naidu v. Gunamma* (18), it was held that where the managing member of a joint Hindu family was a co-mortgagor with his brother, and made a payment to the

(13) 59 C 1128; 138 Ind. Cas. 740; A I R 1932 Cal. 620; 55 C L J 347; 36 C W N 487; Ind. Rul. (1932) Cal. 503.

(14) I L R (1937) All. 272 (283); 166 Ind. Cas. 106; A I R 1936 All. 820; (1936) A L J 1140; 1936 A I R 1002; 9 R A 359 (F B).

(15) 25 M 220 (F B).

(16) I L R (1939) All. 258; 181 Ind. Cas. 490; A I R 1939 All. 230; (1939) A L J 66; 11 R A 568.

(17) 184 Ind. Cas. 622; A I R 1939 Rang. 287; 12 R Rang. 163.

(18) 58 M 418; 154 Ind. Cas. 1053; A I R 1935 Mad. 101; 68 M L J 470; 41 I. W. 94; (1935) M W N 17; 7 R M 535.

(8) 66 M L J 40; 148 Ind. Cas. 126; A I R 1934 Mad. 45; (1933) M W N 1023; 39 L W 237; 6 R M 443.

(9) 90 Ind. Cas. 774; A I R 1926 Cal. 150.

(10) 5 Luck. 1; 121 Ind. Cas. 193; A I R 1929 P C 297; 57 I A 1; 6 O W N 1136; 34 C W N 145; Ind. Rul. (1930) P C 17; 31 L W 1; 32 Bom. L R 136; (1930) M W N 1; 51 C L J 56 (P C).

(11) 53 M 119; 121 Ind. Cas. 858; 57 M L J 588; 30 L W 677; A I R 1929 Mad. 881; Ind. Rul. (1930) Mad. 266.

(12) 55 Ind. Cas. 763; A I R 1920 Mad. 418.

mortgagee at a time when the mortgagee was pressing both brothers for payment, there was evidence of an implied agency.

In the present case I could not infer a payment of interest as such on the sister's behalf from the mere fact that interest was paid regularly by some one. But the regular payments of Rs. 60 per month are evidence from which it may be inferred that they were at least made on behalf of the brother who showed his concern at the rate of interest which was being paid. As regards the sister the conclusion might well be different, but as the only appellants are the heirs and legal representatives of Ismail Eusoof Karwa it is clear that the payment of interest on December 30, 1927, saved limitation as against him, and consequently this appeal must be dismissed. There is however a small point in respect of which the decree should be made clear. The amount claimed was Rs. 8,368, being Rs. 8,000 principal and Rs. 368 interest to the date of filing the suit. This was decreed together with further interest from the date of the institution of the suit until realization at the contract rate of 6 per cent. per annum; this further interest must be calculated on the principal sum of Rs. 8,000 and not upon the amount claimed of Rs. 8,368. The appellants must pay the costs of the appeal, Advocate's fees in this Court forty gold mohurs; and we certify for two Counsel.

Blagden, J.—This case might well be described as a tragedy of errors and about it only satisfactory feature is the conspicuous ability with which it has been presented to us by learned Counsel on both sides. The plaintiff commenced this suit on July 6, 1936, when she filed a plaint alleging—execution of a promissory note for Rs. 8,000 with interest at 9 per cent. per annum and creation of a mortgage by deposit of title deeds to secure that sum in favour of Balthazar & Son Ltd., by one Khatiza Bibi and one Ismail Eusoof Jeewa Karwa (hereinafter together called "the mortgagors") on September 6, 1932, endorsement over to herself of the promissory note and delivery over of the title deeds. She further averred the death on August 10, 1934 and thereafter of both the mortgagors, certain reductions in the original rate of interest: and non-payment of Rs. 8,000 principal and Rs. 368 interest; and claimed Rs. 8,368 with interest at 6 per cent. to judgment, sale of the mortgaged property in default of payment, and a Receiver, against two groups of defendants the one consisting of Ebrahim Moosaji Mamoojee husband heir and legal personal

representative of Khatiza Bibi, and the other of seven persons the heirs and legal representatives of Ismail Eusoof Jeewa Karwa. This story was duly verified as true by the plaintiff on July 7, 1936.

The first named defendant who (we must remember) represented the female mortgagor did not defend the suit and (or but) subsequently died, and by an order of August 8, 1938 his legal personal representatives were brought on the record. They also did not defend the suit. The remaining defendants who represented the male mortgagor did defend the suit. Hereinafter when I refer to "the defendants" I shall, unless the contrary appears mean these the effective, defendants. They filed written statements which did not deny that they were the legal representatives of the male mortgagor, and in other respects each took the form of a general traverse. They also took certain points of law with which I shall try to deal later. As some capital has been sought to be made of the lack of merits which this defence discloses, I will observe at once that a personal representative is in my view fully justified in requiring strict proof of any claim against the estate not within his personal knowledge, and entitle—may be bound if others than he are interested in the estate—to avail himself of any technical defence which he may be advised is open to him.

Some time in the autumn of 1936 the plaintiff was apparently advised erroneously in view of the subsequent decision in *Hirendra Nath Datta v. Noyes* (5) that her cause of action as set out in her plaint was imperfect and in an endeavour to put matters right, a deed was executed on November 18, 1936 whereby Balthazar Son Ltd., assigned to the plaintiff the debt and security sued on. This deed was duly registered and on November 19, 1936 the plaint was amended by inserting an allegation of the deed: the amended plaint was again verified by the plaintiff. This step was not only unnecessary but also, of course, completely idle, because it is clear (I should imagine in the law of any country civilized enough to entertain law suits) that if a party at the moment he commences a suit has but an inchoate cause of action nothing he thereafter does can entitle him to any relief in that suit. His only course is to discontinue it and, if possible, start afresh. A party who, having a complete cause of action, alleges it imperfectly may be helped by amendment; but a premature suit is incurable; see in England *Clayton v.*

Lo Roy (19) in *India, Gulzar Singh v. Kalyan Chand* (20) and *Gobind Ramanuj Das v. Debendrabala Dasi* (21) and in this country *Smith v. Mrs. Heptonstall* (1). It is fair to observe that at the date of the deed and of the first amendment the last cited case was not yet decided. However vain thing though it was, this deed had this importance, namely that amongst its short and simple recitals was a recital of a mortgage of September 6, 1932. The suit came on for hearing before Braund, J., and it transpired that a stamp on the promissory note relied on by the plaintiff as proof of debt was not properly deleted. Braund, J. refused leave to amend by asserting the original obligation alleged by the plaintiff to be subsisting before September 6, 1932 but he offered the plaintiff leave to withdraw her suit and bring another. This was declined, and the learned Judge accordingly dismissed the suit on June 1, 1937.

The plaintiff appealed, and the case on appeal is reported in *Mrs. Niemeyer v. E. M. Mamooji* (22). The Court reversed Braund, J.'s decision and granted the plaintiff leave to amend. Mr. Ray for the defendants has pressed upon us the decision in *Ma Shwe Mya v. Maung Mo Hnaung* (2), *Maung Ba Thein v. Ma. Than Myit* (23) and *Ma Thaing v. Maung Chit On* (24). But material as these cases would be if we were considering whether to allow an amendment or not, in the events which have happened both we and the defendants are bound by the decision in the present suit reported as *Mrs. Niemeyer v. E. M. Mamooji* (22) right or wrong. It would therefore be both presumptuous and superfluous for us to discuss the merits of that decision. What has, however, turned out to be a most unfortunate thing happened. The Court did not insist that learned Counsel for the plaintiff should formulate in writing the amendment he desired to make before considering whether it would allow the amendment or not, nor did it declare generally that the plaintiff should be allowed to amend her plaint and remit the case to the Judge of first instance to consider what precise amendments he would in his dis-

(19) (1911) 2 K B 1031; 81 L J K B 49; 104 L T 419; 75 J P 229; 27 T L R 206.

(20) 15 A 399; A W N 1893, 170.

(21) 4 P L J 387; 52 Ind. Cas. 231; A I R 1919 Pat. 507.

(22) 1938 Rang. 521; 180 Ind. Cas. 519; A I R 1938 Rang. 461; 11 R Rang. 411.

(23) 3 R 483; 92 Ind. Cas. 253; A I R 1926 Rang. 49.

(24) 7 R 140; 117 Ind. Cas. 577; A I R 1929 Rang. 179; Ind. Rul. (1929) Rang. 209.

cretion allow; instead it allowed an amendment, "on the lines set out at the foot of p. 540 and the top of p. 541" of the report. Now it is easy to be wise after the event and I am not going to criticize anybody concerned for what then and afterwards happened. But, like my Lord, I do think the subsequent history of the case well illustrates the desirability of adhering to the general rule of practice laid down by the English Court of Appeal in *Hyams v. Stuart King* (3) at pp. 717, 724†.

Much of the time this case has necessarily occupied before us was spent in considering the question whether the amendment which the plaintiff did make came within the four walls of the permission she had received or not. What she did in reliance on that permission was to make about as drastic a series of amendments as it is possible to imagine. She completely jettisoned the mortgage of September 6, 1932; and abandoned all suggestions that there was any privity of contract between herself personally and the defendants or the mortgagor they represent. In place of these averments she, by her second amended plaint, filed on April 23, 1938, asserted a loan by one George Henry Smith through the agency of Balhazar & Son, Ltd., to the original mortgagors of Rs. 8,000 on or about December 4, 1922; a promissory note for that amount with interest at 9 per cent. per annum and a mortgage by deposit of title deeds of the property referred to in her original plaint, also on December 4, 1922; She further asserted a will made by George Henry Smith appointing her sole executrix, the death on April 8, 1926 of George Henry Smith, and grant of probate to her, the plaintiff. The rest of the pleadings followed the lines of the original plaint, except that the plaintiff (as, on her new case, was necessary) now averred due payment of interest as such up to September 30, 1935 and that such payment saved limitation. The relief prayed remained unaltered.

That the defendants carried in objections to these amendments is not surprising. By those objections it was contended that the amendments were not only out of time—nothing now turns on this—but also (and this is a substantial question for our decision) out of order. Shaw, J. heard and disallowed those objections, and in due course the suits came before Dunkley, J. for hearing on the amended pleadings. The defendants sought

† Pages of (1938) Rang.—[Ed.]

† Pages of (1908) 2 K. B.—[Ed.]

before him to go behind the decision of Shaw, J. Whether Dunkley, J. was entitled to take this course I will not discuss, for clearly he was not bound to and he did not. Equally clearly, however, he reserved to the defendants full liberty to question before us, if unsuccessful before him, the propriety of that learned Judge's decision as well as that of his own. In the result he found in favour of the plaintiff and from that decision the defendants now appeal. It thus comes about that this appeal though in form from Dunkley, J., is in substance in part an appeal from that learned Judge and in part from Shaw, J. Mr. Ray for the present appellants takes three points which I propose to deal with in the following order. He says (1) that the plaintiff's second amendment is not within the terms of the leave granted her and therefore, irregular i.e., that the order of Shaw, J., was wrong; (2) that the alleged mortgage of 1932 destroyed by novation the mortgage of 1922 on which the plaintiff, now, relies and (3) that payment of interest as such by or on behalf of his clients or the deceased has not been proved and that the claim is therefore statute-barred. The suit must be dismissed if he is right on any one of these points.

I have traced the rather complicated history of the suit in some detail for the purpose of making intelligible the conclusions at which I have arrived on the first and second of these points, which I can now, I hope, state comparatively briefly. Had the second amendment been formulated in writing when leave to amend was asked, and had its effect been to deprive the defendants of any advantage which they would have enjoyed had the case thereby set up, been set up in the original plaint, it would have been a strong ground for refusing leave to amend; had its effect been to set up a cause of action which since the filing of the original plaint had become statute-barred leave would, we may be sure, have been refused. If therefore Mr. Ray could have shown as that the amendment had in fact either effect we could, I think, safely say that the amendment as made was not one which the Bench in 1938 intended to allow. Actually however it is one of the few satisfactory features of the case that it had neither effect. Both the original mortgagors who might have given evidence in their own favour, if alive, died not after the second amendment but before the suit was commenced at all; while the amendment, so far from being a device to evade the statute

of limitations, made, as Mr. Clark said, a present to the defendants of, at least a highly arguable case under that enactment.

The real spear-head of Mr. Ray's attack on this particular front was wisely concentrated on the change of character in which the plaintiff sued. The Court, he said, gave the plaintiff leave "to set out the existing liability, if any, which the two deceased persons owed to the plaintiff" that is to say, to Mrs. Mary Niemeyer, in 1932; whereas what has been done is to set out the existing liability which the two deceased persons owed to the executrix of Captain Smith. It is true that the latter happened to occupy the same body as the former, but, he says, that is a mere accident, and the two are in law separate and distinct entities. For certain purposes the office of legal representative must be regarded as a distinct thing from its holder. Whether this is so for the present purposes we have to decide. The decision of Braund, J., in *Mahant Singh v. U Aye* (25), as well as the dicta in *Mackintosh Burn Limited v. Shivakali Kumar* (26) at pp. 805-6 and *Zubaida Sultan v. Dawood Ismail* (27) at p. 101 are against this contention, and it might suffice to say that I respectfully and entirely agree with Braund, J.'s, decision and am content to adopt his reasoning. But I ought to add that the case of a trustee in bankruptcy who institutes proceedings appears to me analogous to that of the representative of a deceased person who sues, and it is well settled that if the former is unsuccessful his adversary is entitled to look for his costs to his individual assailant and not to an insolvent estate the right of the former to an indemnity from such assets as there may be in the latter is plain, provided certain conditions are satisfied, but is no concern of the successful defendant. So in the present case if Mrs. Niemeyer personally was worth Rs. X it matters not to the defendants what the estate of Captain Smith, or what Mary Niemeyer's interest in that estate, may be worth. As neither can be less than nothing Rs. X to which the defendants, if successful, were entitled on the original pleadings remains undiminished.

Mr. Ray sought to distinguish *Mahant Singh v. U Aye* (25) on the ground that the (25) 14 R 336; 166 Ind. Cas. 247; A I R 1936 Rang. 514; 9 R Rang. 243.
(26) 60 C 801, (805-6); 149 Ind. Cas. 282; A I R 1933 Cal. 668; 6 R C 554.
(27) 1 L R (1937) 1 Cal. 99 (101); 175 Ind. Cas. 895; A I R 1937 Cal. 407; 11 R C 9.

public trustee is a statutory person and executors are not, but I do not find this distinction convincing for though it is true that the individual who holds the office of executor is not chosen by statute his duties, subject to the will, are as much statutory duties as those of the public trustee. Both sides place reliance on s. 52 (1), Civil P. C., but in my opinion it tells strongly in favour of the plaintiff. This section provides what is to happen :

"Where a decree is passed against a party as the legal representative of a deceased person and the decree is for the payment of money out of the property of the deceased"

If a decree against an executor as such were necessarily a decree for the payment of money out of the property of the deceased the words I have just quoted from "and the decree" down to and including "the deceased" would be quite unnecessary. The section therefore contemplates a decree against a party as the legal representative of a deceased person which is not limited in the way described but is enforceable without more ado against him personally, and such a decree is in my opinion the proper decree where the executor is plaintiff, while in the absence of misconduct on his part the other form of decree is applicable where e. g., the executor as such is defendant in an action by a creditor of the deceased. The first point in the appeal therefore, in my judgment, fails. As to the second point (novation) it is not disputed that if there was a complete mortgage in 1932 that is an end of the plaintiff's case as now pleaded, and whether there was is a pure question of fact. We must consider whether there was any evidence on which Dunkley, J., could have found, as he did, that there was no such mortgage. If there was none we must, and if there was any we may, reverse his decision, though in the latter event it would need a very strong case to persuade us so to do.

I do not myself think that the possibility of there having been a mortgage in 1932 can lightly be cast on one side. True, there would have been no point in such a transaction but the plaintiff might well have been as ill-advised in September 1932 as she was in November 1936. The plaintiff herself has stated in writing no less than five times that there was a mortgage in September 1932 while her witness Mr. Joakim flatly contradicted himself at the trial, saying in chief that there was no such mortgage and in cross-examination that the recitals in the deed of November 1936, were correct from

which answer, if true, it follows that there was. Comment before us has been made on the fact that the learned Counsel who cross-examined him did not follow up this answer with a specific and direct question as to the alleged 1932 mortgage. In the light of after events I am inclined to think it would have been better if this had been done, but I do not for a moment blame the learned Counsel concerned for exercising his discretion in the way he did and, having got what he (I think very reasonably) understood to be the answer he desired, not seeking to paint the lily with further questions. After all, he was not dealing with an elderly maiden lady or an illiterate person but with an experienced and intelligent man of business, nor were the recitals to the deed of November 1936, by any means prolix or complicated.

Anyhow, that was the evidence about this matter. The existence of the 1932 mortgage had been six times asserted and only once denied, but of course you do not weigh evidence by counting assertions and denials. To my mind it is difficult to believe that if there had been a mortgage in 1932 the plaintiff's present advisers would not have been so instructed and that if they had been so instructed they would, when framing the second amendment, have gone back into the mists of antiquity for the purpose of founding their case on the 1922 mortgage. They could have pleaded and, as it turns out, proved their client's case by reliance on the promissory note of 1922 and the mortgage of 1932. If I had had to decide the point I should, I think, have shared what must have been Dunkley, J.'s view, namely that Mr. Joakim's answer in cross-examination was a mistake due to his not appreciating where the answer led him ; but it is sufficient to say that I am quite clear that we ought not to reverse the learned Judge's decision on this question of fact.

The third question—that of limitation—is at first view the most difficult in the case but the difficulties largely solve themselves if we bear in mind that we have before us the representatives of only one of the original mortgagors and are therefore not concerned with the rights of the representatives of the other who have let the suit go by default. I do not propose to indulge in any elaborate review of the authorities on this part of the case because as I find myself in complete agreement with what my Lord has said about them and in particular with his observations on *Janaki Ammal Srinivasa* (8) and *Achole Sundari Debi v. Doman Sundrri Debi*, 90

Ind. Cas. 774 (9). The law applicable is, I think undisputed to this extent, namely, (1) that the combined effect of ss. 20, as now amended, and 21, Lim. Act, imposed on the plaintiff, who does not here allege any such written acknowledgment as the proviso to the former section contemplates, the burden of proving at least one payment of interest expressly as such by Ismail Eusoof Jeewa Karwa or some person duly authorized by him, between April 23, 1926, (being 12 years before the second amended plaint was filed) and January 1, 1928, (when a written acknowledgment as well as a payment of interest became necessary to save limitation) and (2) that it is not enough for her merely to prove that payment was made either by or on behalf of Eusoof Jeewa Karwa or of his co-mortgagor without showing which or that a payment in gross by Eusoof Jeewa Karwa was lawfully appropriated to interest by or on behalf of the mortgagee.

Mr. Clark sets about the discharge of this burden by proving, by the evidence of Mr. Joakim supported by the books of his company, that a payment of an amount precisely equal to the interest then due was made by somebody on December 30, 1927, a few days after that payment fell due. He then proves by similar evidence a whole series of similar payments since that date, each of them round about a date when interest would be payable, down to 1935. It seems to me quite clear, and I do not think any of the authorities conflict with this view, that the learned Judge was on this uncontradicted evidence justified in inferring that the payment on December 30, 1927, was a payment of interest as such by somebody. Who then was that somebody? It is true that some kind person might from 1927 to 1935 have been benevolently but voluntarily paying the mortgagors' interest for them without their knowledge, and it is true that Messrs. Balthazars might have been paying it themselves by means of book entries for the purpose of defeating the statute. The former contingency appears to me unlikely, and the latter fantastically so. Not only would they, as reputable people, not have dreamt of doing anything so dishonest, but also they would not have done anything so silly as by faking their books to make themselves accountable to their principals for money they had never in fact received. Section 114, Evi. Act, in effect provides that the Court may use a little commonsense. It would, I think, be a conspicuous failure to use any either to

draw no inference from the fact of these payments at all or, in the absence of any evidence to suggest it, to infer that all these payments were, and in particular that the payment of December 30, 1927, was, made by some person other than one or more of those who would unnaturally be expected to make payments of interest, namely, the mortgagors.

Is there then anything to justify the inference that the male mortgagor was that one, if it was only one? Mr. Clark asks us to say that such an inference can be drawn from the fact that the mortgagors were brother and sister. To that proposition I cannot agree. A Buddhist husband is not as such his wife's agent, (First Appeal No. 53 of 1938 *U. So Maung v. J. Thom* (17) and I can see no reason, why a Muhammadan brother should as such be his sister's, even if, as here was in evidence the sister is a *pardanashin* lady. If he is an agent to pay interest, what, one may ask, are the limits of a brother's ostensible authority *qua* brother? If one imagines the chaos that might result wherever there was a large family, of whatever race if all the brothers each pledged all their sisters' credit and each sold all their sisters' property each to different persons one realizes without difficulty that this suggestion cannot be well founded, and Mr. Ray has cited ample authority against it. But Mr. Clark has a better card in his hand than that. In none of the cases to which Mr. Ray drew our attention on this point did it appear, as here it does, that one of several co-mortgagors applied for and obtained a reduction of the rate of interest, after which interest was paid at the reduced rate. This, it seems to me, points clearly to the conclusion that if the payments before his application were not made, at the time they were made, by the applicant they were ratified by him: since the subsequent punctual payments of money at the reduced rate and of no more money raise the inference that there were then no arrears of interest and almost must have been made by the applicant, or with his knowledge and approval, since without information received from him nobody on behalf of the mortgagors could well have known of the reduction. That disposes of the appeal, and I agree with the order which my Lord the Chief Justice proposes and also with his observation as to what its effect as regards interest will be.

D.

Appeal dismissed.

PATNA HIGH COURT

Criminal Appeal No. 246 of 1940

January 3, 1941

ROWLAND, AND SHEARER, JJ.

MOHAMMAD ARIF alias SUPAN—

APPELLANT

versus

EMPEROR—OPPOSITE PARTY

Evidence Act (I of 1872); s. 32 (1)—Dying declaration—Assailant not recognized—Possibility of naming suspected person as assailant should not be ignored by Court—Dying declaration, when can be acted upon, for convicting accused without corroboration—Duty of Court in this respect—Prosecution attempting to improve and develop evidence at successive stages—Special caution is necessary in dealing with dying declaration—Serious room for doubt as to whether dying declaration includes matter suggested to deceased by outsiders—Value to be attached to it.

Although it is improbable that a man who has been stabbed and has been able to recognize his assailant would omit to name the actual assailant and instead give the name of some other person in his dying declaration, yet in cases where the assailant has not been recognized the Court must not ignore the possible temptation that there may be, if one has grounds for suspecting any person, to name that person as having been actually and positively identified. The danger of this kind of wrong identification has to be borne in mind in dealing with what are called dying declarations. There is no absolute rule that a dying declaration should not be acted on for the purpose of convicting an accused person even if uncorroborated, provided, that the Court is fully satisfied that it is true. But before so acting on it the Court will apply to it every test of its genuineness and good faith which it is possible in the circumstances of the case to apply. [p. 186, col. 2.]

Where the prosecution evidence shows that there are signs of attempt to improve and develop it at successive stages special caution is needed also in dealing with a dying declaration. [p. 186, col. 1.]

When there is serious room for doubt as to whether the contents of the dying statement include matter suggested to the deceased by the outsiders, this is a circumstance which cannot be ignored in estimating the value to be attached to it. [p. 188, col. 2.]

Cr. A. from a judgment of the Sessions Judge of Gaya, dated November 7, 1940.

Messrs. *Khurshed Husnain and Ashique Hossain Akbari*, for the Appellant.

The Assistant Govt. Advocate assisted by Mr. *Avadesh Nandan Sahay*, for the Crown.

Rowland, J.—The appellant Mohammad Arif alias Supan Mian aged about twenty years has been convicted by the Sessions Judge of Gaya on a charge of murder of Sheonandan Singh and sentenced under s. 302 of the I. P. C. to transportation for life. The crime is said to have been committed on Monday July 10, 1939, at about 5 P. M. by stabbing Sheonandan in the abdomen with a broad-bladed knife at Nawada on the bridge which cross the river. Sheonandan pressing his hands to the wound walked without assistance to the end of the bridge where he was picked up by a *rickshaw-wala*

Shital Lal and taken to the hospital. There he made a statement charging Supan the son of Hafiz Abdul Qadir with the crime. He received surgical treatment but died the same night.

The trial was held with the aid of four assessors of whom two who were Muhammadan thought the accused was not guilty and the other two who were Hindus thought that he was guilty. The Sessions Judge in a careful and considered judgment has examined the evidence of the prosecution witnesses who have deposed as to the events of that day and has found that most of them are unreliable and expresses doubt whether the alleged eye-witnesses were present at all. He, however, has based the conviction of the accused in the main on the identification of Sheonandan himself along with the fact that on search of the house of the father of accused that night a knife was recovered which was on chemical examination found to be stained with blood, and partly also on the fact that whereas the accused had pleaded *alibi* saying that he was in Calcutta there is evidence which the Sessions Judge accepts to prove his presence in Nawada on the day in question. As to the dying declaration the Sessions Judge has observed that he would not wish to attach any exaggerated or sentimental value to it though he finds it difficult to envisage circumstance or motive so cogent as would induce a man mortally wounded to accuse a person other than his actual assailant. I would go so far in agreement with the learned Judge as to accept that it is improbable that a man who has been stabbed and has been able to recognize his assailant would omit to name the actual assailant and instead give the name of some other person. But in cases where the assailant has not been recognized I think that we must not ignore the possible temptation that there may be, if one has grounds for suspecting any person, to name that person as having been actually and positively identified. The danger of this kind of wrong identification has I think to be borne in mind in dealing with what are called dying declarations. There is no absolute rule that a dying declaration should not be acted on for the purpose of convicting an accused person even if uncorroborated provided that the Court is fully satisfied that it is true. But before so acting on it the Court will apply to it every test of its genuineness and good faith which it is possible in the circumstances of the case to apply.

Before coming to a discussion of the dying

statement itself I may first refer to some of the oral evidence. The Sessions Judge has doubted whether the alleged eye-witnesses were at all present. It is certainly clear that if they were present they have not correctly described their own movements. They do not corroborate the presence of each other. But if for the purpose of examination we take their evidence at its face value there is much in it to lead to the view that the assailant of Sheonandan may have been an unidentified person. Jugal whose statement was the first to be recorded by the Sub-Inspector out of all the alleged eye-witnesses told the Police that he had noticed a boy aged eighteen or twenty wearing a *kurta* and green *lungi* and it appears from the statement he made to a Magistrate on July 13, 1939, that immediately after the incident he told passers by that some Muhammadan boy had stabbed Sheonandan. He has said in the course of his evidence that he did not know the name of accused till he heard it later, though almost in the same breath he admits having known Supan for three or four years. On the face of his evidence, therefore, it would seem that though he had known Supan for some time the person that he saw stabbing and running away was a person unknown to him. The next eye-witness Jamuna claims to have seen a boy running away and he says that Sheonandan pointed out the boy and said that that boy "has stabbed me". What this witness said to the Police was that he saw a boy running dressed in a *kurta* and green *lungi* whom he could not recognize. He did not give to the Police the name or the parentage of the accused and even at the trial he had to admit that he had seen him from behind only so that his opportunity for identification at the best would be poor. The next witness Basdeo who at the trial identifies and names Supan as the assailant of Sheonandan had said to the Police that Sheonandan's assailant was a man aged nineteen of short stature and fair complexion whom he would be able to identify if shown to him. That statement is inconsistent with the assailant having been a person who was known to Basdeo from before in which case one would have expected Basdeo to give the name or at least the parentage. But Basdeo in his evidence has admitted that he knew Supan from before. The last of the so-called eye-witnesses is Raghunath. Pandey and he refers to a Muhammadan boy eighteen or nineteen years of age wearing a green *lungi* and a striped shirt. He says also that Sheonandan told him that Ashraf and Sabatul had held

his hands and that a Muhammadan boy had stabbed him. If there is any truth at all in Raghunath's evidence this last statement would be very significant as indicating that of three persons referred to by Sheonandan the latter was able at the time to name two but did not name the third and that would very strongly support the inference that the third person was unidentified. This witness in the earlier proceedings and in the trial of Sabatul and Ashraf which took place in the absence of the present accused did not give Supan's name but referred to him as a Moslem boy whom he claimed to be able to identify if he should see him. It was much to be desired that a test identification should have been held after the strictest possible precautions and indeed the father of this accused after the arrest in Calcutta of the latter petitioned the Sub-Divisional Officer that arrangements might be made for the accused to be sent to Central Jail, Gaya, after making special arrangements to see that prosecution witnesses should not have an opportunity of seeing him at Nawadah Railway Station. But nothing was done about this. The witness as a matter of course when confronted with Supan as the sole accused in the dock had no difficulty in identifying him.

Then there is the evidence of the witnesses who claim to have seen this accused in Nawada on the day of occurrence whose evidence is relevant from two points of view; firstly, as a negative to the plea of *alibi* set up; and, secondly, as lending force to the prosecution contention that between the date of the crime and the time of his arrest in Calcutta the accused was absconding. There would be naturally not so much force in this contention if it were accepted that the accused had been in Calcutta all the time. The witnesses who saw accused before the occurrence are Dhanu Pasi and Gobind Thakur. Dhanu is a toddy seller and his evidence is that at about 2 or 2-30 p.m. four or five young men came to his shop and demanded toddy. One of them was wearing a striped *kurta* and check *lungi* and he identifies the present accused as being that person. But in his statement to the Police he said that there had been five persons of whom he named three and the inference follows that the other two were persons unknown to him. But in cross-examination he admits that he had known Supan for four or five years and knew his name from before. Gobind Thakur is a witness who claims to have seen the accused sitting on the bank of the river at about 4-30;

that is to say, shortly before the occurrence. There is a discrepancy in successive statements of this witness as to whether he saw the accused at 4-30 or 6 P.M. and the Sessions Judge was not disposed to attach any value to his evidence. Assuming that he did see someone who might be considered a suspicious character in the bed of the river the identification of that person may or may not have been correct.

Then there is the evidence of accused's presence in Nawada after the occurrence and for this the prosecution relies on Kishun Pasi and on Babu Lachmiprasad, the Assistant Station Master of Nawada. The Assistant Station Master proves that a boy whom he described to the Police had bought a ticket for Asansol by the passenger train leaving Nawada at 7-21 P.M. He has not, however, identified the accused and so far as this witness is concerned the criminal if was the person who bought the ticket may have been some person other than the present accused. The other witness Kishun Pasi has told a rather curious story that at about sunset Supne came and asked him for toddy and insisted on being supplied threatening Kishun with a knife and said he would kill him as he had killed Sheonandan Babu. He describes the accused as wearing a *kurta* and green *lungi* and has said at the trial that he recognized him both by face and by voice. But when he was examined on July 13, 1939, before a Magistrate under s. 164 of the Criminal P. C. he said that he recognized Supna by voice only and that owing to darkness his face was not visible. This is no recognition on which any reliance can be placed.

A general comment may be made on all this evidence that there are signs of attempt to improve and develop it at successive stages. When one finds that tendency in the evidence generally special caution is needed also in dealing with a dying declaration. It has been admitted by the compounder of the hospital that a large number of Hindus assembled on hearing of the incident and crowded into the room in which Sheonandan was and talked to him; and it has been argued for the defence that the inference ought to be drawn that Sheonandan not having recognized his assailant was influenced by suspicions put into his mind by others in such conversation. In this connection it is pointed out that on the way to the hospital Sheonandan did not disclose the name of his assailant either to the *rickshaw-wala* Shital or to an acquaintance Suganchand Jain whom he met on the

way. The prosecution argued on the other hand that as Sheonandan had suffered a severe injury he must be supposed to have been anxious in the first instance for his own treatment with a view to saving his life and that therefore he was not going to stop on the way side to indulge in conversation about the details of what had happened to him. The evidence is that Suganchand asked Sheonandan what had happened and he said a Muhammadan had stabbed him, that Suganchand asked him '*kis ne mara*' (who stabbed) and he said his condition was not good and asked Suganchand to come to hospital which the latter did. The *ricksha-wala* Shital Lal says that he himself did not ask anything from Sheonandan nor did Sheonandan tell him anything. The compounder says that immediately on arrival he asked Sheonandan what had happened and was told that a Muhammadan boy stabbed him with a *chhura*. The expression may imply that the Muhammadan boy who had stabbed him was unidentified though such an inference does not inevitably follow. Then according to the compounder after some conversation with outsiders Sheonandan asked that his statement might be recorded. There is serious room for doubt as to whether the contents of the dying statement include matter suggested to the deceased by the outsiders and this is a circumstance which cannot be ignored in estimating the value to be attached to it. Further more the dying declaration itself in several particulars is unconvincing especially as to the parts attributed to Ashraf and Sabatul. In fact two successive statements were made by Sheonandan in the one of which he said that those two persons caught him one by each hand and in the other he said that Ashraf caught his left hand and Sabatul caught his right hand and waist. I cannot feel that in this case the dying declaration is one on which full and implicit reliance can safely be placed.

As regards the motive the Sessions Judge has observed that the motive of the outrage remains obscure. The prosecution have attributed it to communal feeling between Hindus and Muhammadans and reference has been made to two previous incidents one arose out of the burial of a Muhammadan woman and the other out of some alleged defilement of idols of Siva and Parbati. Sheonandan no doubt was a person of some influence among the Hindus but the evidence is that in both these instances he exerted his influence in favour of a compro-

mise between the two communities and in both cases a compromise was effected.

To what extent then are the dying declarations corroborated? The evidence as to the presence of Supan in Nawadah that day seems to me to be little better than the direct evidence of the eye-witnesses and impossible to trust in the matter of Supan's presence. Then there is the finding of the knife and it may be noticed that although there was stains of blood on it it could not be proved that the blood was human and it has not been proved that the accused was at or about the time of occurrence residing in the house in which the knife was found. In the circumstances I do not feel able to support the conclusion at which the learned Sessions Judge has arrived or to regard the dying declaration as being sufficiently convincing in itself or sufficiently corroborated to form the basis of the conviction of this appellant. I would allow the appeal and set aside the conviction, acquit the accused and direct his release.

Shearer, J.—I agree.

Appeal allowed!

NAGPUR HIGH COURT

First Appeal No. 33 of 1936

November 18, 1940

STONE, C. J. AND BOSE, J.

KASHINATH VISHWANATH JOT AND
ANOTHER—PLAINTIFFS—APPELLANTS
versus

BAPURAO AND OTHERS—RESPONDENTS

Hindu Law—Alienation—Alienation not binding on family as whole—Mother is no more bound than sons—Mortgage—After-born son, if can challenge—Cause of action—His rights—Nature of alienation in joint family—Member, if can own part of family property as his separate property—Partition—Mother's share, when arises.

The mother is no more bound by an alienation which does not bind the family as a whole than are the sons. [p. 189, col. 2.]

An after-born son has no cause of action to sue for a declaration that a mortgage is not binding on him nor can he create a cause of action for himself by waiting until he is dispossessed and then suing for possession; nor can he set up rights while he could not urge in a suit of his own by way of defence when the mortgagee sues. The cause of action to challenge the mortgage arises at the date of its execution and hence a son born and conceived after that date cannot challenge the mortgage though he still has a right to redeem. 191 Ind. Cas. 241 (1), explained and applied. [p. 190, col. 2.]

The real alienor according to orthodox Hindu ideas is the family and not the individual who puts his signature to the deed. [p. 191, col. 1.]

An individual member of a joint Hindu family can own separate property. The family can by agreement break off a piece of its property (whether

tangible or a share) and hand it over to one of its members for him to have and to hold as his separate estate. They can do this just as effectually and completely as they could to a complete outsider, and yet remain joint. In any one of these ways it is possible for an individual member to acquire for himself as his own separate property a part of the family estate. [p. 191, cols. 1 & 2.]

Under Hindu Law the mother's share does not accrue until the family partition.

F. A. from decree the the Court of the Additional District Judge, Akola, dated December 19, 1935.

Mr. A. V. Khare with Mr. W. B. Pandharkar, for the Appellants.

Mr. S. A. Sohoni, for Respondent No. 1.

Mr. V. K. Rajwade, for Respondents Nos. 2 and 3.

Mr. A. Ahmad, for Respondent No. 4.

Mr. B. L. Gupta, for Respondents Nos. 6 and 7.

Judgment.—After the decision of the Full Bench only two points remain. The first relates to the fields S. No. 17, 5/2, 6/2, 63/2 and 88. Both sides are agreed that the shares which the 6th and 7th defendants, Janrao and Dnyandeo, have in these fields should be released from the mortgage. But they are not agreed about the extent of their shares.

According to the learned Counsel for the plaintiffs the family consists of Govinda (defendant No. 4), and his two sons, Janrao and Dnyandeo, (defendants Nos 6 and 7), and the mother of the sons, the 5th defendant Saraswatibai. The learned Counsel contends that each would have a share on partition and therefore the extent on the 6th and 7th defendants' interests is only 1/2 and so that is all that can be released.

The contention of the other side is that if the mother is taken into account then her share would also have to be excluded and that would leave the plaintiffs with only 1/4th. But, they say, no question about her share has been raised hitherto and so all they claim is 2/3rd. We think this is sound. If the mother's rights are to be taken into account, then the plaintiffs can only get 1/4 because the mother is no more bound by an alienation which does not bind the family as a whole than are the sons. But, as Counsel for the defendants admits, no question about her share has been raised, and in any event her share does not accrue until the family partitions (which it has not done hitherto), therefore all that the defendants can claim is 2/3rds. We accordingly direct that a 2/3rd share in the fields mentioned be re-

leased from the mortgage and be excluded from the decree.

The next question is more difficult and pivots around the decision of the Full Bench. Lalji's son Bapurao (now the 1st defendant) was born on December 9, 1926. The cause of action on the mortgage which this suit seeks to enforce did not accrue till March 21, 1927. Therefore Bapurao was born after the mortgage (which is dated March 21, 1922), was executed and before the cause of action on it accrued. Bapurao's learned Counsel relies on the following passages in the Full Bench decision (*Kashinath v. Bapurao* (1)):

"The cause of action arises at the moment the alienee enters into possession where the suit is for possession. It may be there are other causes of action arising at different dates.

Whichever cause of action is in question it belongs to those in existence when the cause of action arises.

* * *
If a co-parcener is not in existence when such a cause of action arises he cannot sue.

When the co-parceners are defendants different considerations arise."

It is argued by him that Bapurao was in existence when the cause of action in this suit arose and consequently had he been a plaintiff he could have sued for a declaration that the mortgage did not bind him; and if he could have done that, then he can set up the same right by way of defence. It is also argued in the alternative that even if he could not have sued the Full Bench decides that different considerations apply in the case of defendants and therefore, as he is in possession, he can challenge the mortgage.

This is not a proper interpretation of our decision. The question referred was whether an after-born co-parcener can challenge an alienation made before the date of his conception. It was assumed all the way through the arguments, and that assumption underlies much of our opinions, that if he could challenge the alienation by way of suit he would also be able to do so by way of defence. The test was whether he could sue and as that answered the other question attention was concentrated on the first point.

As regards the other point, namely that "when the co-parceners are defendants different considerations arise", it was not developed because the case was not argued from that angle. It was never doubted or contested that the after-born son has a right of redemption indeed that is why he was

(1) I L R. (1940) Nag. 573, (618); 191 Ind. Cas. 241; A. I. R. 1940 Nag. 305; 1940 N. I. J. 528; 13 R. N. 168.

joined as a defendant to this suit but as advantage has been taken of this sentence in the Full Bench decision by the learned Counsel who appeared before us but who had not appeared either at the earlier stage of the case or before the Full Bench, it will be necessary to explain what was meant.

A mortgage splits the bundle of rights which constitute ownership into two parts. One part passes out of the mortgagor and goes to the mortgagee. This is the transfer of the interest spoken of in s. 58 (a) of the T. P. Act. The other part remains in the mortgagor and constitutes the right to redeem. As we say it has never been doubted that the right to redeem resides in the family even after the mortgage and that therefore the after-born son obtains an interest in that right by birth the moment he is conceived. The dispute in this case, and before the Full Bench, did not touch that right at all. The arguments there were confined, so far as mortgages are concerned, (and this is a mortgage case), to the other part of the bundle of rights which pass to the mortgagee. Those rights pass under the mortgage. Therefore unless the mortgage can be challenged the mortgagee is entitled to have those rights enforced. The Full Bench decides that if the challenging co-parcener is born (or to be more accurate, conceived) after the cause of action arises, then he cannot challenge the alienation.

But the cause of action spoken of there is the cause of action which accrues to the after-born son to challenge the alienation and not to the cause of action which accrues to the alienee to enforce his transfer. The cause of action to challenge a mortgage accrues at the date of the mortgage. A suit for a declaration can be filed the moment the mortgage is executed. In other cases the cause of action would accrue at other times, for example, in the case of dispossession by a trespasser, it would accrue at the date of the dispossession when the right to sue for possession first accrued; so also in the case of an unregistered sale or mortgage which requires registration. We did not mean that in the case of a mortgage, though the after-born son has no cause of action to bring a declaratory suit he can create a cause of action for himself by waiting until he is dispossessed and then suing for possession; nor did we mean that though he could not have sued for a declaration he can set up rights which he could not urge in a suit of his

own by way of defence when the mortgagee sues. In the view we take the after-born son has no cause of action at all if the transfer is good, at the time, or if it must be deemed to have been good by reason of the co-parceners in being at the date of the alienation not choosing to challenge it within the time allowed by law.

In the Full Bench case we were both agreed as to the conclusion and Bose, J. fully concurred with the view taken by the Chief Justice but he also felt that the matter could be traced back even further than the Chief Justice had gone and that the root of the rule is to be found in the doctrine of national partition. According to his view there is no escape from the logic of the ancient and rigid Hindu Law position which is still followed in Allahabad unless the doctrine of notional partition is introduced.

As he pointed out, according to orthodox Hindu notions all family property is owned by the fluctuating entity known as the joint family. No individual co-parcener owns any part of that property as an individual. Until partition he has no separate rights and no separate share. He has no separate existence for those purposes. His identity is merged in the family as completely as an ounce of water or sand is merged in the gallon or pound of which it forms a part, and until partition his separate identity cannot be distinguished for these purposes any more than can that of the ounce of water or sand. If there is an alienation it must be the family as a complete whole which alienates. If not, there is no alienation. There is nobody to alienate. There is nothing which this nobody can own to alienate. It is true that the family either acts as a whole, each member joining in the alienation, or that it acts through the manager or whoever else is invested with authority to act on its behalf. But the real alienor according to orthodox Hindu ideas is the family and not the individual who puts his signature to the deed.

But the moment there is a partition, however partial it may be, the moment a piece of property, whether a plot of land or an ascertained share, is broken off from the whole and given to an individual member as his separate estate of course he can do what he likes with it. An individual member of a joint Hindu family can own separate property and a joint Hindu family can separate and yet not divide its estate by metes and bounds. In between these

extremes lies another possibility. The family can by agreement break off a piece of its property (whether tangible or a share) and hand it over to one of its members for him to have and to hold as his separate estate. They can do this just as effectually and completely as they could to a complete outsider, and yet remain joint. In any one of these ways it is possible for an individual member to acquire for himself as his own separate property a part of the family estate.

If they partition they can assign to any given member any part of the property they please. It does not matter whether it is equal to his share or not. It does not matter that it comprises the entire family estate. That is their affair. If they are satisfied nobody else can question their action except that the after-born son may in certain limited circumstance claim to reopen such a partition. Those circumstances are set out at p. 613* of the Full Bench decision by Bose, J. in his opinion. So also, if the family chooses to gift its entire estate to a stranger. If the family agrees, there is, an end of the matter. The property transferred goes and is lost to the family from that moment and there is nothing to which the after-born son can succeed. The position is the same if the transfer is made to a co-parcener. In his case it may be made in anticipation of partition as the whole or part of the share which he is to receive when and if the family divides, or it may be a pure gift, or it may be for any other consideration. But it is clear that such transfer came to be made provided the whole family agrees.

Of course the members of the family then in being (or the after-born son in the circumstances mentioned) could get such an agreement set aside if suitable grounds existed, or they could show that they had never agreed, but if the agreement and transfer were really made, they would be binding and valid until avoided. All this is, we think, commonplace. The next step is not as easy.

The inconvenience of the orthodox position was early recognised though its logic is inescapable and attempts were made to break away from it. This caused a split in which one side adhered and still adheres, as in Allahabad, to the extreme orthodox and logical position, while the other took a more liberal attitude which has resulted in the view we take of alienations in this Province. But the difficulty all through

*Page of I L R (1940) Nag.—[Ed.]

has been to trace this down to some logical and legal principle. Bose, J. has endeavoured to do this in his opinion in the Full Bench case and according to his view the more liberal among the early commentators developed what we might term the principle of notional partition, that is to say, they regarded a transfer first as a partition, partial or otherwise, which was immediately followed by the alienation. Looked at from this point of view the family is deemed to separate off the alienated property from the rest of the family property and hand it over to the alienating member. As we have shown this can be done in several ways and it does not matter for these purposes which is selected because they all come to the same thing in the end, namely, that the property passes completely out of the family and is lost to it from the moment of the alienation. Nor does the fact that any co-parcener then in being has the privilege of avoiding this notional partition make it any the less binding till avoided. If they choose not to avoid it or to challenge it, it stands, and if they die before doing so, their right to avoid lapses and no one else not claiming through or under them can exercise it on their behalf.

• But whether this *ratio decidendi*, which is that of Bose, J. is right or not (and we can see difficulties, as for instance where there are minors at the date of the alienation) we are both of opinion that the Full Bench decides that the son who is born or conceived after the cause of action to challenge the alienation arises cannot do so. The cause of action to challenge the mortgage here arose on March 21, 1922. Bapurao was born and conceived after this and so he cannot challenge the mortgage though he still has a right to redeem.

As, in our view, the Full Bench was decided the point, it will be idle to examine the cases cited at the last hearing because we cannot now reopen the question.

The result is that the appeal succeeds except as regards the 2/3rd share in the fields we have specified above belonging to the 6th and 7th defendants. The decree of the lower Court will therefore be set aside and a foreclosure decree will now be passed in the plaintiffs' favour in respect of all the mortgaged property except the 2/3rd share mentioned above. The costs of the suit and of the appeal will be paid by the defendants. A further six months will be allowed for redemption.

- D.

Appeal allowed. -

LAHORE HIGH COURT

First Appeals Nos. 26, 37, 38 and 43 of 1939
June 7, 1939

TEK CHAND AND DALIP SINGH, JJ.

Thakar HARI RAM—APPELLANT.

versus

CENTRAL GOVERNMENT THROUGH
SECRETARY, COMMERCE

DEPARTMENT, DELHI—RESPONDENT

Civil Procedure Code (Act V of 1908), O. I, r. 3—“Necessary” and “proper” party, distinction between—Tea Control Act (VIII of 1938), s. 7 (2)—Appeal under s. 7 (2)—Central Government or Tea Licensing Committee, if necessary party—Joint controller, if can engage Counsel in absence of authority from Committee.

The distinction between a “necessary” and a “proper” party to an action, appeal or other proceedings, is well recognized. A “necessary” party is one, whose presence on the record is enjoined by law, or in whose absence no effective decision can at all be given. Without such party the action, appeal or proceeding is not properly constituted and is liable to be dismissed on this ground alone. A “proper” party, on the other hand, is one whose presence is not essential for the constitution of the suit, appeal or proceeding, but whom it may nevertheless be desirable, or even necessary, to have before the Court in order to properly, or completely and adequately, adjudicate on the matter involved. It is the duty of the person, bringing the action, appeal or proceeding to implead all “necessary” parties to it and his omission to do so is a fatal defect, which if not remedied, with the permission of the Court within the period prescribed by law, results in its dismissal. No such duty, however, is cast on him in the case of a “proper” party nor does the absence of such a person from record entail any such serious consequences. [p. 194, col. 2.]

In appeals under s. 7 (2), Tea Control Act, it is not necessary for the appellant to make the Central Govt., or Indian Tea Licensing Committee a party to the appeal. The Court may, however, issue notice to the Committee to appear and support its decision, or the Committee may apply to be permitted to be heard, and if necessary to lead evidence to show that its order was correct. Similarly, in some cases the Central Govt., also might like to be heard if any question of principle is involved, and the Court may permit it to do so. *Suprakash Das v. Indian Tea Licensing Committee* (1), explained, *Tynemouth Corporation v. Attorney-General* (2), 109 Ind. Cas. 618 (3) and 103 Ind. Cas. 533 (4), distinguished. [p. 195, col. 1.]

The joint controller cannot engage or instruct a Counsel on behalf of the Tea Licensing Committee in the absence of any rule, or resolution of the Committee, authorising the joint controller to do so. [p. 195, col. 2.]

F. As. against an order of Dalip Singh, J., dated April 5, 1939.

Mr. Mehr Chand Mahajan, for the Appellant.

Mr. M. Sleem, Advocate-General, for the Respondent (Central Govt.).

Mr. Ishwar Das Khanna, for the Indian Tea Licensing Committee.

Tek Chand, J.—Four Appeals, F. A. O. Nos. 26, 37, 38 and 43 of 1939, have been

preferred to this Court under s. 7 (2), Tea Control Act, 1938, by the "owners" of four tea-estates in Kangra District against certain orders of the India Tea Licensing Committee passed under s. 14 of the Act. The appellants in the four appeals respectively are, Thakar Hari Ram of the Hailaynagar Tea Estate (F. A. O. No. 26); Mastak Chand of the Kaulpur Tea Estate (No. 37); Manak Chand of the Talasham Tea Estate (No. 38) and Onkar Singh of the Onkar Singh Tea Estate (No. 43). In two of the appeals, namely F. A. O. Nos. 26 and 43 the sole respondent impleaded is the Central Govt. while in the other two appeals, (F. A. O. Nos. 37 and 38), the Central Govt. and the Indian Tea Licensing Committee "through the joint controller" have both been made respondents.

These appeals came up for hearing in the first instance before a Single Bench. There the first question raised was as to the frame of the appeals under s. 7 (2) of the Act. The learned Advocate-General who appeared on behalf of the Central Govt., stated that the Govt. was not a necessary party, that it had no interest in the subject-matter of any of the appeals and that it did not wish to be heard. Mr. Ishar Das Khanna appeared on behalf of the joint controller in the two cases in which the Indian Tea Licensing Committee had been impleaded and he applied for an adjournment to enable him to file certain documents which he urged, would assist the Court in coming to a correct decision on the points involved. He further urged that the Committee was an essential party to appeals under s. 7 (2) and that those appeals in which the Committee had not been impleaded within the prescribed period of limitation were not properly constituted, and should be dismissed. Counsel for the appellants in these appeals contended, on the other hand, that under the law it was not necessary for the appellants to implead any party as a respondent, and that they had impleaded the Central Govt. *ex majori cautela*, the cases being the earliest of their kind in this province, and that the Central Govt. be struck off the record. He further urged that the "Indian Tea Licensing Committee," though a body created by the statute, was not a legal *persona* that the joint controller had no lawful authority to represent it in legal proceedings and that if the Court permitted the Committee to present its case in these proceedings, it would only be done by Counsel, who had been instructed by all its members and not by the joint controller. As the cases were of first impression and the Act or the rules framed thereunder

did not contain any specific provisions dealing with the points raised, the appeals were referred to a Division Bench.

Before us, the matter was argued at considerable length but eventually all Counsel were agreed that under the Act, as it stands, it was not legally necessary for the appellants to implead any party as a respondent in such appeals. The appeal to the High Court under the Act is a very peculiar proceeding. It is an appeal to a judicial tribunal against an administrative order passed by the "Indian Tea Licensing Committee," constituted under the Act to control the export of tea and the extension of its cultivation in India. The only provision in the Act dealing with the matter is contained in s. 7 (2) which gives an appeal to a tea-estate aggrieved by an order passed by the Committee under s. 14. But the tea-estate concerned is given the choice of the forum of appeal. It may prefer the appeal either to the Central Govt. or the High Court at its option. But once it has made its choice and lodged the appeal either in the High Court or the Central Govt., this will bar an appeal to the other. There is no other provision in the Act dealing with appeals. Certain other sections of the Act confer the power to make rules and the only rule, which contains a reference to appeals is No. 10 of the rules framed by the Central Govt. and promulgated in notification No. 201 (3)-T. R. (I. E. R.)/38 dated July 16, 1938, which lays down that

"an estate appealing under s. 7 (2) of the Act to the High Court of the province within which the estate is situated shall at the same time intimate to the Central Govt. that an appeal to the High Court has been filed."

It was at one stage of the argument contended by Counsel for the appellants that this rule contemplated that the Central Govt. is to be impleaded as a party respondent in the appeal. But the rule does not say so, and, as rightly pointed out by the learned Advocate-General, the object of the rule appears to be merely to give information to the Central Govt. of the fact that an appeal had been filed in the High Court, so that the owner of the estate concerned may not, concurrently or subsequently, file an appeal to the Central Govt. against the same order. The rule framed by the Central Govt. thus throws no light on the point, nor has the High Court framed any rule regulating the procedure of appeals preferred to it under the Act. In the absence of any provision in the statute, or the rules framed thereunder, it cannot be said that the Central Govt. or the Indian Tea

Licensing Committee is a necessary party to the appeal. It may be that the Court, finding it difficult to effectively adjudicate on the points raised in the appeal, may require the Committee to place before it all the materials in its possession bearing on the matter and in most cases the Court will permit, or require, the Committee, as the only custodian of the materials on which the order under appeal was passed, to appear before it. But this is very far from saying that the appeal is not properly constituted because the Committee has not been impleaded as a party respondent and for this reason it should be dismissed.

Mr. Ishar Das Khanna has placed before us a copy of the judgment, recently delivered by a Single Bench of the Calcutta High Court in *Suproakash Das v. Indian Tea Licensing Committee* (1) (since reported in 43 C W N 820). In that case a tea estate, which had preferred an appeal to the High Court under s. 7 of the Act had originally impleaded the Indian Tea Licensing Committee as a respondent, but before the date of hearing an application was made by the appellant for deletion of the name of the Committee on the ground that it was not a necessary party. This application was dismissed, the learned Judge being of the opinion that "the Committee was a proper and necessary respondent" in an appeal under s. 7 (2). This conclusion is based on the reasoning that the Committee is an administrative body empowered by the statute to take certain decisions on such materials, as may be available to it in order to enable it to control the export of tea and the extension of the cultivation of tea, and that on appeal from orders passed by it, the High Court, in order to reach a correct decision will not proceed *ex parte* but

"may think it necessary to allow the Committee to support its order by the materials before it or even to adduce further evidence, as it might think necessary."

With great respect we agree with the conclusion of the learned Judge as stated in the sentence just quoted, and in the decision dismissing the application for the deletion of the name of the Committee from the record, once it had been brought before the Court and the Court considered its presence necessary for the disposal of the appeal. We however think that this case does not support the contention originally put forward by Mr. Ishwar Das Khanna that the Committee is a "necessary" party to the appeal in the sense that the failure of the appellant to implead it within time is fatal to the maintainability of the appeal.

(1) 43 C W N 820; 1 L R (1939) 2 Cal. 277.

It is no doubt true that in an earlier part of the judgment in *Suproakash Das v. Indian Tea Licensing Committee* (1) the learned Judge has used the expression "necessary party" and "proper party" (if we may venture to say so with great deference) indiscriminately. But it is clear from the judgment that the intention was not to use the words "necessary" or "essential party" in the sense in which Mr. Khanna contends they were used. The distinction between a "necessary" and a "proper" party to an action, appeal or other proceedings, is, of course, well recognized. A "necessary" party is one, whose presence on the record is enjoined by law, or in whose absence no effective decision can at all be given. Without such party the action, appeal or proceeding is not properly constituted and is liable to be dismissed on this ground alone. A "proper" party, on the other hand, is one whose presence is not essential for the constitution of the suit, appeal or proceeding, but whom it may nevertheless be desirable, or even necessary, to have before the Court in order to properly, or completely and adequately, adjudicate on the matter involved. As observed in *Pomeroy on Remedies* (s. 330)

"necessary parties defendants are those without whom no decree at all can be rendered: proper parties defendants are those whose presence renders the decree more effectual: and all the proper parties are those by whose presence the decree becomes a complete determination of all the questions which can arise, and of all the rights which are connected with the subject-matter of the controversy."

It is the duty of the person, bringing the action, appeal or proceeding to implead all "necessary" parties to it and his omission to do so is a fatal defect, which if not remedied, with the permission of the Court within the period prescribed by law, results in its dismissal. No such duty however is cast on him in the case of a "proper" party nor does the absence of such a person from record entail any such serious consequences. There is nothing in the Indian Tea Control Act which might be taken to impose, expressly or by necessary implication, on the owner of a tea estate, appealing under s. 7 (2) the duty to implead the Committee as a party or which lays down that on his failure to do so the appeal cannot be heard. Nor do the cases cited in *Suproakash Das v. Indian Tea Licensing Committee* (1) support this conclusion. In *Tynemouth Corporation v. Attorney-General* (2) all that Lord Davey laid down was that in appeals from orders passed by the Licensing Justices under the

(2) (1899) A C 293; 68 L J Q B 752; 80 L T 633; 63 J P 404; 15 T L R 370.

Licensing Act,

"the only proper respondents to the appeal are the Justices themselves, who are served and may appear in the interests of the public to support their own decision."

His Lordship did not say that the Justices were "necessary" or "essential" parties to the appeal, in whose absence the appeal is not properly constituted. Nor is this laid down in any of the other English cases cited in that judgment. They merely rule that the appellant as well as the Justices may be allowed to lead further evidence in appeal. Similarly, in the Calcutta cases referred to, all that was held was that in appeals to the Court of Small Causes under s. 141, Cal. Municipal Act, 1923, from certain orders passed by the executive officer of the Corporation, the appellant must be given "an opportunity of adducing evidence if he wants, to show that the decision of which he complains is wrong" *Corporation of Calcutta v. Sm. Jalajabasi Devi* (3). Neither in this case nor in *Corporation of Calcutta v. Keamuddin* (4) was the question as to whether the Corporation was a "necessary" or a "proper" party to such appeals was considered.

We hold, therefore, that in appeals under s. 7 (2), Tea Control Act, it is not necessary for the appellant to make the Central Govt. or Indian Tea Licensing Committee a party to the appeal. The Court may, however, issue notice to the Committee to appear and support its decision, or the Committee may apply to be permitted to be heard, and if necessary to lead evidence to show that its order was correct. Similarly, in some cases the Central Govt. also might like to be heard if any question of principle is involved, and the Court may permit it to do so. For the foregoing reasons, we would hold that none of these appeals can be said to be improperly constituted. As the Central Govt. does not wish to be heard in any of the four cases before us, we direct that its name be struck off in each case. There will be no order as to the costs of the Advocate-General, as the cases where of first impression and the provisions of the Act relating to this matter were not clear. Though we have held that the Indian Tea Licensing Committee is not a necessary party to these appeals, we think it proper to allow it to be heard in support of the orders complained of in each case. The Committee has already been impleaded as a party respondent in

(3) 32 C W N 378; 109 Ind. Cas. 618; A I R 1928 Cal. 450; 47 C L J 315.

(4) 31 C W N 1040; 103 Ind. Cas. 533; A I R 1927 Cal. 802; 55 C 228; 46 C L J 260.

F. A. O. No. 37 and F. A. O. No. 38 of 1939. We direct that it be impleaded as a respondent in F. A. O. No. 26 and F. A. O. No. 43 of 1939.

Mr. Ishwar Das Khanna has been instructed by the Joint Controller to appear on behalf of the Committee in all these cases. But it appears to us that in the absence of any rule, or resolution of the Committee, authorising the Joint Controller to engage and instruct Counsel on its behalf. Mr. Khanna cannot act or plead on behalf the Committee. Mr. Khanna asks for time to obtain the necessary *vakalatnama* from the members of the Committee. We grant this prayer and adjourn the case to June 20, 1939.

D.

Order accordingly.

OUDH CHIEF COURT

Second Civil Appeal No. 290 of 1937,
Civil Miscellaneous Application No. 186
of 1941

March 25, 1941

BENNETT AND GHULAM HASAN, JJ.

GOKUL PRASAD—DEFENDANT—

APPELLANT

versus

Thakurain MAHADEI KUNWAR—

PLAINTIFF—RESPONDENT

Civil Procedure Code (Act V of 1908), O. XLI, r. 27, O. XIII, r. 10, s. 100—Additional evidence—When can be allowed to be produced—Record of another case sent for—Use of important documents in it, as evidence—Procedure to be followed—Fraud—Finding as to, is one of fact.

In order to entitle the appellant to produce additional evidence in the appeal the essential conditions required by r. 27 of O. XLI of the Civil P. C., must be satisfied. Where no attempt was made to produce the documents in lower Courts when they could have been produced and they are not required by the Court to enable it to pronounce judgment or for any other substantial cause, such additional documentary evidence cannot be admitted in appeal. [p. 197, col. 1.]

The power to send for the record of another case and to inspect the same does not carry with it the power to treat the whole of the record or a part thereof as evidence in the case. If upon inspection of the record the trial Court came across an important document as the summons which in its opinion either threw important light on the question at issue or was of material assistance in ascertaining the truth, it is open to the Court to adopt proper proceedings to have the document brought on the record and proved according to law before such document can be used as evidence in the case. Mere summoning of the record does not, however, render the entire record *ipso facto* evidence in the case. 18 Ind. Cas. 857 (2), 98 Ind. Cas. 881 (3), 111 Ind. Cas. 361 (4) and 131 Ind. Cas. 374 (5), referred to. [p. 198, col. 1.]

The finding of the lower Appellate Court on the question of fraud is a clear finding of fact which cannot be challenged in second appeal. [p. 198, col. 2.]

S. C. A. against the order of the District Judge, Gonda, dated April 14, 1937.

Messrs. *Sri Ram* and *Lekh Ram*, for the Appellant.

Mr. *M. H. Kidwai*, for the Respondent.

Judgment.—This is a defendant's appeal arising out of a suit for a declaration filed by the plaintiff-respondent, which was dismissed by the trial Court but has been decreed by the lower Appellate Court in appeal.

The plaintiff-respondent brought a suit for a declaration that the decree dated April 20, 1926, passed by the Subordinate Judge of Bahraich against her in favour of the defendant-appellant is null and void on the ground of fraud and collusion. The plaintiff is the daughter of one Baijnath and has two brothers, Mohan Lal (Not a party to the suit) and Gokul Prasad, the defendant-appellant. Baijnath got the plaintiff, *Mst. Mahadei Kuar*, married some time in 1887 to one Kanhaiya Lal while she was only 11 years old. Kanhaiya Lal made a registered will on September 11, 1889, by virtue of which the plaintiff became the absolute owner of the property left by her husband. Kanhaiya Lal died on September 24, 1889. Kanhaiya Lal had another wife *Mst. Bhagwan Dei* when he married *Mst. Mahadei*. *Bhagwan Dei* died in 1916. *Mst. Mahadei's* allegation was that Gokul Prasad filed a suit for maintenance against her in 1934 and that in that suit he (Gokul Prasad) in replication alleged that he had obtained a declaratory decree in respect of the property owned and possessed by *Mst. Mahadei* on April 20, 1926, in the Court of the Subordinate Judge of Bahraich. Gokul Prasad filed a copy of this decree and a copy of the written-statement purporting to have been filed by Raj Bahadur, general agent of *Mst. Mahadei*, on her behalf in that suit. *Mst. Mahadei* alleged that she came to know for the first time about the aforesaid decree and the written-statement on April 13, 1934, that Gokul Prasad had filed a suit in 1926, to the effect that he was the reversioner of the property by virtue of a certain oral agreement between Baijnath and Kanhaiya Lal to the latter's property and that this agreement had been admitted on behalf of *Mst. Mahadei* in that suit. The plaintiff's case was that she was an old *pardanashin* lady who was not literate and could only sign her name in Nagri and that Raj Bahadur, her general agent, used to do *pairvi* in her case on her behalf, that she used to sign papers at the instance of Raj Bahadur whom she fully trusted, and that

Raj Bahadur having colluded with Gokul Prasad had made a false admission of his claim and had got a decree passed against her by practising fraud. He denied the alleged agreement by virtue of which Gokul Prasad claimed her husband's property as a reversioner. The plaintiff imputed fraud both to Gokul Prasad and to Raj Bahadur.

The defendant Gokul Prasad denied all the allegations and asserted that the plaintiff was fully aware of the suit of 1926 and the decree passed in that case and pleaded that the suit was not maintainable and was barred by the principle of *res judicata*. The plea of limitation was also raised in the case.

The trial Court held that the decree of 1926 was not obtained by fraud or collusion. It further held that the plaintiff knew of the decree from the very beginning and consequently the present suit filed by her on April 14, 1936, was barred by time. The suit was therefore dismissed.

The learned District Judge in appeal set aside the findings of the trial Court and decreed the suit. The defendant thereupon preferred a second appeal to this Court.

An application under O. XLI, r. 27 of the Civil P. C. was filed by the defendant-appellant praying for the admission of two judgments in appeal. One of these judgments was passed by a learned Single Judge of this Court in Second Civil Appeal No. 139 of 1935 on September 23, 1936, in a suit for maintenance brought by the defendant-appellant against the plaintiff-respondent. The other document is also a judgment passed by the Munsif of Qaiserganj, Bahraich, on March 18, 1937, in another maintenance suit. It appears to us to be necessary to dispose of this application before dealing with the appeal.

It is stated in this application that by virtue of the two judgments sought to be filed in the case the matter is concluded by ss. 10 and 11 of the Civil P. C., as the points involved in this case were materially and substantially in issue in the two cases decided by the two judgments. Having heard learned Counsel in support of the application, we are of opinion that no case has been made out for the production of additional evidence in the appeal. As regards the judgment of the Chief Court, which is sought to be filed in the case, it may be noted that the suit in that case had been decreed by the trial Court on May 18, 1934, and the decision of the trial Court was confirmed by the lower Appel-

late Court on March 7, 1935. The present suit was filed on April 14, 1936, and the written statement was filed on May 11, 1936. The judgment of the Chief Court was delivered on September 23, 1936. No attempt was however, made by the defendant to file the aforesaid judgment before the trial Court in the present case and no plea under s. 10 or s. 11 of the Civil P. C., was raised on the basis of this judgment. The present suit was dismissed on November 30, 1936, by the trial Court and was decreed in appeal on April 14, 1937. The other judgment, namely the judgment of the Munsif of Qaiserganj, Bahraich, which was passed on March 18, 1937, could have been filed before the lower Appellate Court in the present case but no attempt was made to produce it. In the memorandum of appeal filed in this Court the plea raised in the application have not been referred to. The application itself does not state reasons why these documents were not produced in the lower Courts after they were available. In order to entitle the appellant to produce additional evidence in the appeal the essential conditions required by r. 27 of O. XLI of the Civil P. C. must be satisfied. We are of opinion that the requirements of O. XLI, r. 27 (1) (b) and (c) have not been satisfied in the present case. According to sub-cl. (b) of r. 27 (1) which was added by the Chief Court, it is obligatory on the party seeking to produce additional evidence in appeal to show that the evidence sought to be produced after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree or order under appeal was passed or made, nor is the case governed by sub-cl. (c) of r. 27 of O. XLI of the Civil P. C., which requires that the Appellate Court can admit the document only if it requires the production of the document to enable it to pronounce judgment or for any other substantial cause. (See *Parsotim v. Lal Mohar*, L. R. 58 I. A. 254). (1). We, therefore, see no reason whatever to admit the additional documentary evidence in appeal and reject this application.

This disposes of the pleas under ss. 10 and 11 of the Civil P. C. raised on behalf of the defendant-appellant for the first time before this Court.

As regards the merits of this appeal, (1) 58 I. A. 254; 132 Ind. Cas. 721; A. I. R. 1931 P. C. 143; 33 Bom. L. R. 1015; (1931) A. L. J. 513; 35 C. W. N. 786; Ind. Rul. (1931) P. C. 209; 13 L. W. 76; 54 C. L. J. 1; 12 P. L. T. 683; (1931) M. W. N. 929; 10 Pat. 654; 61 M. L. J. 489 (P. C.).

it has been contended on behalf of the defendant-appellant that neither fraud nor collusion had been proved in the case. It is also contended that the lower Appellate Court was not justified in holding that the procedure of the trial Court in summoning the record of the suit of 1926 for inspection was not warranted.

So far as the latter contention is concerned, it appears that the defendant-appellant had filed a copy of the written statement of *Mst. Mahadei* (Ex. A-12) filed in the suit of 1926 on her behalf by her agent, Raj Bahadur, and in order to prove this and other documents he had summoned the record. The trial Court discovered in the record a summons issued to Swami Dayal, another agent of *Mst. Mahadei*, which according to the report made on it had been served. Swami Dayal, who was produced by *Mst. Mahadei* in the present case, was not questioned either on her behalf or on behalf of the defendant whether he had received any summons and whether it bore his signature and whether he had informed *Mst. Mahadei* of the suit. The learned District Judge recorded the opinion that the trial Court was not justified in using the summons of Swami Dayal as evidence in the case and consequently excluded it from consideration in coming to the finding upon the main question in the case. We are satisfied that the decision of the lower Appellate Court upon this point is correct. Order XIII, r. 10 (1) of the Civil P. C. lays down :—

"The Court may of its own motion, and may in its discretion upon the application of any of the parties to a suit, send for either from its own records or from any other Court, the record of any other suit or proceeding, and inspect the same."

This shows that it is open to the Court either of its own motion or on the application of any party to the suit to send for the record of a case and inspect the same. Sub-cl. (3) of r. 10 of O. XIII of the Civil P. C. runs as follows :

"Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in the suit."

It is clear that the record had been sent for for the specific purpose of proving certain documents. The summons to Swami Dayal was not one of the documents which was intended to be proved as no copy of the summons had been produced in the case. Further, the summons was inadmissible in evidence without proof of the signature of Swami Dayal as required by s. 67 of the Indian Evi. Act. Section 35 of the Indian Evi. Act does not render the summons admissible inasmuch as

the signature of Swami Dayal purporting to have been made by him on the back of the summons cannot be said to be an entry in any public or official book, register or record and made by a public servant in the discharge of his official duty. That being so, it is quite clear that the trial Court was not justified in using the summons as evidence in the case and relying upon it in support of its findings. The power to send for the record of another case and to inspect the same does not in our opinion carry with it the power to treat the whole of the record or a part thereof as evidence in the case. If upon inspection of the record the trial Court came across an important document as the summons in the present case, which in its opinion either threw important light on the question at issue or was of material assistance in ascertaining the truth, it was open to that Court to adopt proper proceedings to have the document brought on the record and proved according to law before such document could be used as evidence in the case. Mere summoning of the record does not, however, render the entire record *ipso facto* evidence in the case. In *Punja v. Bhadu* (18 Ind. Cas., 857) (2) the lower Appellate Court sent for and inspected the record apparently behind the backs of the parties attached the whole record to the file of the case and used as substantive evidence for the purpose of adjudicating upon the appeal. It was held that the procedure was clearly irregular. It was further held that s. 165 of the Evi. Act, 1872, and O. XIII, r. 10, Civil P. C., 1908, are intended to arm the Court with a power of initiative in getting at the truth. But the act of sending for a document under s. 165, Evi. Act, or for a record under O. XIII, r. 10, does not *ipso facto* make such document or record evidence in the case. If the Court finds in the document or record so sent for relevant evidence, or a guide to relevant evidence to be found somewhere else, proceedings must be adopted, if such evidence may be properly admitted at that stage, to have it brought into the trial according to the provisions of law. A similar view has been taken by the Lahore High Court in *Phullu v. Ghulam Nabi* (A. I. R. 1927 Lahore 69 (2) (3)), *Abdul Ghani v. Faqir Muhammad* (A. I. R. 1929 Lahore 78) (4), *Maya Dhari v. Chuni Lal-Panna Lal* (A. I. R. 1931 Lahore 119) (5).

As regards the first contention, the learned
 (2) 18 Ind. Cas. 857; 9 N. L. R. 11.
 (3) A. I. R. 1927 Lah. 69 (2); 98 Ind. Cas. 881.
 (4) A. I. R. 1929 Lah. 78; 111 Ind. Cas. 361.
 (5) A. I. R. 1931 Lah. 119; 131 Ind. Cas. 374; 31 P. L. R. 926; 12 L. L. J. 290; Ind. Rul. (1931) Lah. 470.

ed District Judge upon a consideration of the evidence and the circumstances in the case came to the conclusion that *Mst. Mahadei* had no knowledge of the institution of the suit in 1926, that she was neither informed by Swami Dayal, who was her general agent, of the service of any summons of the suit, nor by Raj Bahadur, another general agent. He also found that the written statement, purporting to have been filed on her behalf by Raj Bahadur, did not bear her signature and was not filed within her knowledge or under her instructions. He further found that Ex. A-12 the application filed by Raj Bahadur to abide by the oath of Gokil Prasad, was not proved to bear the signature of *Mst. Mahadei*, nor were the particulars of that application explained to her. The statement of Raj Bahadur, who was examined on behalf of the defendant was disbelieved and the statement of *Mst. Mahadei* plaintiff was believed by the learned District Judge. Raj Bahadur in his evidence admitted that *Mst. Mahadei* did not sign the application, Ex. A-12, in his presence but that he gave the application to one Jugul Kishore to take it to her and obtain her signature thereon. His finding in effect was that *Mst. Mahadei* was totally ignorant of the suit of 1926 and the decree which followed. As regards the ante-nuptial agreement between Kanhaiya Lal and Baijnath set up in the suit of 1926 to the effect that Gokul Prasad would succeed as a reversioner upon the death of *Mst. Mahadei* to the property left by Kanhaiya Lal, the learned Judge came to the conclusion upon a consideration of the entire circumstances of the case that such an agreement was not established. His final conclusion was that *Mst. Mahadei* had been deliberately kept in the dark about the suit of 1926 and the decree against her was obtained fraudulently. It cannot be denied that active concealment of the proceedings of 1926 resulting in a decree being passed against the plaintiff is clear fraud and vitiates the decree. The finding of the lower Appellate Court on the question of fraud is a clear finding of fact which cannot be challenged in second appeal.

There is no substance in this appeal, which is accordingly dismissed with costs.

s. Appeal dismissed.

PATNA HIGH COURT

Appeal from Appellate Decree No. 736
of 1939

December 20, 1940

HARRIES, C. J. AND MANOHAR LALL, J.
RAJA JHA—DEFENDANT—APPELLANT

versus

RAMCHANDRA JHA AND OTHERS—

DEFENDANTS—RESPONDENTS

Bihar Tenancy Act (VIII of 1885 as amended in 1934), s. 26-N, whether applies where transferee had been lawfully ejected in execution of proper rent decree before amending Act came into force.

Though s. 26-N, Bihar Ten. Act, was expressly made retrospective it could not affect rent decrees which had been obtained and which had been fully executed previous to the section coming into force. The section would apply to all cases which had not been the subject-matter of litigation or which were actually the subject-matter of litigation when the amending act came into force, namely, on June 10, 1935. The section can have no application whatsoever when the transferee had been lawfully ejected before the Amending Act of 1934 came into operation. 160 Ind. Cas. 105 (2) (1), relied on.

Hence where a decree when obtained was a proper rent decree and in execution of that decree the auction purchaser had obtained the possession of the lands purchased by him and ejected the transferees of the tenant in due course of law before the Amending Act of 1934 was even passed and long before the Act actually came into force, s. 26-N cannot affect the rights of the auction purchaser.

A. from a decision of the District Judge of Darbhanga, dated May 23, 1939.

Messrs. Hareshwar Pd. Sinha and R. K. Choudhary, for the Appellants.

Messrs. L. K. Jha, P. Misra and A. B. Jha, for the Respondents.

Harries, C. J.—This is a defendant's appeal from a decree of the learned District Judge of Darbhanga reversing a decision of the learned Munsif and decreeing the plaintiff's claim for a declaration and possession of certain property.

To appreciate the points involved in the case, it will be necessary to set out the facts in some detail. Musan and Mahesh were two brothers who held a holding of 7 bighas 17 khattas 1 dhur. In the Record of Rights, however, the holding was recorded in the name of these two brothers and Maksudan; but both the lower Courts have come to the conclusion that Maksudan was not a joint owner of the holding but was some kind of transferee of a very small portion of 6 kattas odd by sale or gift or some such like transaction. Mahesh died issueless, and the holding was inherited by Musan. On January 31, 1905 Musan sold 1 bigha 10 kattas of this holding to Jagmohan Misser. On May 31, 1927, the father of plaintiffs Nos. 1 to 10 took a usufruct-

uary mortgage of this 1 bigha 10 kattas of land from Rajkant Misser, who were the heirs of Jagmohan Misser.

In the year 1929 or thereabouts Musan died leaving his son Abhinandan and a grandson, Sitaram, a son of deceased son Harikrishun. In the year 1930 after the death of Musan the Darbhanga Raj who were the proprietors of the land in question brought a rent suit against Abhinandan and Sitaram and obtained a decree. It appears that Abhinandan had a minor son Kamalakant who was not impleaded in this suit. Maksudan also was not impleaded neither were the plaintiffs Nos. 1 to 10 who held a usufructuary mortgage of the 1 bigha 10 kattas which had been sold to Jagmohan Misser. The holding was sold in execution of this decree and was purchased by the defendant-appellant some time in 1933, and a sale certificate was granted to him, which is dated May 11, 1934. Delivery of possession was actually given to the defendant-appellant on July 26, 1934.

The plaintiffs who were the usufructuary mortgagees of 1 bigha 10 kattas instituted the present suit on July 2, 1937, for a declaration that they were entitled to the 1 bigha 10 kattas as usufructuary mortgagees and for possession of the same. They pleaded that the decree obtained by the Darbhanga Raj was not a rent decree but a simple money decree, because neither Kamalakant nor Maksudan who were interested in the tenancy were made parties nor were the mortgagees of mortgagors made parties. Accordingly they contended that the decree obtained in the absence of these interested and necessary parties was a simple money decree and that the sale in execution of that decree passed only the interest of the judgment-debtors and not the whole interest in the holding. The interest of the plaintiffs, therefore, did not pass by the execution sale and, therefore, they were entitled to possession as against the defendant-appellant who purchased in that sale.

The defendants pleaded that Maksudan had no interest in the holding itself and that he had been wrongly recorded in the Record of Rights. They also pleaded that Kamalakant had not been born at the date of the rent suit, and in any event if he was alive he was sufficiently represented by his father. As to the mortgagors and the mortgagees, the defendants pleaded that these transfers had not been recognised by the landlord, and, therefore, they were not necessary parties to the suit as the law

stood at the time the rent suit was instituted.

The trial Court held that Maksudan had no interest in the holding, but if he had any interest it was only an interest in 6 *kattas* odd by some kind of transfer. As that transfer had never been recognised by the landlord he was not a necessary party to the rent suit when it was instituted. As to Kamalakant, the learned Munsif held that he was alive when the suit was instituted but that he was sufficiently represented by his father. As to the others, namely, the mortgagors and the mortgagees, they were not the necessary parties as the transfers had never been recognised by the landlord. Upon these findings the learned Munsif was satisfied that all the persons interested in the holding had been made parties and that the decree obtained was a rent decree in the true sense of the term. The holding, therefore, passed by the sale in execution of the decree, and the plaintiffs could not recover possession as against the defendant-appellant who had purchased the whole of the holding. He, therefore, dismissed the plaintiffs' claim.

On appeal, however, the lower Appellate Court reversed the finding of the learned Munsif holding that the decree was not a rent decree but only a simple money decree. The learned Judge appears to have agreed with the learned Munsif that Kamalakant was sufficiently represented and that Maksudan was only some kind of transferee in respect of 6 *kattas* odd in this property. The learned District Judge, however, was of opinion that Maksudan and the transferees of this 1 *bigha* 10 *kattas* were necessary parties to the suit. He relied upon s. 26-N, Bihar Ten. Act, which was expressly made retrospective. The learned District Judge was of opinion that with regard to those transfers the consent of the landlord would have to be presumed, and that being so, they were, when the suit was instituted, necessary parties and as they had not been impleaded the decree was only a money decree, and the plaintiffs' interest in the property was not affected by the sale in execution and the purchase by the defendant-appellant. He, therefore, gave the plaintiffs the declaration asked for and possession of the 1 *bigha* 10 *kattas* which was in dispute.

Counsel for the appellant has contended that the learned Judge was wrong in holding that Maksudan and the transferees of the 1 *bigha* 10 *kattas* odd were necessary parties at the time when this rent suit was instituted and decreed. He has con-

tended that s. 26-N, Bihar Ten. Act as it then was though expressly made retrospective, cannot possibly affect the position because the rent decree was obtained and fully executed and possession obtained by the appellant before this section came into force. He has conceded that the act which was made retrospective would affect existing rights which had not already been made the subject of litigation and would affect rights which were the subject of litigation when the Act came into force. He, however, contends that the Act cannot affect decrees validly obtained before the Act came into force and the execution of such decrees which had been completed before the amendment was made in the law.

Section 26-N, was introduced into the Bihar Ten. Act by the Bihar Ten. (Amendment) Act, 1934. The assent of the Governor-General to this act is dated November 14, 1934, and by s. 1 (2) of the Act it was provided that it should come into force on such date as the Local Govt. might by Notification appoint. It actually came into force by Notification on June 10, 1935.

Section 26-N, which was then introduced into the statute, was in these terms:—

"Every person claiming an interest as landlord in any holding or portion thereof shall be deemed to have given his consent to every transfer of such holding or portion by sale, exchange, gift, or will made before the first day of January 1923, and in the case of the transfer of a portion of a holding, to have accepted the distribution of the rent of the holding as stated in the instrument of transfer, or if there is no such instrument as settled between the transferor and the transferee."

Section 26-O which was introduced into the Act by the same Amending Act provided that in the case of a transfer made on or after first day of January 1923, but before the date of the commencement of the Act, the transferee might pay to the landlord or deposit with the Collector a transfer fee as therein particularised and upon his complying with this condition the consent of every person claiming as interest as landlord in the holding or portion transferred should be deemed to have been given to the transfer. The Act contained no saving clause modifying the effect of ss. 26-N and 26-O.

In the case of *K. C. Mukerjee, Official Receiver v. Ramratan Kuer* (1), their Lordships of the Privy Council had to consider the effect of these sections. They

(1) 15 Pat. 268; 160 Ind. Cas. 105 (2); A I R 1936 P O 49; 1936 O L R 69; 1936 A L R 101; 8 R. P O 142; 40 C W N 263; 17 P L T 25; (1936) M W N 35; 2 B R 225; 70 M L J 105; 62 C L J 419; 43 L W 336; 63 I A 47 (P C).

held that ss. 26-N and 26-O, Bihar Ten. Act, are expressed and intended to have retrospective action and there being no saving clause, they were applicable to pending suits.

The finding of the learned District Judge is that s. 26-N being retrospective applies to the facts of this case and, therefore, the landlord must be deemed to have consented to the transfer to Maksudan and to Jagmohan Misser, as those transfers were made before January 1, 1923. Those persons, therefore, must now be regarded as persons who should have been impleaded as defendants in the rent suit, and as they were not impleaded the decree obtained was not a rent decree but only a simple money decree.

In my judgment though s. 26-N, Bihar Ten. Act, was expressly made retrospective it could not possibly affect rent decrees which had been obtained and which had been fully executed previous to the section coming into force. This view of the law is in my judgment, made clear by observations of Sir George Rankin who delivered the opinion of the Board in the case of *K. C. Mukerjee, Official Receiver v. Ramratan Kuer* (1). At p. 271* Sir George Rankin observes as follows:—

"Section 26 (N) is not a provision to the effect that no action shall lie in certain circumstances, nor had it any reference directly to litigation. Its provision is that every person claiming an interest as a landlord shall be deemed to have given his consent to every transfer made before January 1, 1923. This is retrospective, the question is not whether general language shall be taken only in a prospective sense. The object of this section can only be to quiet titles which are more than ten years old, and to ensure that if during those two years the transferee has not been ejected he shall have the right to remain on the land. Within this class the Legislature has not thought fit to discriminate against tenants whose right is under challenge in a suit, a course which it may well have regarded as invidious or unnecessary".

This observation makes it clear that their Lordships were of opinion that the section would apply to all cases which had not been the subject-matter of litigation or which were actually the subject-matter of litigation when the Amending Act came into force, namely, on June 10, 1935. He, however, makes it clear that the section can have no application whatsoever when the transferee had been lawfully rejected before the Amending Act, came into operation. In the present case the decree when obtained was a proper rent decree. It was put into execution, and the defendant-appellant as purchaser obtained possession of

the land in dispute and ejected the plaintiffs by due course of law. They were lawfully ejected before the Act was even passed and long before the Act actually came into force. In my view s. 26-N cannot affect the rights of the defendant-appellant who had purchased this property in execution proceedings which were perfectly lawful at the time and he had obtained possession as a result of those proceedings. Had the proceedings been pending when the Amending Act came into force, different considerations might well have applied. That being so, the defendant-appellant had acquired a good title to the 1 *bigha* 10 *kattas* of land now claimed by plaintiffs and the latter's claim should, in my view, have been dismissed.

I would, therefore, allow this appeal, set aside the decree of the learned District Judge and restore the decree of the learned Munsif dismissing the suit. The defendant-appellant must have the costs of this Court and of the proceedings in the Courts below.

Certain minor defendants have been impleaded as respondents in this case and Counsel who has appeared on their behalf has supported the case of the defendant-appellant. The plaintiff's claim must be dismissed in its entirety not only against the defendant-appellant but also against these minor defendants who are in the array of the respondents.

Manohar Lall, J.—I agree.

S.

Appeal allowed

RANGOON HIGH COURT

First Appeal No. 34 of 1940

May 29, 1940

MYA BU AND MOSELY, JJ.

MA PWA SHIN—PLAINTIFF—APPELLANT

versus

MA GALE AND ANOTHER—DEFENDANTS

—RESPONDENTS

Burmese Buddhist Law—Succession—Husband and wife dying within short time of one another—Property inherited by one during marriage from collaterals—Mode of succession to.

Where property is inherited during marriage from collaterals by one party only, it should be treated not like property inherited from parents nor as jointly acquired property, but on the same footing as payin property or as inherited *lettetpwa* in cases of divorce by mutual consent, and should go to the extent of two-thirds to the relatives of the party who inherited it and to the extent of one-third to the relatives of the other party in case of death of both parties within a short time of one another.

•F. A. against the decree of the Assistant District Court, Tharrawaddy, dated January 19, 1940..

Mr. Chan Htoon, for the Appellant.

Mr. U E Maung, (1) for the Respondents.

Mosely, J.—The plaintiff-appellant Ma Pwa Shin sued for a share in and administration of the estate of Maung Tun E and his wife Ma Hmin, who died within a short time of one another. Ma Bwa Shin is the sister of Ma Hmin. The defendants-respondents, Ma Gale and Maung Hla Maung, are the sister and the half brother of Maung Tun E. The estate claimed consists of the hnazon or jointly acquired property of Maung Tun E and Ma Hmin and the share which Maung Tun E inherited just before his death in the estate of his first cousin once removed Daw Pwa Zon, with whom he and Ma Hmin lived. That share according to the pleadings (para. 6 of the plaint) was one-third of Daw Pwa Zon's estate. Daw Pwa Zon died on May 1, 1939, Ma Hmin on May 4, and Maung Tun E on May 19, of that year. The Assistant District Court allowed the claim in respect of one-half of the hnazon property of Maung Tun E and Ma Hmin, but not in respect of the property inherited by Maung Tun E from Daw Pwa Zon. The provisions as to inheritance by collaterals of both sides where husband and wife die within a short time of one another are contained in a well known and disjointed part of the Manukye Dhammathat, Book X, para. 56. This section deals also with the ordinary case where one party dies more than a short time before the other. It says that if either spouse left no direct descendants and if their parents had predeceased them the relations who should inherit are the six relations of the husband or wife, that is the six kinds of uncles, father's elder and younger brother etc. It is clear that there are really eight kinds not six, and the deceased's father's younger sister and the mother's younger brother were held to be entitled to inherit in *U Pe Gyi v. U Pyo* (1). The section omits any reference to the brothers and sisters of the deceased, who are preferred to uncles and aunts, (Manukye, Book X, para. 19: see *U Po The Dun v. Maung Tin* (2). The relations of the wife are to take the property that came to her by descent from her parents (*miba ga pa thaw ossa yat*), and the relations of the

(1) 3 R 271; 88 Ind. Cas. 657; A I R 1925 Rang. 235.
(2) 8 R 480; 129 Ind. Cas. 524; A I R 1930 Rang. 237; Ind. Rul. (1931) Rang. 92.

husband are to take what came to him by descent from his parents.

It would seem that this refers to cases where the husband and wife die within a short interval, as the section goes on to say that if one party dies (a considerable time) before the other the relations of the survivor only are to inherit. If the survivor sells any of the hereditary property (*ossa yo*) it is to be offered to the next of kin. This expression '*ossa yo*' appears to mean not all property inherited from the parents but entailed property, such as land held on hereditary tenure, (Manukye, Vol. VIII paras. 1 and 2) heirlooms, insignia and the like *Mi Lan v. Maung Shwe Daing* (3), at pp. 124 and 136. If the couple die within a short interval

"the relations of both are to inherit according to consanguinity, and also the property that accrued to the couple during marriage (*hnit pa dwin pwa thi ossa*)."

This last expression is translated by Richardson as "property acquired by the deceased couple during marriage," but is not the equivalent of the word "hnazon" in its modern signification, that is property acquired by joint exertion as opposed to *lettetpwa*, another modern term, which includes property acquired by inheritance, *Ma Ngwe Bwin v. Maung Lun Maung* (4). In fact "*hna pa dwin pwa thi ossa*" seem to be the equivalent of the modern "*lettetpwa*." The corresponding text of other Dhammathats will be found in s. 308 of Vol. I of the Digest. For *miba ga pa thaw ossa* some Dhammathats give *meimma pa ossa* or *lin pa ossa*, property brought to the marriage by husband or wife, i. e. payin. For *hnit pa dwin pwa thi ossa* the Amwebon Dhammathat, which merely copies the portions of Manukye that deal with inheritance, gives *hnit pa son dwin pwa ossa*, which can only mean the same. In Manukye, Vol. XII, para. 3 as p. 345 a distinction is drawn between property brought to the marriage, payin, and property acquired during the coverture—Richardson translates "acquired mutually," *hnit pa son dwin ossa*. The section further defines property acquired during marriage, "*hnit pa son lettet pwa thi*", as of two kinds, property inherited from the parents during the coverture, (Richardson omits the words "during the coverture," *thin ne va dwin*), and property acquired by the joint efforts and work of the couple, (*hnit u tha kyan si lok saung*). The fact is that the Dhammathats do not specifically

(3) (1892-96) 2 U B R 121 (124 & 136).
(4) (1893-1900) L B R 295.

deal with property inherited from collaterals during coverture, but the distinction is throughout that between property inherited from the parents and property otherwise acquired by the couple.

Another section of Manukye, Vol. X, para. 32, deals with the partition of the property of a couple dwelling apart from their parents who both die (*hnit pa son the*) without leaving issue. The early part of the section relates evidently, though it is not so stated, to cases where the couple die within a short interval of one another, for the last part of it lays down a different rule in the opposite case. The parents of each spouse are to take what he or she brought to the marriage (*payin*), while the property that accrued to the couple during the marriage, (*hnit pa son pyit pwa thi ossa*), is to be divided equally amongst the parents of both spouses. This section in terms applies only to parents, but if the doctrine of common disaster is to apply at all the heirs who are to be preferred to parents, *e. g.*, brothers and sisters; *Maung Kun v. Ma Chi* (5) must also come under its provisions. The section goes on to lay down that where one spouse brought no property to the marriage (*payin*) the parents of that spouse were to take one share of the *payin* and the parents of the spouse who brought *payin* to the marriage two shares, (the parties being in the relationship of *nissita* and *nissiya*). The corresponding texts of other Dhammathats are given in s. 347 of the Digest. In Vol. XII, para. 3 of Manukye the same principle of division is applied so the *payin* property of virgin couples at divorce where one spouse only brought *payin* to the marriage, and also to *lettetpwa* by succession, *Kin Kin Gyi v. Mg. Kan Gyi* (6), *Mi Myin v. Nga Twe* (7), *Mi Saing v. Yan Gin* (8) and *Ma Ngwe Hnit v. Maung Po Hmu* (9).

The trial Court was of the opinion that the method of division laid by Manukye in the case of hereditary property ought to be extended by analogy to the case of property inherited from collaterals during coverture. But these special and exceptional rules of the customary law of inheritance should not be extended beyond the cases actually covered by them, *Ma Pwa Thin*

(5) 9 R 217; 133 Ind. Cas. 234; A I R 1931 Rang. 113; Ind. Rul. (1931) Rang. 250 (F B).

(6) (1903) 2 U B R (Buddhist Law, Divorce) 1.

(7) (1906) U B R (Buddhist Law, Divorce) 19.

(8) 2 U B R 127; 38 Ind. Cas. 405; A I R 1914 U B 56.

(9) 11 L B R 52; 64 Ind. Cas. 806; A I R 1921 L B 2.

v. U Nyo (10), at p. 414, except where it is necessary by implication to hold that heirs who exclude parents or uncles and aunts are entitled to the same rights as they. It would further seem that it is only property inherited from the parents which is to go solely to the relatives of the spouse who had it. It must be held then that where property is inherited during marriage from collaterals by one party only it should be treated not like property inherited from parents, nor as jointly acquired property, but on the same footing as *payin* property, or as inherited *lettetpwa* in cases of divorce by mutual consent, and should go to the extent of two-thirds to the relatives of the party who inherited it and to the extent of one-third to the relatives of the other party. The preliminary decree of the lower Court will therefore be altered to one declaring that the plaintiff-appellant is entitled to one-third of Maung Tun E's share in the property inherited by him from Ma Pwa Zon, that is to say to one-ninth of Ma Pwa Zon's estate, and the Commissioner will be directed to make the necessary inquiries and take accounts and report accordingly. The respondent must pay the costs of this appeal, Advocate's fee *ad valorem* on the estimated value of the share in respect of which the appellant has been successful, namely Rs. 562.

Mya Bu, J.—I agree.

D.

Decree modified.

(10) 12 R 409 (414); 152 Ind. Cas. 768; A I R 1934 Rang. 318; 7 R Rang. 173.

PATNA HIGH COURT Special Bench

Miscellaneous Judicial Cases Nos. 47
and 48 of 1940

April 17, 1941

HARRIES, C. J., FAZL ALI AND
MANOHAR LALL, JJ.

THE PROVINCE OF BIHAR—
PETITIONER

versus

Maharaja PRATAP UDAI NATH
SAHI DEO OF RATUGARH—

ASSESSEE

Bihar Agricultural Income-tax. Act (VII of 1938), ss. 2 (a), 6 (b), 25 (6)—Cess imposed by Bengal Cess Act (IX of 1880), on tenure-holders and raiyats and collected by proprietors of land, can be assessed as agricultural income of latter as defined in s. 2 (a)—Whether non-recurring premia or salamis paid to proprietors of land when granting lease, is agricultural income of proprietors within s. 2 (a) is question of fact—Test of determination—Held, such payments were not agricultural income and could not

be taxed—Agricultural income-tax authorities must follow decisions of Patna High Court—They are not entitled to follow decisions of other High Courts or rely on their own experience, in case of conflict of authorities—Whether 'bankar', 'lahkar' and 'phalkar' incomes are incomes from agriculture or lands used for agricultural purposes, is question of fact—Duty of authorities to state facts when stating case to High Court—Held, that incomes derived by assesses in this case from such sources were not derived from land used for agricultural purposes or from agriculture and could not be assessed to tax under Act—Words and phrases—'Bankar', 'lahkar' and 'phalkar,' meaning explained.

The cess as imposed by the Ben. Cess Act (Act IX of 1880 B. C.) on tenure-holders and *raiya*ts and collected by the proprietors of the land can be assessed as agricultural income of the latter as defined in s. 2 (a) Bihar Agri. Income Tax Act. The cess received by the proprietors of land from the tenure-holders and *raiya*ts is income derived from land used for agricultural purposes. All such land is expressly made liable to cess by the Ben. Cess Act and it is payable by the tenure-holders and *raiya*ts by reason of their relation to the land, and further it is received by the proprietors by reason of their rights as proprietors of the land. The liability to pay such cess and the right to receive it only exists as long as the relationship of proprietor and tenure-holder or proprietor and *raiya*t exists. When the proprietor ceases to be a proprietor, he no longer has any right to the cess and similarly when the interests of the tenure-holder or *raiya*t cease, their liability to pay cess comes to an end. The liability to pay and the right to receive cess is so closely connected with the land that it can truly be said that it is income derived from the land. That being so, the cess forms part of their agricultural income and is liable to be taxed under the Bihar Agri. Income Tax Act. [p. 205, col. 2; p. 208; cols. 1 & 2.]

It is impossible to lay down a hard and fast rule that a *salami* or premium can in no case be taxable. The question in each case would depend on the facts and circumstances of that particular case. *Salami* may in certain cases be regarded as payment of rent in advance, and in such cases the *salami* could rightly be regarded as income. Where, however, *salami* cannot be regarded as payment of rent in advance, it cannot be regarded as income and would, therefore, not be taxable. Where the premium or *salami* represents the whole or part of the price of the land, it could not be income. Income connotes a periodical monetary return coming in with some sort of regularity, or expected regularity, from definite sources. The premium, or *salami*, which is paid once for all, is not a recurring payment and does not satisfy the test of income. 187 Ind. Cas. 691 (3) and 192 Ind. Cas. 316 (5), relied on. [p. 209, col. 2.]

It is for the income-tax authorities to show that there do exist facts which would make the *salami* income. *Prima facie*, *salami* is not income. [*ibid.*]

Where it is impossible upon the facts as stated to say that the single non-recurring premium and *salami* paid to the assessee once only as consideration for the settlement of agricultural land at the time of granting of a lease constituted a part of the assessee's income, it cannot be held to be agricultural income within the meaning of s. 2 (a) of the Bihar Agri. Income Tax Act and is not assessable under that Act. [p. 208, col. 2; p. 210, col. 1.]

The Agricultural Income-tax Authorities in Bihar must in view of s. 25 (6), Bihar Agri. Income Tax Act, regard cases decided by the Patna High Court under the Act as binding upon them and they will not be entitled in the case of a conflict of authorities to follow

decisions of other Courts or to rely on their own experience. [p. 210, col. 1.]

"*Bankar*" is income derived from the sale of wood from jungles, whereas "*lahkar*" is income from letting lands and trees for cultivation of lac. "*Phalkar*" is income from the fruit of jungle trees and bushes. The question whether the income from these sources can be said to be derived from land used for agricultural purposes or from agriculture, is in the main, one of fact and the authorities should bear this in mind when stating a case to the High Court. If the land is not so used, then the income is not taxable under the Bihar Agri. Income Tax Act. [p. 230, col. 2.]

Where the "*bankar*" income was derived by the assessee from virgin jungles or jungle land not actually cultivated and the trees appeared to have grown naturally in the jungles without the intervention of human agency :

Held, that the growth of these trees could not be said to result from the cultivation of the soil and the income referred to as "*bankar*" was not derived from agricultural land or from agriculture and, therefore, it could not be assessed under the Bihar Agri. Income Tax Act. [p. 210, col. 2; p. 211, col. 1.]

Lac is not the result of any cultivation but is the creation of a particular insect when placed on particular trees. Where nothing appears to be done by the assessee beyond placing the insect on the trees, it cannot be held that "*lahkar*" income is derived from land used for agricultural purposes or from agriculture. [p. 211, cols. 1 & 2.]

"*Phalkar*" is income derived from wild jungle fruits, and it cannot be said that the fruit gathered is the result of any cultivation, but, on the contrary, it is the result of the absence of cultivation. Trees and bushes yielding these fruits grow not on cultivated soil but on land not under cultivation and frequently the more neglected and wild the land is the thicker grow these wild bushes and trees yielding such crop. Practically in all cases the crop is the result of want of cultivation and not the result of cultivation.

Held, that it was not established that the income described as "*phalkar*" in the case was income derived from land used for agriculture or from agriculture and was, therefore, not assessable to agricultural income-tax. [p. 211, col. 2.]

Misc. J. Cs. Nos. 47 and 48 of 1940. *In re*, statement of case under section 25 (2), Bihar Agricultural Income Tax Act (Act VII of 1938), by the Board of Agricultural Income-tax, Bihar, dated May 13, 1940, regarding assessment.

The Advocate-General and Mr. Phulan Prasad Varma, for the Petitioner in Nos. 47 and 48.

Sir Sultan Ahmad, Messrs. P. R. Das, B. C. De, P. K. Banarji, K. K. Banarji, H. R. Kazimi and A. H. Akbari, for the Assessee in No. 47.

Sir Sultan Ahmad, Messrs. P. R. Das, B. C. De, P. K. Banarji, K. K. Banarji and J. M. Ghosh, for the Assessee in No. 48.

Harries, C. J.—These are two references made by the Board of Agricultural Income-tax, Bihar, under s. 25 (2), Bihar Agricultural Income Tax Act (Act VII of 1938). The two references raise precisely the same questions, and it will be convenient to deal with them in one judgment.

The facts giving rise to Miscellaneous Judicial Case No. 47 of 1940 can be shortly stated as follows :—

The assessee is the Maharaja of Chota Nagpur. He was called upon to make a return of his agricultural income for the previous year, and eventually he made a return showing an income of Rs. 9,956-12-6 derived from agricultural. The Income-tax Officer questioned the return and finally assessed the assessee on a net income of Rs. 1,42,743-8-7½. The assessee being dissatisfied with this assessment appealed to the Commissioner of Agricultural Income-tax, who by an order dated September 20, 1939, dismissed the appeal and confirmed the assessment. The assessee then petitioned the Board of Agricultural Income-tax, Bihar; but his petition was rejected by an order dated February 21, 1940.

The facts giving rise to Miscellaneous Judicial Case No. 48 of 1940 are very similar :—

The assessee in this case is the Raja of Panchkote who was assessed by the Income-tax Officer to agricultural income-tax upon a sum of Rs. 99,392. The assessee appealed to the Commissioner of Income-tax, but his appeal was dismissed on September 21, 1939, and a petition to the Bihar Board of Agricultural Income-tax was rejected on February 21, 1940.

The points taken by both the assesseees were the same. It was contended, in the first place, that the Bihar Agri. Income Tax Act was *ultra vires* and that neither assessee was liable to be assessed in respect of his agricultural income. Secondly, it was urged that the case collected by the assesseees from their tenure-holders and *raiyyats* did not form part of the agricultural income and, therefore, could not be included in the sum to be assessed to agricultural income-tax. Thirdly, it was contended that payments in the nature of *premia* or *salami* formed no part of the income of the assesseees and that such had been wrongly assessed to income-tax by the Income-tax Officer. Lastly, it was contended that income from *phalkar*, *bankar* and *lahkar* could not be assessed under the Act as part of the agricultural income of the assesseees.

The Commissioner of Agricultural Income-tax and the Bihar Board of Agricultural Income-tax decided that the Act was *intra vires* the Bihar Provincial Legislature and, therefore, the assessee could be assessed to agricultural income-tax. They further decided that the sums representing cess,

premia or *salami* received by the assesseees and income from *phalkar*, *bankar*, and *lahkar* had been rightly assessed to tax. As the cases involved difficult questions of law, the Bihar Board of Agricultural Income-tax was asked to state cases for the opinion of this Court, and the Board stated cases under s. 25(2), Bihar Agri. Income Tax Act, and these cases formulate four questions :

(1) Whether agricultural income of the assessee can be assessed under the Bihar Agri. Income Tax Act (Act VII of 1938)?

(2) Whether the cess as imposed by the Ben. Cess Act (Act IX of 1880 B.C.) on tenure-holders and *raiyyats* and collected by the assessee can be assessed as agricultural income of the latter as defined in this Act?

(3) Whether single non-recurring *premia* and *salamis* paid to the assessee once only as consideration for the settlement of agricultural land at the time of granting of a lease can be held to be income within the meaning of the Act?

(4) Whether the income from trees derived by the assessee is agricultural income as defined in the Act?

It will be convenient to consider each of these questions separately.

Question No. (1). Whether agricultural income of the assessee can be assessed under the Bihar Agri. Income Tax Act (Act VII of 1938)?

The assessee wished to contend that the whole of the Bihar Agricultural Income-tax was *ultra vires* the powers of the Bihar Provincial Legislature or in the alternative that the Act was *ultra vires* in so far as it purported to tax agricultural incomes arising from permanently settled estates. The estates of both the assesseees were permanently settled and were assessed to land revenue. At the outset Counsel for the assesseees realised that it would be impossible to contend before this tribunal that the Act under which the tribunal was constituted was *ultra vires*. This tribunal has been expressly set-up by the Act to hear references under s. 25 of the Act, and an argument that the whole of the Act was *ultra vires* cannot be urged before a tribunal which owes its very existence and jurisdiction to the Act itself. Realising the difficulties, Counsel informed the Court that they did not press for an answer to this question as, in their view, the matter could be more appropriately and effectively raised in a suit challenging an assessment. That being so, no

further argument was addressed to us upon this question, and I would, therefore, make no answer to it.

Question No. (2). Whether the cess as imposed by the Ben. Cess Act (Act IX of 1880 B. C. on tenure-holders and *raiyyats* and collected by the assessee can be assessed as agricultural income of the latter as defined in this Act?

In the cases of both assessees the Income-tax Officer had included in their gross income sums collected by the assessees as cess from their tenure-holders and *raiyyats*. In the case of the Maharaja of Chota Nagpur the amount of cess collected from tenure-holders and *raiyyats* amounted to Rs. 1,14,686-0-2½ and the amount payable by the said Maharaja under the Cess Act amounted to Rs. 1,62,757-2-10. In the case of Raja of Panchkote the amount of cess actually collected from the tenure-holders and tenants is not clearly stated, but there can be no question that it was a substantial amount. The amount of cess paid by the said Raja amounted to Rs. 78,705-13-7.

There can be no question that the cess payable by the assessees under the provisions of the Cess Act are proper deductions from their gross income as such deductions are expressly provided for in s. 6 (b), Bihar Agri. Income Tax Act. Among the deductions permissible under s. 6 (b) are sums

"actually paid in the previous year in respect of such land as any local cess or rate collected under any Ben. Act or under any Bihar and Orissa Act or under any Bihar Act."

The contention of the assessees was that though cess paid by them could be deducted from their gross income the cess actually collected by them from their tenure-holders and *raiyyats* formed no part of their agricultural income and could not be included in the same representing their gross income. It was conceded that there was no justice or equity in this contention; but it was urged that on the plain words of the Act cess collected by the assessees formed no part of their income.

"Agricultural income" is defined in s. 2 (a) as, *inter alia*, any rent or income derived from land which is used for agricultural purposes, and is either assessed to land-revenue in Bihar or subject to a local cess or rate assessed and collected under any Ben. Act or under any Bihar and Orissa Act or under any Bihar Act;..... Counsel for the assessees argued that the Provincial Legislature had no power to define agricultural income as that term had already been defined in s. 311, Govt.

of India Act, 1935. It is to be remembered that the power of the Provincial Legislature to levy agricultural income-tax is given to them under s. 100 and Sch. VII, List II, Item No. 41, Govt. of India Act. By reason of these provisions a Provincial Legislature is empowered to impose taxes on agricultural income. The latter term is defined in s. 311 (2), Govt. of India Act, as meaning agricultural income as defined for the purposes of the enactments relating to Indian income-tax. Section 2 of the present enactment relating to Indian income-tax defined "agricultural income" as any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land-revenue in British India or subject to a local rate assessed and collected by officers of the Crown as such.

It will be observed that the definition of "agricultural income" given in the Indian Income Tax Act differs somewhat from that given in the Bihar Agri. Income Tax Act. In the Indian Income Tax Act agricultural income consists of any rent or revenue derived from agricultural land, whereas in the Bihar Agri. Income Tax Act it consists of any rent or income derived from agricultural land. In my judgment there is no real difference between the words "revenue" and "income" used in these two Acts. In the Indian Income Tax Act the word "revenue" is clearly used to cover payments in the nature of income other than rent derived from the land.

The definitions in the two Acts also differ as to the description of the agricultural land contemplated. In the Indian Income Tax Act the land must either be assessed to land-revenue in British India or subject to a local rate assessed and collected by officers of the Crown as such, whereas in the Bihar Act the land must be either assessed to land-revenue in the province or subject to a local cess or rate assessed and collected under any Ben. Act or under any Bihar and Orissa Act or under any Bihar Act.

For the reasons which I have already given, Counsel for the assessees could not and did not wish to contend that the whole Act was *ultra vires* by reason of the fact that the definition of "agricultural income" in the Bihar Act differed from that in the Govt. of India Act. Counsel, possibly, could have argued that the Act was *ultra vires* in so far as the definition in the Bihar Agri. Income Tax Act, extended to cases not covered by the definition in the Govt. of India Act. Such an argument, however,

could not avail the assesseees in the present case, because both the estates were assessed to land-revenue and, therefore, the cases of both were covered not only the definition in the Bihar Act but also by the definition in the Govt. of India Act. No point can be made in the present proceedings on the difference in the two definitions, and I merely mention the question in difference to the argument which was addressed to the Court.

The learned Commissioner of Income-tax was of opinion that the cess collected by the assesseees from their tenure-holders and *raiyats* formed part of their income though he did not regard the cess as part of the rent payable by the tenure-holders or *raiyats* as the Income-tax Officer appears to have thought. The Bihar Board of Agricultural Income-tax however, came to the conclusion that cess formed part of the rent and was, therefore, liable to assessment as part of the assessee's agricultural income. The contention of the Income-tax Authorities was that the definition of "rent" given in the Chota Nag. Ten. Act was wide enough to cover these payments of cess; but in my judgment the view of the learned Commissioner is the correct one. It may well be that for the purposes of the Chota Nag. Ten. Act cess could be regarded as part of the rent, but that would not make cess rent for the purposes of agricultural income-tax. It would, indeed, be strange if cess could be regarded as rent for the purposes of taxation in Chota Nagpur and could not be so regarded for the purposes of taxation in other parts of this province. In my judgment the cess received by the assesseees cannot be regarded as part of the rent for the purposes of the Agri. Income Tax Act and, therefore, taxable. It can only be assessed if it can be regarded as part of the agricultural income of the assessee.

Cess is imposed by s. 5 of the Ben. Cess Act which is in these terms :—

"From and after the commencement of this Act in any District or part of a District, all immovable property situate therein, except as otherwise in s. 2 provided, shall be liable to the payment of a local cess."

The mode of payment of local cess is provided for in s. 41 of the Cess Act, which is in these terms :—

"Except as otherwise in this Act provided—

(1) every holder of an estate shall yearly pay to the Collector the entire amount of the local cess calculated on the annual value of the lands comprised in such estate, at the rate which may have been determined for such cess for the year as in this Act provided, less a deduction to be calculated at one-half of the said rate for every rupee of the revenue entered in the valuation roll of such estate as payable in respect thereof :

(2) every holder of a tenure shall yearly pay to the holder of the estate or tenure within which the land held by him is included, the entire amount of the local cess calculated on the annual value of the land comprised in his tenure at the rate which may have been determined for such cess for the year as in this Act provided, less a deduction to be calculated at one-half of the said rate for every rupee of the rent payable by him for such tenure :

(3) every cultivating *raiyat* shall pay to the person to whom his rent is payable one-half of the said local cess calculated at the said rate upon the rent payable by him, or upon the annual value ascertain under the provisions of s. 24 or 25 of the land held by him....."

It will be seen that by reason of s. 41 the proprietor has to pay cess on all the land held by him and the tenure-holders or *raiyats* under the proprietor have to pay cess to the latter in respect of the lands held by them. The landlord's liability to pay cess is not conditional upon the collections of cess made by him from his tenure-holders or *raiyats* and the landlord is bound to pay the cess payable by him whether he is able or not to collect the cess due to him from persons holding from him. Section 41 of the Act makes it clear that the liability of the proprietor to pay cess in no way depends upon payments of cess made to him by his tenure-holders or *raiyats*.

It was faintly urged that the cess received by the assesseees from their tenure-holders and *raiyats* formed no part of their agricultural income by reason of the fact that the assesseees had themselves to pay cess and in substance and in fact what they received from the tenure-holders and tenants they actually paid with their own contribution to the local authorities. If the proprietors were merely collecting agents of this cess, then it could be urged that the amounts collected by them formed no part of their income. However, if such was the case, the assesseees could not claim a deduction of the cess payable by them in respect of lands actually held by tenure-holders and *raiyats* under s. 6 (b), Bihar Agri. Income Tax Act, because such cess would not be paid by the assesseees but paid by the tenure-holders and *raiyats* through the hands of the assesseees. The fact that the proprietors are entitled to deduct not only cess paid by them in respect of lands in their *khas* possession but also in respect of lands held by tenure-holders and tenants makes it clear that the liability is that of the proprietor and not of those holding under him. In my view proprietors are not mere agents for the collection of cess, but, on the other hand, they are the only persons liable to pay the cess due to the local authorities and further they are the only persons

entitled to the cess payable by the tenure-holders and *raiyyats*.

In my judgment it is clear that the cess received by the assessee from tenure-holders and *raiyyats* does form part of their income. When they receive the payments they are absolutely entitled to them and can retain them even if they themselves were able to avoid payment of their cess to the local authorities. The payments from the tenure-holders and *raiyyats* are received regularly and are clearly within the definition of "Income" given by Sir George Lowndes in the judgment of their Lordships of the Privy Council in *Commissioner of Income-tax, Bengal v. Shaw Wallace & Co.* (1). At p. 1350 Sir George Lowndes observed :—

"Income, their Lordships think, in this Act (meaning the Indian Income Tax Act) connotes a periodical monetary return 'coming in' with some sort of regularity," or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. Thus income has been likened pictorially to the fruit of a tree, or the crop of a field."

As the assessee receives this cess regularly year by year and appropriate it to their own use it is clearly part of their income. The question, however, still remains whether it is income derived from land used for agricultural purposes, because it must, to be taxable, be derived from such land.

In my judgment the cess received by the assessee is income derived from land used for agricultural purposes. All such land is expressly made liable to cess by the Ben. Cess Act and it is payable by the tenure-holders and *raiyyats* by reason of their relation to the land, and further it is received by the assessee by reason of their rights as proprietors of the land. The liability to pay such cess and the right to receive it only exists as long as the relationship of proprietor and tenure-holder or proprietor and *raiyyat* exists. When the proprietor ceases to be a proprietor, he no longer has any right to the cess and similarly when the interests of the tenure-holder or *raiyyat* cease, their liability to pay cess comes to an end. The liability to pay and the right to receive cess is so closely connected with the land that it can truly be said that it is income derived from the land. The cess was received by the assessee by virtue of the fact that they were the proprietors of

the land used for agricultural purposes. That being so, the cess forms part of their agricultural income and is liable to be taxed under the Bihar Agri. Income Tax Act.

It was urged by Sir Sultan Ahmed on behalf of the assessee that cess could not form part of the agricultural income of the assessee, because the rights of the assessee to this cess were governed not by contract between them and their tenure-holders or *raiyyats* but by statute. In my view it can make no real difference whether the money is received by reason of an agreement or by reason of a right given by statute. Rent is payable by the tenant or the tenure-holder as the result of agreement. The Cess Act imposes a further liability on the tenure-holder and the tenant and gives the proprietor a right to something more than the rent which was fixed as the result of agreement. Both the payments are made by the tenure-holders or *raiyyats* by virtue of the fact that they hold interests in land from the proprietor and the latter's right to receive both the payments are equally by virtue of the fact that he is the proprietor of the land. In my view no distinction can be drawn by reason of the fact that cess is payable under statute, and in my judgment cess clearly forms part of the agricultural income of the assessee. I would, therefore, answer this question in the affirmative.

Question No. (3) Whether single non-recurring premia and *salamis* paid to the assessee once only as consideration for the settlement of agricultural land at the time of granting of a lease can be held to be income within the meaning of the Act?

The learned Commissioner was of opinion that such premia or *salamis* were not capital payments but were revenue receipts and therefore, taxable. In his judgment he observed :—

"The amount of *salami* to be paid is and must necessarily be taken into account by the would-be lessee in estimating what rent he can afford to pay for the tenancy and I consider therefore that *salami* of this nature must in fact be regarded as merely a capitalised value of a portion of the future rents. I hold therefore that *salamis* of this nature are rent, but even if I did not come to this conclusion, I do not see how I could avoid holding that such *salamis* are income derived from land which is used for agricultural purposes. Money received must be either capital or income, and I find it impossible to regard *salamis* of this nature as being in any sense capital. They do not represent compensation for any deterioration of the landlord's estate and are, in my opinion, income pure and simple."

The Bihar Board of Agricultural Income-tax also came to the conclusion that these

(1) 59 C 1343, (1350); 136 Ind. Cas. 742; Ind. Rul. (1932) P C 156; 9 O W N 515; 36 C W N 653; A I R 1932 P C 138; (1932) M W N 618; 55 C L J 386; (1932) A L J 588; 34 Bom. L R 1033; 36 L W 63; 63 M L J 124; 59 I A 206 (P C).

salamis formed part of the assessee's agricultural income. The Board relied upon the decision in *Birendra Kishore Manikya v. Secretary of State for India* (2) and declined to follow a decision of this Court in *Commissioner of Income-tax v. Maharaja-dhiraj Kumar Visheshwar Singh* (3).

Dealing with the decision of this Court the Board states :—

"With due respect to the ruling of the Hon'ble High Court, I feel, I must upon this issue be guided by my own experience as a revenue officer and Court. This point has come before the Board in many shapes and forms and especially whilst deciding question of rent reduction in the recently initiated proceedings in the province under ss. 112 and 112-A of the Bihar Ten. Act and the analogous section of the Chota Nag. Ten. Act. I have, so I think, invariably seen that whenever a landlord has settled *zirat*, *bakasht* or *nilami* lands with tenants and has accepted a *salami* it has been always because of the imposition of a lower rate of rent than would have been the case if such *salami* had not been taken. I am of opinion that this has been the uniform practice in such cases coming before the Board throughout the province and on this consideration I cannot do anything else but hold that these *salamis* are merely advance rent and nothing else and so agricultural income tax is rightly imposed upon them."

The facts relating to these various payments of *salami* are nowhere set out in the case. All that is said is that these payments by way of *salami* were made on settlement of lands with tenants. Both the Commissioner and the Board appeared to have thought that as a matter of law such payments were not capital receipts but revenue receipts and, therefore, formed part of the proprietor's income. The case of *Birendra Kishore Manikya v. Secretary of State for India* (2) now overruled on the main question which it decided does support the views of the Commissioner and the Board, but it is to be observed that this Court has not accepted the law as laid down in that case. In *Raja Shiva Prasad Singh v. The Crown* (4) this Court refused to follow the view of the Calcutta High Court that *salami* paid on the settlement of land was income. In that case the question was whether a sum of money received by the assessee by way of *salami* or premium for granting a mining lease was taxable. Dawson Miller, C. J. observed :—

"There is a vast difference between a sum paid once for all for the lease of mineral rights and a rent or royalty paid annually to the lessor. The lessor in this case who holds an unfettered right of disposal would appear, in granting these leases, to

(2) 48 C 766; 61 Ind. Cas. 112 (2); A I R 1921 Cal. 262; 25 C W N 80; 32 C L J 433.

(3) 18 Pat. 805; 187 Ind. Cas. 691; A I R 1940 Pat. 24; 6 B R 524; 12 R P 629.

(4) 4 Pat. 73; 82 Ind. Cas. 653; A I R 1924 Pat. 679; 5 P L T 497; (1924) Pat. 234; 2 Pat. L R 233 Cr.

have had two objects in view which are distinguishable. In so far as rent and royalty are reserved, he is founding an annual increment to the income of the Raj for himself and his successors, but with regard to *salami* it is the price he demands for parting with his direct enjoyment of the property by himself and his successors for a period of 999 years. He is parting with the capital to persons who, whilst not purchasers of the fee simple, are undoubtedly purchasers of a large interest therein. The purchase price is presumably not based upon the estimated outturn but is paid in exchange for the long term transferred. Possibly it may be objected that the distinction is one of degree rather than of kind; recurring payments at short periods being treated as income and a single payment of a similar kind covering a long period being treated as capital, but after all this is a distinction acknowledged in s. 4 of the Act itself, and, as has been observed, the Income Tax Acts are not cast upon absolutely logical lines. Nor does there appear to be any reason why we should extend the exception made in the case of rent and royalty to the case of a non-recurring payment made to cover a long period."

This case was distinguished by the learned Commissioner on the ground that it related to royalties; but the case was approved and followed by a Bench of this Court in *Commissioner of Income-tax v. Maharajadhiraj Kumar Visheshwar Singh* (3), which was a case not connected with minerals but was a case relating to land. In this case the learned Judges reviewed all the authorities and came to the conclusion that where the premium or *salami* represented the whole or part of the price of the land, it could not be income. Income connoted a periodical monetary return coming in with some sort of regularity, or expected regularity, from definite sources. The premium, or *salami*, which was paid once for all, was not a recurring payment and did not satisfy the test of income. Manohar Lall, J. further stated that it was impossible to lay down a hard and fast rule that a *salami* can in no case be taxable. The question in each case would depend on the facts and circumstances of that particular case.

The same view was taken by another Bench of this Court of which I was a member, in the case of *Rani Bhuneshwari Kuar v. The Commissioner of Income-tax, Bihar* (5). These two recent cases make it clear that *salami* cannot be regarded as income as a matter of law. *Salami* may in certain cases be regarded as payment of rent in advance, and in such cases the *salami* could rightly be regarded as income. Where, however, *salami* cannot be regarded as payment of rent in advance, it cannot be regarded as income and would, therefore, not be taxable. In the present case, as I have

(5) A I R 1941 Pat. 30; 192 Ind. Cas. 316; 7 B R 380; 13 R P 451.

stated, no facts are given relating to any particular payment of *salami*. It is for the Income-tax Authorities to show that there do exist facts which would make the *salami* income. *Prima facie*, *salami* is not income, and it is impossible upon the facts as stated to say that the *salamis* received by either assessee in this case constitute part of their income and, therefore, assessable to agricultural tax. I would, therefore, answer this third question in the negative.

I think it only right to draw the attention of the Agricultural Income-tax Authorities to s. 25 (6) Bihar Agri. Income Tax Act. They must in future regard cases decided by this Court under the Act as binding upon them and they will not be entitled in the case of a conflict of authorities to follow decisions of other Courts or to rely on their own experience.

Question No. (4) Whether the income from trees derived by the assessee is agricultural income as defined in the Act?

The Maharaja of Chota Nagpur was assessed to income-tax on Rs. 832-12-0 income from *bankar*, Rs. 636-10-0 income from *lahkar* and Rs. 22-4-0 income from *phalkar*. The Raja of Panchkote appears also to have been assessed on income from some if not all the sources, though the actual amounts received from the various sources are not set out in the order of the Income-tax Officer, or in either the judgment of the Commissioner or the Bihar Board of Agricultural Income-tax. Further, no details of any kind are given in the cases stated as to the precise nature of the sources of this income. All that can be gathered is that income from *bankar*, *lahkar* and *phalkar* has been taxed, and the contention of the assessee is that such is not income derived from land used for agricultural purposes, and, therefore not taxable.

The Commissioner of Income-tax appears to have thought that income derived from timber in virgin forests was income derived from land used for agricultural purposes. In his view trees were undoubtedly a crop, and the practice of forestry formed part of agriculture. He relied upon the case of the *Chief Commissioner of Income-tax, Madras v. Zamindar of Singampatti* (6). In that case, however, the learned Judges appear to have thought that income from forests and fisheries might be regarded as agricultural income, though they pointed out that it was not necessary to determine whether such was the case or not. Another

(6) 45 M 518; 70 Ind. Cas. 504; A I R 1922 Mad. 325; 15 L W 496; (1922) M W N 353; 31 M L T 21 (F B).

case supporting the view of the learned Commissioner is the case of *Panadai Pathan v. Ramasami Chetti* (7), in which it was held that a lease of land for growing casuarina trees is a lease for an agricultural purpose within the meaning of s. 117, T. P. Act, and, therefore, does not require a registered instrument for its creation. It was further held that "agriculture" does not connote tilling the soil for raising food products alone but means cultivation of the soil for any useful purpose.

The Bihar Board of Agricultural Income-tax upheld the Commissioner, but he conceded that the point involved was a difficult one, and he in fact gives no reasons for agreeing with the Commissioner. All he says is:

"The learned Commissioner has given his reasons for thinking that virgin forest is a crop and all I will say is that for the purposes of these proceedings I will not differ from him."

"*Bankar*" is income derived from the sale of wood from jungles whereas "*lahkar*" is income from letting lands and trees for cultivation of lac. "*Phalkar*" is income from the fruit of jungle trees and bushes. The question which has to be determined is whether the income from these sources can be said to be derived from land used for agricultural purposes or from agriculture. If the land is not so used, then the income is not taxable under the Bihar Agri. Income Tax Act. "Agriculture" is defined in Shorter Oxford Dictionary, Vol. I, p. 37, as "The science and art of cultivating the soil, including the gathering in the crops and the rearing of live stock", and another alternative definition is "farming in the widest sense."

It will be convenient to deal with the items *bankar*, *lahkar* and *phalkar* separately.

Bankar. It appears that this head of income was derived from virgin jungles or jungle land not actually cultivated. A few forest guards appear to have been employed to protect the property, but it cannot be said that the trees have grown as the result of cultivation. They appear to have grown naturally in the jungles without the intervention of human agency, and in my view the growth of these trees cannot be said to result from the cultivation of the soil. In fact, it was the absence of cultivation that permitted the area to develop into a jungle.

In the later cases decided in Madras the

(7) 45 M 710; 70 Ind. Cas. 657; A I R 1922 Mad. 351; (1922) M W N 384; 43 M L J 191; 16 L W 264; 31 M L T 76.

learned Judges take a different view from the cases already referred to. In the case of the *Commissioner of Income-tax, Madras v. T. Manavedan Tirumalpad* (8), a Special Bench of three Judges held that the amounts received by the owner of unassessed forest lands, by the sale of timber trees thereon, are income liable as such to income-tax under the Indian Income Tax Act. In short, the income was not derived from land used for Agricultural purposes and, therefore, not within the exception in the Indian Income Tax Act. In this case, however, it does not appear to have been seriously contended that income derived from the sale of such trees was income derived from land used for agricultural purposes or from agriculture.

In *Chandrasekara Bharati v. Duraiswamy Naidu* (9), a Bench held that growing casuarina trees, that is trees for fuel, is not an agricultural purpose so as to make the person who holds the land for that purpose a *raiyyat* within the meaning of the Mad. Estates Land Act.

A similar view appears to have been taken by the Allahabad High Court in a Full Bench case, *Kesho Prasad Singh v. Sheo Pargash Ojha* (10). The learned Judges held that land held for the purposes of a grove was not land held for agricultural purposes, and this view was approved of in appeal by their Lordships of the Privy Council in the case of *Kesho Prasad Singh v. Sheo Pragash Ojha* (11) in which their Lordships stated expressly that they agreed with High Court that land held for the purposes of a grove was not land used for agricultural purposes. In my judgment it has not been established in this case that the income referred to as "*bankar*" is derived from agricultural land or from agriculture and, therefore, it cannot be assessed under the Bihar Agri. Income Tax Act.

Lahkar. This is income derived from letting land and trees for the cultivation of lac. Lac is a substance produced by certain insects which are placed on certain trees. Lac does not seem to be the result of any

cultivation but is the creation of a particular insect when placed on particular trees. Nothing appears to be done beyond placing the insect on the trees, and in my judgment on the materials before the Court I cannot hold that this head of income is derived from land used for agricultural purposes or from agriculture.

Phalkar. This is income derived from wild jungle fruits, and it cannot be said that the fruit gathered is the result of any cultivation, but, on the contrary, it is the result of the absence of cultivation. Trees and bushes yielding these fruits grow not on cultivated soil but on land not under cultivation and frequently the more neglected and wild the land is the thicker grow these wild bushes and trees yielding such crop. Practically in all cases the crop is the result of want of cultivation and not the result of cultivation. In my judgment it is not established that the income described as "*phalkar*" in these cases is income derived from land used for agriculture or from agriculture and is therefore, not assessable to agricultural income-tax.

The case as stated on this fourth question does not set out precisely how the various items of income were obtained. On the materials before me, I cannot hold that any item constitutes agricultural income but on a fuller statement of the facts it may be open to a Court to come to a different conclusion. The question is in the main one of fact, and the authorities should bear this in mind when stating a case.

In the result, therefore, I would answer this question in the negative.

The assesses have been partially successful in this case though they have failed on the main question as to cess. In all the circumstances, I would make no order as to costs of these references, particularly as the points involved are new and difficult.

Fazi Ali, J.—I agree.

Manohar Lall, J.—I also agree.

Order accordingly.

(8) 54 M 21; 126 Ind. Cas. 596; 59 M L J 265; 32 L W 170; A I R 1930 Mad. 764; (1930) M W N 716; Ind. Rul. (1930) Mad. 868 (F B).

(9) 54 M 900; 134 Ind. Cas. 42; 34 L W 185; A I R 1931 Mad. 659; Ind. Rul. (1931) Mad. 794; 61 M L J 618.

(10) 44 A 19; 64 Ind. Cas. 248; A I R 1922 All. 301; 19 A L J 749; 3 U P L R (A) 117.

(11) 46 A 831; 82 Ind. Cas. 962; A I R 1924 P C 247; 51 I A 381; 23 A L J 168; 27 Bom. E R 130; 40 C L J 461; 47 M L J 824; 21 L W 295; L R 6 A (P O) 1; 29 C N 606; 10 O & A L R 1105; 1 O W N 640 (P O).

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Appeal No. 105/39 of 1939

November 11, 1940

ALMOND, J. C. AND MIR AHMED, J.
SECRETARY OF STATE—APPELLANT

versus

MOHD. SAIFUR KHAN NAQIBULLAH
KHAN AND OTHERS—RESPONDENTS

Land Acquisition Act (I of 1894), ss. 23, 4 (1)—Market value — Sale prices after notification under s. 4 (1) for acquisition—Fact of land being used for building purposes and proposal for converting sub-division in which it was situate into district, if can be taken into account.

In determining the market value of the land to be acquired the sale prices of similar types of land in similar position in the past as well as after the notification under s. 4 (1) of the Land Acquisition Act, the fact that the land was at the time of determining its value being used for building purposes; a proposal to convert the sub-division in which the land was situate into a district resulting in acceleration of high price for the land, can all be taken into account even though the aforesaid factors have come into being after the notification under s. 4 (1). 181 Ind. Cas. 230 (1), relied on.

A. against the decree and the judgment of the District Judge, Peshawar Division, dated March 30, 1939.

Mr. Arbab Taj Mohd. Khan, Govt. Pleader, for the Appellant.

L. Hukam Chand, and Mr. S. M. Abbasi, for Respondents Nos. 1 and 2, and other respondents, respectively.

Mir Ahmed, J.—The Govt. required land for building a hydro-electric sub-station at Mardan. A notification was therefore issued on October 15, 1935 for acquiring 12 kls. 13 mls. 6 srs. of land belonging to Mohd. Saifur Khan, Abdul Gafur Khan, Saadullah, Mehr Dil, Mahmud and Purdil. The Collector offered to pay Rs. 280-10-0 per *kanal* for the land. The owners did not accept this price. They asked for a reference to Court under s. 18, Land Acquisition Act. The matter was therefore sent up to the District Court and the District Judge tried the case. The District Judge found that this piece of land was situated in the midst of a new growing suburb. He referred to a sale by Fateh Mohd. Khan to Ghulam Haider of 10 *marlas* of land for Rs. 750. According to a copy of the mutation which has been entered to record, the sale took place on October 14, 1935. The Judge also referred to a judgment of a single Judge of this Court dated August 15, 1935. It was in a case of pre-emption. The land in dispute was situated in the neighbourhood of the land now in suit and was one

kanal in area. This Court held that the sum of Rs. 800 which had been paid before the Sub-Registrar was the correct price of the land under pre-emption. The District Judge also pointed out that Mardan had been converted into a District. (It was made a District on January 1, 1937). He observed that in expectation of the conversion of Mardan into a District from a sub-division the price had been gradually rising round about that town. He also adverted to the sales of lands belonging to Attar Singh in a Court auction. These sales took place on March 31, 1937, April 1, 1937 and April 6, 1937. The land was sold at an average rate of Rs. 149-11-8 per *marla*. He mentioned the fact that the owners had stated before the Collector that the land was at least worth 90 per *marla*. Taking all these factors into consideration the Judge arrived at the conclusion that Rs. 80 per *marla*, or in other words Rs. 1,600 per *kanal*, was a fair average price of the land in suit. He therefore increased the price payable to the owners accordingly.

The Secretary of State has come up on appeal to this Court. The learned Counsel has pointed out that besides the copy of the mutation which has not been attested, no proof has been produced to show that Fateh Mohd. Khan sold 10 *mls.* of land to Ghulam Haider at Rs. 750. He referred to s. 23 (1), Land Acquisition Act, in which the market value of the land in the neighbourhood on the date of the sale has been laid down as the criterion for assessing the price to be paid to the owner for forcible acquisition. He objected to the admissibility of the evidence with regard to the sales of Attar Singh's lands. He said that the sales took place long after the notification had been issued for the acquisition of the land in suit. Counsel did not attach any value to the fact that the land was situated near the other habitations and also remarked that there was nothing to indicate that the proposal to convert Mardan into a District had anything to do with the rise of prices in the locality in which the land is situated. We have given the matter our careful consideration. It is in the award of the Collector that a Police Station was built close to this land in 1923. It is not therefore a matter for surprise that the proximity of the Police Station encouraged the building of houses in this locality. In fact the Collector has said :

"As I have remarked in my previous award good many houses have been built in the vicinity and many

more are being built. The land became more costly being suitable for the construction of houses near the civil lines."

We are satisfied therefore that the land should be treated as one used for building purposes and that in view of its potentiality as a building site the most lucrative and advantageous price should be fixed for its forcible acquisition. We are fortified in this opinion by the remarks of their Lordships of the Privy Council in a ruling reported in *Narayana Gajapatiraju v. Revenue Divisional Officer, Vizagapatam* (1). At p. 102* their Lordships have remarked :

"It is perhaps desirable in this connection to say something about this expression 'the market price.' There is not in general any market for land in the sense in which one speaks of a market for shares or a market for sugar or any like commodity. The value of any such article at any particular time can readily be ascertained by the prices being obtained for similar articles in the market. In the case of land, its value in general can also be measured by a consideration of the prices that have been obtained in the past for land of similar quality and in similar positions, and this is what must be meant in general by 'the market value' in s. 23. But sometimes it happens that the land to be valued possesses some unusual, and it may be, unique features as regards its position or its potentialities. In such a case the arbitrator in determining its value will have no market value to guide him, and he will have to ascertain as best he may from the material before him, what a willing vendor might reasonably expect to obtain from a willing purchaser, for the land in that particular position and with those particular potentialities. For it has been established by numerous authorities that the land is not to be valued merely by reference to the use to which it is being put at the time at which its value has to be determined (that time under the Indian Act being the date of the notification under s. 4 (1), but also by reference to the uses to which it is reasonably capable of being put in the future. No authority indeed is required for this proposition. It is a self-evident one. No one can suppose in the case of land which is certain, or even likely, to be used in the immediate or reasonably near future for building purposes but which at the valuation date is waste land or is being used for agricultural purposes, that the owner, however willing a vendor, will be content to sell the land for its value as waste or agricultural land as the case may be. It is plain that in ascertaining its value, the possibility of its being used for building purposes would have to be taken into account."

We think that the rate of Rs. 80 per *marla* fixed by the lower Court is a fair and reasonable price. It is approximately the rate at which Fateh Mohd. Khan sold his land to Ghulam Haider and is nearly half of the peak price reached when the lands of Attar Singh were sold in 1937. A copy of the deed of sale by Fateh Mohd.

(1) A I R 1939 P C 98 (102); 181 Ind. Cas. 230; I L R (1939) Kar. 167; I L R (1939) Mad. 532; 66 I A 104; 1939 O W N 480; 11 R P C 231; 1939 O L R 303; 5 B R 601; 43 C W N 557; 20 P L T 381; 41 P L R 394; 41 Bom. L R 725; (1939) 2 M L J 45; 50 L W 1; (1939) M W N 708 (P.C.).

*Page of A. I. R. 1939 P. C.—[Ed.]

Khan to Ghulam Haider has been produced in another case, *Secretary of State v. Abdul Ghafur*, which is also before us to-day and its correctness is not denied by the Counsel for the appellant. The mutation is therefore a reliable piece of evidence. No doubt the sales of Attar Singh's lands were subsequent to the notification for the acquisition of the land in suit but they indicate the high water mark of the rise in prices which most probably began in 1923 and was accelerated by the proposal to convert Mardan into a District. They are therefore useful in assessing the price of the land in dispute and cannot be ignored. We do not see any ground for disagreeing with the lower Court and dismiss the appeal with costs. Pleadar's fee Rs. 150, half to be paid to Mohd. Saifur and Abdul Ghafur and the other half to the remaining set of respondents in equal shares.

Appeal dismissed.

PATNA HIGH COURT

Criminal Revision No. 142 of 1941

March 20, 1941

AGARWALA, J.

PANDEY PARASNATH RAI OF
UPPER BAZAR, RANCHI—

PETITIONER

versus

THE MUNICIPAL CORPORATION

OF RANCHI—OPPOSITE PARTY

Bihar and Orissa Municipal Act (VII of 1922), s. 192—Offence under—Sentence—Rigorous imprisonment in default of payment of fine cannot be awarded.

A person committing an offence under s. 192 of the Bihar and Orissa Municipal Act is liable to be fined but is not liable to imprisonment otherwise than in default of payment of the fine. Therefore, by reason of s. 67 of the I. P. C., the imprisonment to be awarded in default of payment of the fine must be 'simple'.

Or. R. from an order of the Deputy Commissioner, Ranchi, dated January 4, 1941.

Messrs. L. K. Chowdhury and R. K. Sahay, for the Petitioner.

Mr. K. K. Banerji, for the Opposite Party.

Order.—The petitioner has been convicted of an offence under s. 192 of the Bihar and Orissa Municipal Act (VII of 1922), and has been sentenced to pay a fine of Rs. 50 or, in default, to undergo rigorous imprisonment for one month. The first point to be noticed is with regard to

the sentence. A person committing an offence under s. 192 of the Act is liable to be fined—not exceeding Rs. 500 but is not liable to imprisonment otherwise than in default of payment of the fine. Therefore, by reason of s. 67 of the I. P. C., the imprisonment to be awarded in default of payment of the fine must be 'simple'.

With regard to the merits, it has been contended that the prosecution is barred by limitation by reason of the provisions of s. 375 of the Municipal Act, which requires, in the case a continuing offence such as the present, that the prosecution shall be instituted within six months of the commission of the offence, or within six months from the time when it is first brought to the notice of the Commissioners of the Municipality. The Courts below have found in the present case with regard to a part of the building which the petitioner is putting up, that the offence was brought to the notice of the Commissioners within six months of the date on which the prosecution was instituted. The petitioner alleges that the offence was committed on October 16, 1939, and that the Commissioners had notice of it on that date. The Courts found that there was no evidence to show that the offence had been committed on that date and held that the offence had been committed between December 8, 1939, and January 14, 1940. There is no merit in the point.

The rule is discharged subject to this modification that the period of the imprisonment in default of payment of the fine will be one month's simple imprisonment and not one month's rigorous imprisonment.

s.

Rule discharged.

ODDH CHIEF COURT

Criminal Revision No. 147 of 1940

March 18, 1941

YORKE, J.

NASIMULLAH—ACCUSED—

APPLICANT.

versus

EMPEROR THROUGH PREM NARAIN—

COMPLAINANT—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 437—Scope and object—Essential point to be considered before acting under s. 437—Case before Magistrate in middle of hearing—Order directing commitment is not justified.

Section 437, Criminal P. C., contemplates a case in which there has already been a completed inquiry under the provisions of Chap. XVIII followed by an order of discharge in a case triable exclusively by the

Court of Session. The object of s. 437 is to enable the Sessions Judge in such a case to order commitment for trial without the necessity of a fresh and unnecessary inquiry. Such a procedure as is contemplated by s. 437 may be either in a proceeding under Chap. XVIII or in a case in which the accused has been tried out and convicted or acquitted on other charges in a warrant case. Such discharge may be either express or by implication. The essential point either for a Magistrate acting under s. 347 or for a Sessions Judge acting under s. 437 is to make certain that the rights of the accused are in no way prejudiced. [p. 216, col. 1.]

In a case where the Magistrate has only framed charges in respect of certain offences and fixed a date for further cross-examination of the prosecution witnesses and thus the case is still in the middle of its hearing an order under s. 437, Criminal P. C., directing commitment is not justified and must be set aside. 132 Ind. Cas. 47 (1), 190 Ind. Cas. 761 (2) and 93 Ind. Cas. 145 (3), referred to.

Cr. R. for the revision of the order of the Additional Sessions Judge, of Kheri, dated October 26, 1940.

Mr. Siraj Husain, for the Applicant.

The Govt. Advocate, for the Crown.

Mr. A. N. Mulla, for the Opposite Party (Prem Narain).

Judgment.—This is an application in revision by one Nasimullah against an order of the Additional Sessions Judge of Kheri, directing under s. 437 of the Criminal P. C., that the Magistrate should commit the present applicant to the Court of Session for trial on charges under ss. 367 and 307, I. P. C., in addition to charges under ss. 377/511 and 323 which had already been framed against him.

This case arose out of a first information report filed on June 29, 1940, and registered as a report of an offence under s. 307, I. P. C. The report was made by Jagat Narain Gupta in regard to an offence said to have been committed by the present applicant Nasimullah against his brother Prem Narain. The story told was that Nasimullah wanted to have unnatural intercourse with Prem Narain and kidnapped or abducted him for that purpose. The boy refused to allow unnatural intercourse and the applicant was said to have throttled him so that he became unconscious. The boy Prem Narain was sent for medical examination on June 30, and on July 18, the Police prosecuted the case to Court under s. 377 read with s. 511, and the Magistrate in due course took up the trial as for a warrant case. On September 16, he heard arguments prior to the framing of a charge and it appears to have been urged before him that a *prima facie* case had been established not only under s. 377 read with s. 511, and s. 323,

but also under ss. 367 and 307 or 308, I. P. C. The Magistrate, however, on September 23, framed charges under ss. 377/511 and 323, I. P. C., only and fixed October 4, for further cross-examination of the prosecution witnesses. On the following day, September 24, Mathura Prasad, guardian, of Prem Narain, applied to the Magistrate to commit the case to the Sessions Court on charges under s. 367, 327 and 307 or 308 in addition to the charge under s. 377/511. This application the learned Magistrate returned to the applicant Mathura Prasad with an endorsement "Returned. It must come through P. I." Whether or not the Prosecuting Inspector would have pressed this application cannot be known as on the very next day, September 25, Mathura Prasad filed an application in revision under ss. 435 and 437 of the Criminal P. C., in the Court of the Additional Sessions Judge of Kheri.

The Additional Sessions Judge has written a lengthy order and has ultimately come to the conclusion that he had the power under s. 437 of the Criminal P. C., to direct that Nasimullah applicant be committed for trial upon the matter of the charges under ss. 367 and 307, I. P. C. It is against this order that the present application is filed. Learned Counsel for the applicant contends that this order of the Additional Sessions Judge is bad in every way, and to a certain extent the learned Govt. Advocate has to concede that there is force in this argument. It is doubtless the case that under s. 435 of the Criminal P. C., the Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of his jurisdiction for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court. It is not very clear first of all as to what order the learned Sessions Judge could be justified in considering to be incorrect, illegal or improper. There was nothing at any rate very improper in the Magistrate's endorsement on the application of Mathura Prasad. The case before him was being conducted by the Prosecuting Inspector, the prosecution being by the Crown and any application of the kind should necessarily have been made to him by the Prosecuting Inspector. Secondly it is difficult, to see what irre-

regularity there was in the proceedings of the Magistrate. The Magistrate had before him a case in which a report had been made, in consequence of which the Police registered a case under s. 307, I. P. C., but the Police had chosen to prosecute the case under s. 377 read with s. 511. It might be that the evidence suggested the possibility of other charges being framed against the accused, but if the Magistrate at that stage of the case thought that the only charges made out *prima facie* against the accused were charges under s. 377 read with 511 and 323, I. P. C., that was a view which he was perfectly competent to take. It did not tie his hands in any way. He was going on to allow further cross-examination of the prosecution witnesses according to law and further to hear such defence evidence as might be produced by the accused. It would be open to him under s. 347 of the Criminal P. C., if at a later stage he came to the conclusion that the case was one which ought to be tried by the Court of Session, to commit the accused under the provisions herein before contained, that is the provisions stated in Chap. XVIII of the Code. It seems to me *prima facie* that this was most definitely not the stage at which the Sessions Judge should have interfered with the discretion of the Magistrate. Non-interference could not possibly interfere with the ultimate doing of justice.

Coming now to the order which the Judge did proceed to pass having once sent for the record under the provisions of s. 435, he could, of course, send it back without further comment or with any remarks he might think advisable for the guidance of the Magistrate or he might take action under s. 436 or under s. 437, if either of those sections was properly applicable.

Section 436 prescribes that "on examining any record under s. 435 or otherwise, the Sessions Judge may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make, and the District Magistrate may himself, make or direct any Subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under s. 203 or sub-s. (3) of s. 204, or into the case of any person accused of an offence who has been discharged."

Provided that no Court shall make any direction under this section for inquiry into the case of any person who has been discharged, unless such person has had an opportunity of showing cause why such direction should not be made."

Prima facie the words "further inquiry" in the first paragraph of this section are

applicable to all cases of discharge with the possible exception of that case of discharge which is mentioned in s. 437, that is to say it will cover case of discharge under ss. 203 and 204 or under s. 253 or under s. 209. In none of these cases can there be any question of prejudice to the accused against whom an order is made after he has had an opportunity of showing cause why such order should not be made because the direction for making of further inquiry clearly means that no final order can be passed against such a person without such further inquiry.

The position in regard to s. 437 is very different. That section provides that "when, on examining the record of any case under s. 435 or otherwise, the Sessions Judge..... considers that such case is triable exclusively by the Court of Session and that an accused person has been improperly discharged by the inferior Court, the Sessions Judge..... may cause him to be arrested, and may thereupon, instead of directing a fresh inquiry, order him to be committed for trial upon the matter of which he has been, in the opinion of the Sessions Judge...improperly discharged."

There are two provisos which do not require consideration in the present case.

It seems to me that the clear distinction between ss. 436 and 437 is that s. 437 contemplates a case in which there has already been a completed inquiry under the provisions of Chap. XVIII followed by an order of discharge in a case triable exclusively by the Court of Session. The object of s. 437 appears to be to enable the Sessions Judge in such a case to order commitment for trial without the necessity of a fresh and unnecessary inquiry. Such a procedure as is contemplated by s. 437 may be either in a proceeding under Chap. XVIII or in a case in which the accused has been tried out and convicted or acquitted on other charges in a warrant case. Such discharge may be either express or by implication. The essential point either for a Magistrate acting under s. 347 or for a Sessions Judge acting under s. 437 is to make certain that the rights of the accused are in no way prejudiced, *vide* for example the case of *Ram Ghulam v. Emperor* (A. I. R. 1931 All. 434) (1). That was a case of a complaint under s. 363, I. P. C. The prosecution witnesses were examined and cross-examined. A charge was framed and all the defence witnesses were also examined and cross-examined. Then the

Magistrate acting under s. 347 of the Criminal P. C., amended and framed the charge under s. 366, I. P. C., and committed the accused for trial. It was held that the procedure of the Magistrate was not illegal. The accused had no right of further examination and cross-examination to disprove the amended charge as every possible defence had been given. The amended charge must be deemed to be framed under s. 210. After the commitment the proceedings must be deemed to be in an inquiry under Chap. XVIII and not in a trial. Further examination and cross-examination could be made in the Court of Session. The crucial question in the case was whether there had been any illegality or irregularity or any prejudice to the accused, and it was held that there was no prejudice.

Strong stress was laid on the same point in *Fazal v. Emperor* (A. I. R. 1940 Lahore, 389) (2). It was held that

"there is nothing in s. 347 to suggest that where a Magistrate decides to commit under that section he should be required to commence proceeding *de novo* under Chap. XVIII. What is necessary is that as soon as a Magistrate acting under s. 347 has made up his mind to commit, he should be careful not to prejudice the accused by depriving him of the opportunities provided by ss. 208 and 212 of offering defence evidence: and always provided that the requirements of ss. 208, 211 and 212, as well as the formalities required by s. 213 of the Code are carefully observed, there is no reason why a Magistrate should be required to take proceedings *de novo* under Chapter XVIII of the Criminal P. C."

Great stress in all these cases is laid on the importance of seeing that all the provisions of Chap. XVIII are complied with and the interests of the accused are not prejudiced by his being deprived of any of his rights. On the other hand the order of the learned Additional Sessions Judge in the present case obviously puts the accused at a great disadvantage. The Magistrate has been ordered to commit the case for trial at a stage when the prosecution witnesses have not been recalled for further cross-examination and the original cross-examination, was not an adequate cross-examination because it was recognised that there would be a further right of cross-examination subsequent to the charge. In addition the accused is being deprived of his right to produce defence evidence before the Magistrate. It seems to me that apart from the question whether s. 437 could at all authorise the Sessions Judge to make an order

(1) A I R 1931 All. 434; 132 Ind. Cas. 47; (1931) A L J 587; (1931) Cr. Cas. 706; 32 Cr. L J 849; 53 A 692; Ind. Rul. (1931) All. 479.

(2) A I R 1940 Lah. 389; 190 Ind. Cas. 761; I L R (1940) Lah. 151; 42 P L R 714; 42 Cr. L J 29; 13 R L 226.

of commitment at this stage it is obvious that this is a case in which he was not justified in so doing. If it is the duty of a Magistrate acting under s. 347 to be most careful to see that the accused has all the advantages which are given to him in an inquiry under Chap. XVIII, it is obviously, one might almost say *a fortiori*, the duty of the Sessions Judge to be most careful not to make an order which would have the effect of prejudicing the interests of the accused. In my opinion the order was not justified in the circumstances of the case and I am personally also of opinion that s. 437 does not justify such an order in a case which is in the middle of its hearing. Such an order may possibly be justified when a Magistrate has tried out a case and has allowed the accused all the privileges which are common to a full trial in a warrant case and to a full inquiry under Chap. XVIII, but it is certainly not justifiable at the stage at which the order was made in the present case.

In this connection I may refer to an early case of this Court, *Bilodar v. King-Emperor* (A. I. R. 1926 Oudh, 194) (3), in which it was held that where the Police *chalan* contains mention of ss. 147 and 304, I. P. C., but the Magistrate, after hearing the evidence for the prosecution, frames a charge under ss. 147 and 325, the accused cannot be said to have been discharged within the meaning of s. 437 and the Sessions Judge is not authorised to order commitment under s. 437. Section 253 suggests that the word 'discharge' means absolute discharge.

"A High Court has itself power under s. 439 read with s. 423, to order commitment in a case, and it would obviously be the proper course for the High Court itself to order such commitment if the Sessions Judge's order is held to be a proper one; however, the action under s. 437 or s. 439 for ordering a commitment should rarely be taken in the midst of a trial, and certainly only when the failure of a Court to commit is shown on the face of proceedings to be improper."

I would further remark that in my opinion such interference with a trial, while it is actually going on, is to be deprecated and even if such a power exists it should only be exercised in rare cases. The Magistrate is himself seized of the case, he has heard the witnesses for the prosecution and he may have come to certain conclusions about them, but his conclusions are not yet final and they will only become final after he has heard the

further cross-examination subsequent to the charge. He is at liberty at any stage up to the date on which he may either acquit or convict to take action under s. 347 in respect of the charges with reference to which an application was made to the Sessions Judge. The Sessions Judge will further himself, in case of conviction under other sections, be at liberty to set aside the conviction and order a commitment to Sessions if he thinks the case one in which such a commitment should have been made.

In my opinion, therefore, the order of the Sessions Judge cannot be sustained. I allow this application and set aside the order. It will be open to the Magistrate to deal with the case according to law in whatever way he thinks fit.

s.

*Application allowed.***BOMBAY-HIGH COURT**

First Appeal No. 163 of 1939

August 15, 1940

BROOMFIELD AND DIVATIA, JJ.

COLLECTOR OF BROACH AND PANCH
MAHALS—APPELLANT*versus*

OCHHAVAL BHICALAL—

RESPONDENT

Penal Code (Act XLV of 1860), s. 70—Imprisonment suffered in default of payment of fine—Fine, if can still be recovered—Criminal Procedure Code (Act V of 1898), s. 386 (1) (b) and (3)—S. 386, whether controls s. 70, Penal Code—Effect of s. 386 (3)—Interpretation of Statutes—Adjective law cannot control substantive law in absence of express provision.

The property of the accused is liable to the payment of fine even if he has undergone imprisonment in default of payment of fine.

Section 70, I. P. C., is substantive law as to the payment of fine while s. 386, Criminal P. C., relates to the procedure of its recovery. Section 70, I. P. C., is not therefore controlled by the provisions of s. 386, sub-ss. (1) (b) and (3), Criminal P. C. The warrant issued under s. 386 (1) (b), Criminal P. C., is to be deemed to be a decree for certain purposes only and not for all purposes. For the purpose of limitation therefore the substantive law contained in s. 70 is not affected. The only effect of s. 386 (3), Criminal P. C., is that the warrant which is to be deemed to be a decree is to be executed according to the mode laid down in the civil procedure code. Section 48, Civil P. C., does not prescribe any period of limitation for taking out execution. Section 48, Civil P. C., does not therefore apply to the warrant under s. 386 (3), Criminal P. C.

It is a general rule relating to the construction of statutes that in absence of an express provision, an adjective law cannot control the provisions of substantive law.

F. A. from the decision of the Additional First Class Sub-Judge, Broach and Panch

(3) A I R 1926 Oudh 194; 93 Ind. Cas. 145; 3 O W N 201; 27 Cr. L J 417; 13 O L J 490.

Mahals at Nadiad, in Panch Mahals Special Darkhast No. 1 of 1938.

Mr. R. A. Jadhagirdar, Govt. Pleader, for the Appellant.

Messrs. M. R. Vidyarthi, P. M. Kapadia and B. Moropanth, for the Respondent.

Divatia, J.—This appeal arises in execution of a *darkhast* to recover a certain amount by the appellant who is the Collector of Broach and Panch Mahals against the respondent. The latter had been convicted on January 12, 1929, of the offence of cheating and sentenced to three years' rigorous imprisonment with a fine of Rs. 15,000 and rigorous imprisonment for nine months in default of payment of fine. On May 10, of that year a letter was sent by the Sessions Judge to the Collector under s. 386 (1) (b), Criminal P. C., authorizing him to realize the amount of the fine by execution according to civil process against the immovable property of the defaulter. This letter was sent because the opponent had not paid the amount of fine although he subsequently suffered the period of imprisonment in default of payment of the fine.

Two *darkhasts* were filed by the Collector in 1929 and 1930 to realize the amount of the fine and a sum of Rs. 4,227 was realized in execution. The third *darkhast* was filed in 1933 and the undivided interest of the opponent in certain immovable property was ordered to be sold. The sale took place on June 19, 1935, but as there were no bidders the property was not sold and the *darkhast* was therefore disposed of. Thereafter on February 8, 1938, the present *darkhast* was filed to recover the balance of the fine out of the interest of the opponent in certain immovable property.

The opponent contended in the course of that *darkhast* that as he had suffered rigorous imprisonment in default of payment of the fine, his property was no longer liable to the payment of the fine. His second contention was that under s. 70, I. P. C., the fine imposed upon him should have been recovered only within six years from the date of the sentence, and the present *darkhast*, which was filed in February 1938, after the period of six years was over, was therefore time-barred.

The learned first class Subordinate Judge rightly held on the first point that the claim of the *darkhastdar* was legal even if the opponent had undergone imprisonment in default of payment of the fine. That is clear from the provisions of the I. P. C.

On the second point, the learned Judge was of the opinion that under the provisions of s. 386 (3), Criminal P. C., the warrant issued by the Collector did not become a decree of a Civil Court for all purposes and that the provisions of s. 70, I. P. C., were not affected by s. 386 (3), Criminal P. C., which was added for the first time in 1923. He therefore held that the *darkhast* was time-barred and accordingly dismissed it.

This appeal is presented against that order, and it is contended on behalf of the Collector that s. 70, I. P. C., is controlled by the provisions of s. 386, sub-ss. (1) (b) and (3), Criminal P. C. Now it is clear that under s. 70 the fine, or any part thereof which may remain unpaid, may be levied at any time within six years after the passing of the sentence. This means that the fine could not be levied after the period of six years is over except in the circumstances mentioned in that section i. e., where the person is imprisoned for a longer period than six years. Under s. 386, Criminal P. C., as it stood before the amendment of 1923, whenever an offender was sentenced to pay a fine, the Court passing the sentence may issue a warrant for the levy of the amount by distress and sale of any movable property belonging to the offender. By the amendment the power to issue a warrant has been given to the Criminal Court so as to proceed against the movable as well as the immovable property of the defaulter. It is provided therein that the Court might issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender and it may also issue a warrant to the Collector authorizing him to realize the amount by execution according to civil process against the movable or immovable property, or both, of the defaulter. Then sub-s. (3) provides that where the Court issues a warrant to the Collector under sub-s. (1), cl. (b), such warrant shall be deemed to be a decree, and the Collector to be the decree-holder; within the meaning of the Civil P. C., and the nearest Civil Court by which any decree for a like amount could be executed shall, for the purposes of the said Code, be deemed to be the Court which passed the decree. It is lastly provided that all the provisions of that Code as to execution of decrees shall apply accordingly.

Relying on this new provision it is contended by the learned Govt. Pleader that all provisions relating to execution in the

civil procedure could be applied to this warrant, which is to be regarded as a decree of a Civil Court, and that s. 48, Civil P. C., would therefore apply to such a warrant. Under that section where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from certain dates mentioned therein. Now in the first place it is important to realise that s. 70, I. P. C., is substantive law as to the payment of fine while s. 386, Criminal P. C., relates to the procedure of the recovery. It is true that in certain matters such as the prevention of offences and maintenance of wives and children the Criminal P. C., provides for certain substantive rules, but it is quite clear that s. 386 deals only with procedure of levying the fine imposed under the substantive law of crimes. It is a general rule relating to the construction of statutes that in absence of any express provision, an adjective law cannot control the provisions of substantive law. It must be presumed that the Legislature had the provisions of s. 70, I. P. C., in mind at the time when this new provision was introduced for the first time in 1923, and if no change was made in that section, it must be for the reason that the warrant issued under s. 386 (1) (b), Criminal P. C., was to be deemed to be a decree for certain purposes only and not for all purposes. For the purpose of limitation therefore the substantive law contained in s. 70 was not to be affected.

The warrant which was to be deemed to be a decree was to be executed according to the mode laid down in the civil procedure. That is the only effect of sub-s. (3). But the learned Govt. Pleader says that under that sub-section all the provisions of that Code as to execution shall apply, and that would include the application of s. 48, Civil P. C. But that section only says that no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from certain dates. It does not prescribe any period of limitation for taking out execution. That is provided for in the Lim. Act, and, if it was the intention of the Legislature that the provisions of the Lim. Act, were to apply, it would have expressly stated that the warrant, which was deemed to be a decree, was to be governed for the purpose of execution by the Lim. Act. But the fact that it does

not say so, and the further fact that there has been no amendment or alteration in s. 70, I. P. C., mean that so far as limitation, i. e., the period during which the fine was to be realised was concerned, it did not contemplate any change. All that it intended to do was that over and above the movable property of the offender the immovable property could also be proceeded with by means of execution of the warrant which was to be treated for that purpose as if it were a decree, but the levy of the fine as against movable as well as immovable property was subject to the control of the provisions of s. 70, viz., that it was to be levied within the period of six years. We think therefore the lower Court was right in holding that the *darkhast* which was presented after the period of six years from the date of the sentence is barred under s. 70, I. P. C. The order of the lower Court is therefore confirmed and the appeal is dismissed with costs.

S.

Appeal dismissed.

PATNA HIGH COURT

Appeal from Appellate Decrees Nos. 927 and 928 of 1939

March 26, 1941

AGARWALA, J.

SASHINATH CHOUDHURY—PLAINTIFF—

APPELLANT

versus

UGRANARAIN CHAUDHURY AND OTHERS—RESPONDENTS

Execution sale—Nullity—Declaration as to, sought by party—Onus is upon him—Nature of proof required.

When a party seeks a declaration that an execution sale is a nullity it is necessary for him to prove the circumstances which would nullify the sale. It is not sufficient for him to show only that the sale was not held on the first day of the month of sales or on the actual date fixed in the sale proclamation but also to show that the monthly sales had come to an end before the sale was actually held.

A. from a decision of the Additional Subordinate Judge of Darbhanga, dated September 30, 1939.

Messrs. S. K. Mitra, P. B. Ganguly, M. N. Pal and Jotish Brahma, in S. A. No. 928, for the Appellants.

Messrs. L. K. Jha and Rameshwar Chaudhury, for the Respondents.

Judgment.—In these appeals by the two plaintiffs arising out of the same suit, the only question is whether an execution sale is void as it was not held on the date

fixed but on a subsequent date. The date fixed for the sale was March 8, 1937. The sale was actually held on the 15th of that month. The Court below has held that no suit lies and the proper remedy was by means of an application under O. XXI, r. 90. Furthermore, the Court has held that possibly March 15, was the date on which the monthly sales were being held in which view the sale in the present instance would have been entirely regular.

On behalf of the plaintiffs-appellant reference has been made to the decision of the Allahabad High Court in *Chedami Lal v. Amir Beg* (1) in which it was held that a sale before the time fixed for it was a nullity and not a mere irregularity. That case is not of much assistance as it refers to a different state of circumstances altogether. The next case relied on is the decision in *Motahar Hussain v. Mohammad Yakub* (2). In that case the date fixed for the sale was July 1, 1922. That day was a holiday and, therefore the sale could not be held on it. A title suit was instituted by the sisters of the judgment-debtor claiming the property sought to be sold and praying for stay of the execution sale. In that case an order was passed on July 4, directing that the execution case should be put up on July 7, along with the application for stay. On July 7, the application for stay was objected to and the property was put up for sale on the same date. It was held that the sale was a nullity. It is to be remarked that an application under r. 90, was made to set aside the sale and in exercise of its revisional jurisdiction the High Court set the sale aside on the ground that it has been held although no date had been fixed for it. That case does not appear to be followed in the case of *Gobardhan Behari Basu v. Sarat Chandra Bhattacharjee* (3). In *Jogendra Nath Bhattacharya v. Sheikh Nabi Newaj* (4) it was held that a Court could not treat an execution sale as a nullity on the ground that it was not held on the date fixed for it in the absence of an application by the judgment-debtor under O. XXI, r. 90. The order of the Court below declaring the sale to be a nullity was set aside. The two last mentioned Calcutta cases are based on a decision of the Privy Council in which it

was held in similar circumstances that the holding of the sale on a date not fixed for it but within the period during which the monthly sales take place could not be treated as a nullity. It is contended by the plaintiffs-appellant that they having shown that March 8, was fixed for the sale and that the sale was not held on that date but on the 15th the onus did not lie on them of showing that March 15, was a date on which monthly sales were continuing. In my opinion, when a party seeks a declaration that an execution sale is a nullity it is necessary for him to prove the circumstances which would nullify the sale. It is not sufficient for him to show only that the sale was not held on the 1st day of the month of sales or on the actual date fixed in the sale proclamation but also to show that the monthly sales had come to an end before the sale was actually held.

In these circumstances the appeals fail and must be dismissed with costs.

s.

Appeals dismissed.

RANGOON HIGH COURT

Letters Patent Appeals Nos. 1 and 2 of 1940
May 23, 1940

ROBERTS, C. J. AND BLAGDEN, J.
CO-OPERATIVE TOWN BANK,
HENZADA AND ANOTHER—APPELLANTS
versus

U KYAW THA—RESPONDENT

Arbitration—Award—Suit to set aside—Award under Burma Co-operative Societies Act, ignoring law of limitation—Suit to set aside such award, if maintainable.

Courts are always inclined where possible to support the validity of an award and will not lend themselves to a consideration of what a Court of Law would have done, when the parties have agreed on the one hand, or when there is a statutory obligation placed upon them on the other, to refer their disputes to a tribunal which is not a Court of Law. But, on the other hand, that tribunal must come to a decision which is a *quasi* judicial decision or must make an award which has been arrived at after proper consideration of the case. An arbitrator is bound to give effect to all legal defences including a defence under any statute of limitation.

Consequently where an award made by an arbitrator appointed under the Burma Co-operative Societies Act, has ignored the law of limitation, a suit to set aside the award is maintainable. 178 Ind. Cas. 674 (3), explained.

L. P. As. from the decree of Mackney, J. reported in 189 Ind. Cas. 181.

Mr. U Tun Aung, for the Appellants.

Mr. R. Clark, for the Respondent.

Roberts, C. J.—These two connected appeals are brought by the appellants in

(1) 7 A G 76; A W N 1835, 178.

(2) A I R 1925 Cal. 201; 84 Ind. Cas. 700; 40 C L J 311.

(3) 37 C W N 146; 144 Ind. Cas. 779; A I R 1933 Cal. 486; 6 R O 17.

(4) A I R 1938 Cal. 699; 178 Ind. Cas. 842; 67 C L J 96; 11 R O 417.

order to prevent the respondent from filing a suit to set aside the award of an arbitrator and to claim relief under s. 39, Specific Relief Act. What the plaintiff has done in each of the suits is to aver in his plaint that there is no error of law manifest on the face of the record which vitiates an award; some particulars are given and it is said that, although the arbitrator was bound to comply with the law of limitation, he ignored the principles of law and allowed the claim basing his award on a manifestly erroneous legal proposition. And the question is whether this suit is maintainable. Lord Haldane in *British Westinghouse Electric & Manufacturing Co., Ltd. v. Underground Electric Railways Co. of London Ltd.* (1), said:

"I am of opinion, that the doctrine in *Hodgkinson v. Fernie* (2), to the effect that where an error of law appears on the face of the award the error can be reviewed, is a well established part of the law of the land."

There has been some confusion in connection with arbitrations which are conducted under the Co-operative Societies Act, and I must regret to learn that it has arisen owing to a misunderstanding of the scope of the decision, to which I was a party, in *H. C. Dey v. Bengal Young Men's Co-operative Credit Society Ltd.* (3). That was a case in which a member of a co-operative society, being bound by the very terms of his membership and the statutes which deal with co-operative societies and their members to refer any dispute between him and the co-operative society which touched its business to the Registrar, was sued and it was held that a suit brought in the Courts was impliedly barred under s. 9, Civil P. C.; and all that that case is authority for, is the simple proposition that where a statute expressly says that persons of a certain class must go to arbitration or must refer their disputes in a particular way and not come to the Courts, they are obliged to take that step and the Courts will not, when they do not take that step, entertain an action by them.

But although that step must be taken in the first instance, the case cited is no authority for the surprising proposition that when an award of an arbitrator has been made, or the decision of the Registrar has been arrived at, an error manifest upon the face of the award or decision leaves the

(1) (1912) A C 673; 81 L J K B 1132; 107 LT 325; 56 S J 734.

(2) (1858) 3 C B. (N S) 189; 27 L J C P 66; 3 Jur. (N S) 818; 6 W R 181; 111 R R 614.

(3) 1939 Rang. 50; 178 Ind. Cas. 674; A I R 1938 Rang. 392; 11 R. Rang. 259 (F B).

party aggrieved with no remedy and ousts the jurisdiction of the Courts altogether. It has often been observed that Courts are always inclined where possible to support the validity of an award and will not lend themselves to a consideration of what a Court of Law would have done, when the parties have agreed on the one hand, or when there is a statutory obligation placed upon them on the other, to refer their disputes to a tribunal which is not a Court of Law. But, on the other hand, that tribunal must come to a decision which is a *quasi* judicial decision or must make an award which has been arrived at after proper consideration of the case. I ventured to give this morning as an illustration something which is far different from what is alleged in this case, namely, a case in which an arbitrator being lazy might declare that the issues of law and fact were so complicated that he was just as likely to fall into error as decide right, and thereupon might think he was justified in deciding the case upon the spin of a coin, which would be not his arbitrament but an arbitrament of chance. Other cases may be thought of in which parties may have a right to come to Court to set aside an award not so flagrant; one such would be, in my opinion, the delegation by an arbitrator to some other person never contemplated by the parties, of the duties which lay upon the arbitrator himself.

The question whether in this particular case the arbitrator was right or wrong does not arise at all; nor have we to decide now whether the law of limitation applied, or whether, if it did apply, the arbitrator refused entirely to consider it, or came to a wrong decision of law respecting it; nor have we to decide whether there was an error of law manifest on the face of the award, as the plaintiff pleads. All we have to decide is whether such a suit is maintainable; and if the plaintiff says that there is an error of law, he is clearly entitled to go to the Courts and try to establish that proposition; whether there was such conduct on the part of the arbitrator as would justify the Court interfering, is a matter for the Court before whom the suit is tried. I agree, with respect, with the decision of my learned brother Mackney and find but little to add to it. He has pointed out what are the limits within which the case in *H. C. Dey v. Bengal Young Men's Co-operative Credit Society Ltd.* (3), may be applied, and, by reference to the existing law on the subject, has shown that this is a case in which the aggrieved party is plainly entitled to challenge

the award of the arbitrator. I desire to add very little as to the vexed question of how far an arbitrator should consider the law of limitation: the matter is one which is largely open. This seems clear from the observations in the speech of Viscount Cave L. C., in *Board of Trade v. Cayzer Irvine & Co. Ltd.* (4). He said:

"I am far from wishing to throw doubt upon the view which has been commonly held, and which was affirmed by the decision of a Divisional Court in *In re Astley & Tyldesley Coal and Salt Co., and Tyldesley Coal Co.* (5), that an arbitrator acting under an ordinary submission to arbitration is bound to give effect to all legal defences, including a defence under any statute of limitation. A decision against that view might seriously prejudice the practice of referring disputes to arbitration; and, while I am unwilling to pronounce a final opinion upon a question which does not really arise in this case, I certainly say nothing which is adverse to the view to which I have referred."

For these reasons, we think that the learned Judge's decision in second appeal was undoubtedly right and, accordingly, these appeals must be dismissed with costs; Advocate's fee in each appeal six gold mohurs.

Blagden, J.—I agree.

D. Appeals dismissed.

(4) (1927) A C 610; 96 L J K B 872; 137 L T 419; 71 S J 560; 43 T L R 625; 28 L L L R 114; 17 Asp. M C 281.

(5) (1899) 68 L J Q B 252; 89 L T 116; 15 T L R 154.

ODUH CHIEF COURT

Criminal Revision Applications

Nos. 40, 41 and 42 of 1941.

April 23, 1941

GHULAM HASAN, J.

BISHAMBHAR NATH AND ANOTHER—

APPLICANTS

versus

EMPEROR—COMPLAINANT

—RESPONDENT

Penal Code (Act XLV of 1860), ss. 390, 391—Words 'for that end', in s. 390, meaning explained—Accused first beating complainant and then committing theft—If offence under s. 391 committed.

The words 'for that end' used in s. 390, I. P. C., clearly mean that the hurt caused by the offender must be with the express object of facilitating the committing of the theft, or must be caused while the offender is committing the theft or is carrying away or is attempting to carry away the property obtained by the theft. It does not mean that the assault or the hurt must be caused in the same transaction or in the same circumstances: 38 Ind. Cas. 730 (1) and 147 Ind. Cas. 99 (2), referred to. [p. 224, col. 1.]

Where it was established that the accused persons first belaboured the complainant and his servant and subsequently committed the theft of the cash:

Held, that in the circumstances it could not be said

that whatever injury was caused it was caused when the assault was made with the primary object of enabling the accused to the committing of the theft. The assault or the beating had no relation whatever to the commission of the theft, although the theft was committed at the same time or immediately afterwards. The accused were not, therefore, guilty of an offence under s. 394. [p. 224, col. 1.]

Or. R. Apps. of the order of the Additional Sessions Judge, Hardoi, dated March 5, 1941.

Dr. J. N. Misra, for the Applicants.

The Assistant Govt. Advocate, for the Crown.

Order.—These are three connected criminal revisions by Bishambhar, Hitta Singh, Bechey Lal and Roop Narain alias Filas, who were convicted by a Magistrate under s. 394 of the I. P. C., and sentenced to rigorous imprisonment for one year and a fine of Rs. 50 each, and whose convictions and sentences were upheld in appeal by the learned Additional Sessions Judge of Hardoi.

The prosecution case against the applicants briefly was that on November 11, 1940, the applicants went to a carnival show held at Hardoi, where they tried their luck what is known as dart shooting stall. This stall had a table placed in the middle which had different colours painted on it. There was a board which had similar colours just behind the table. Those who wanted to bet were given three darts with which to shoot at the board at the colour selected by them. The customers paid one anna at least for each set of darts. Filas applicant along with his companions started the betting at about 8 p. m. and this went on for about three hours. At about 11 p. m. Filas bet Rs. 2 on a white colour and threw all his three darts. These did not hit X a white colour at the board, but they hit a black colour. Filas demanded his money back claiming that he had bet on a black colour and had consequently won. The Manager in charge of the stall refused to accept his claim and asserted that he had really bet on a white colour. This led to an altercation between Filas on the one side and the Manager on the other. There was an exchange of hot words between the two persons with the result that all the four accused including Filas tore down the cloth surrounding the booth, entered the enclosure and began to belabour the Manager, Maqbul Husain P. W. No. 1 and his assistant Agha Khan, P. W. No. 2, with fists, kicks and lathis.

The accused overpowered the two persons, and removed the cash box and the money lying on the table. The cash box which contained Rs. 114 was turned down by Filas accused and its money was taken away by all the accused. There were a number of spectators at the spot, and it is somewhat remarkable that the carnival staff which had arrived at the spot on hearing the alarm was not able to arrest the accused with the help of the spectators, due, it is stated to the fact that the accused were armed with *lathis*. The accused disappeared with the booty. The two Police constables who were on duty at the carnival premises, arrived at the spot after the accused had run away. Maqbul Husain, the Manager received six injuries while his companion Agha Khan, received three. These injuries were simple. Maqbul Husain was advised to lodge a report at the Police Station by the constables, who remained at the spot to guard the scene of occurrence. They detained some persons who were eye-witnesses of the occurrence. Maqbul Husain made the first information report at the Police Station at 12-30 A. M. In this report the facts stated above are substantially repeated, but the important fact which needs special mention is that the report says that upon an altercation ensuing between the Manager and Filas accused on the question whether he had bet on a white colour or a black colour, Filas and his companions looted all the cash in the cash box and the other money which was lying on the table, and that when they were restrained from doing so then Filas and his companions began to beat Maqbul Husain and Agha Khan with their *lathis*.

The Sub-Inspector arrived at the scene of the occurrence soon after the report and examined the witnesses to the occurrence. He arrested all the accused except Filas who had absconded. The accused denied the charge and put up a counter story which need not now be discussed as it has been rejected by the learned Magistrate and the learned Additional Sessions Judge. The learned Magistrate upon a consideration of the entire prosecution evidence came to the conclusion that all the accused were present at the shooting stall as stated by the prosecution witnesses, and that they took part in the assault upon the Manager and his servant and that they further robbed them of the money. He held that all the accused were guilty of an offence under s. 394 of the I. P. C.

and sentenced each of them to undergo one year's rigorous imprisonment and pay a fine of Rs. 50. The learned Additional Sessions Judge dismissed the appeals of all the accused.

The learned Counsel on behalf of the applicants has argued that even accepting the evidence of the prosecution witnesses the necessary ingredients of an offence under s. 394 of the I. P. C. have not been established and a conviction under that section is not legally sustainable. Reference has been made in this connection to the definition of the word, 'robbery' in s. 390 of the I. P. C. The relevant portion of s. 390, I. P. C. lays down that

"Theft is 'robbery' if in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, *for that end*, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint."

It is argued before me that although the first information report did actually set out the case that when the Manager of the stall and his servant attempted to stop the accused from removing the cash, the latter pounced upon them and started belabouring them. This story is, however, contradicted by the prosecution evidence, which is to the effect that when an altercation ensued the accused started beating the Manager and his servant, and when they succeeded in overpowering them the accused removed the cash and ran away. In other words while, according to the first information report, the beating followed the theft of cash, according to the evidence of the prosecution the beating preceded the theft. I have looked into the evidence of Maqbul Husain, P. W. No. 1, Agha Khan, P. W. No. 2, Rahim Khan, P. W. No. 3 and Matroo P. W. No. 4, and it seems to me that there is force in the contention that Maqbul Husain and Agha Khan were first belaboured as a result of the quarrel and the money from the cash box on the table was removed subsequently, while accepting the prosecution evidence in agreement with the opinion of the Courts below I hold that it has been satisfactorily established that the accused persons first belaboured the Manager and his servant and subsequently committed the theft of the cash. The question for determination upon this finding, therefore, is whether the offence falls within the purview of s. 394 of the I. P. C. Can it be said in the present case that in order

to the committing of the theft of cash or in committing the theft of cash; or in carrying away or attempting to carry away property obtained by the theft, the accused, for that end, voluntarily caused or attempted to cause hurt? The words 'for that end' used in s. 390 of the I. P. C. in my opinion, clearly mean that the hurt caused by the offender must be with the express object of facilitating the committing of the theft, or must be caused while the offender is committing the theft or is carrying away or is attempting to carry away the property obtained by the theft. It does not mean that the assault or the hurt must be caused in the same transaction or in the same circumstances. A Bench of the Madras High Court in *Karuppa Gounden and Kothukara Thirumalai Gounden v. Emperor*, (18 Cr. L. J. p. 346) (1) has held that

"the words 'for that end' in s. 390 of the I. P. C. cannot be read as meaning 'in those circumstances'."

It was held by the Lahore High Court in *Karman v. Emperor*, (35 Cr. L. J., p. 297) (2) that

"before a person can be convicted of robbery the prosecution must prove that hurt was caused in order to the committing of the theft or in committing the theft or in carrying away or attempting to carry away the property obtained by the theft. The hurt contemplated must be a conscious and voluntary act on the part of the thief for the purpose of overpowering resistance on the part of the victim, quite separate and distinct from the act of theft itself."

In the present case it cannot be contended with any show of reason that whatever injury was caused it was caused when the assault was made upon the stall Manager and his servant with the primary object of enabling the accused to the committing of the theft. I am satisfied, therefore, that the assault or the beating had no relation whatever to the commission of the theft, although there is no doubt that the theft was committed at the same time or immediately afterwards. I am of opinion that the accused are not guilty of an offence under s. 394 of the I. P. C. I therefore set aside their convictions on the charge of robbery. The result of this finding is that all the accused will, however, be liable under s. 323 of the I. P. C. I therefore, alter the conviction of the applicants under s. 394 of the I. P. C. to one under s. 323 of the

I. P. C., and reduce their sentence to three months' rigorous imprisonment under the latter section.

As regards the question whether the applicants are guilty of an offence under s. 379 of the I. P. C., the learned Counsel on behalf of the applicants has argued that the only person liable under this section is Filas, who according to the evidence of Kartar Singh P. W. No. 6, in the main case and of Matroo, P. W. No. 4, in the cognate case, alone removed the cash. This argument ignores the other prosecution evidence on the record which is unanimous upon the point that all the four accused removed the cash. This evidence was accepted by both the Courts below, and it is not open to the applicants to urge in revision that in preference to that evidence the evidence of these two witnesses, namely, Matroo, P. W. No. 4 and Kartar Singh, P. W. No. 6, should be given greater weight. I therefore hold that all the applicants committed the theft of the cash and are consequently liable under s. 379 of the I. P. C. In my opinion the ends of justice will be sufficiently met if Bishambhar, Hittā Singh and Beche Lal accused, are sentenced to rigorous imprisonment for six months each and a fine of Rs. 50 each under s. 379 of the I. P. C. Roop Narain alias Filas, who appears to have taken the leading part, deserved no reduction in sentence. He is accordingly sentenced to one year's rigorous imprisonment and a fine of Rs. 50 under s. 379 of the I. P. C. In default of payment of fine, each accused will undergo another six weeks rigorous imprisonment.

The result is that I allow the revision applications in part, set aside the convictions and sentences of the applicants under s. 394 of the I. P. C., convict them under s. 323 of the I. P. C. and s. 379 of the I. P. C. and sentence them as stated above. The sentences of rigorous imprisonment under ss. 323, I. P. C. and 379, I. P. C. shall run concurrently.

s. Application accepted.

(1) 18 Cr. L. J. 346; 38 Ind. Cas. 730; A. I. R. 1918 Mad. 821.

(2) 35 Cr. L. J. 297; 147 Ind. Cas. 99; A. I. R. 1933 Lah. 407; (1933) Cr. Cas. 648; 6 R. L. 333; 35 P. L. R. 186.

FEDERAL COURT

Case No. II of 1941

April 17, 1941

GWYER, C. J., VARADACHARIAR

AND BEAUMONT, JJ.

A. L. S. P. P. L. SUBRAHMANYAM

CHETTIAR—APPELLANT—APPLICANT

versus

MUTTUSWAMI GOUNDAN—RESPONDENT

—OPPOSITE PARTY

Government of India Act, 1935, (25 & 26 Geo. V, Ch. 42), s. 208 (b)—Leave to appeal to Privy Council—Grounds—General importance of cases—Decision dealing with decrees whose number is limited—No leave can be granted.

The Federal Court will not be disposed to grant leave to appeal to the Privy Council save in cases of real importance, cases which are likely to affect a large number of interests thereafter or cases in which difficult questions of law are involved. Where a decision deals with appeals whose number is limited and cannot be added to, no leave can be granted to appeal against it.

App. for leave to appeal to His Majesty in Council under s. 208 (b) of the Govt. of India Act, 1935.

Mr. Mohammad Taqi, Senior Advocate, Federal Court, (Raghbir Singh with him), instructed by B. Banerji, Agent, for the Applicant.

The Opposite Party was not represented.

Gwyer, C. J.—This is an application for leave to appeal under s. 208 (b) of the Constitution Act. The case was one in which the appellant had sued the respondent for a sum due under a promissory note and had obtained a decree. After the decree had been obtained, the Mad. Agri. Relief Act became law. That Act gave agriculturist debtors the right to have their debts drastically scaled down, and s. 19 empowered the Courts to apply its provisions to a decree for the payment of a debt obtained against an agriculturist before the commencement of the Act. This Court, when the case came before it, heard arguments on a variety of questions, including the question whether the Act conflicted with the Negotiable Instruments Act, which is an Act within the exclusive competence of the Central Legislature; but a majority of the Court were of opinion that questions relating to the Negotiable Instruments Act were irrelevant for the purposes of the case, and held that the original debt had merged in the decree and that the scaling down was of a liability evidenced by a decree and not by a negotiable instrument at all.

Counsel for the appellant has cited to us a number of decisions in which the Judicial

Committee itself has indicated the principles on which it will act when advising His Majesty to grant or withhold special leave to appeal to His Majesty in Council. This Court will not attempt to formulate in advance any code of rules which it will take for its guidance in granting or withholding leave to appeal to the Judicial Committee, and will deal with each case on its merits as it comes before it. But it will not be disposed to grant leave to appeal save in cases of real importance, cases which are likely to affect a large number of interests hereafter or cases in which difficult questions of law are involved.

In the present case the decision of the Court dealt only with the scaling down of decrees obtained before the Mad. Act came into force. The number of such decrees must necessarily be limited, and there can be no addition to their number. In a case which was before us in May 1939 and in which we had refused leave, the applicant afterwards petitioned the Judicial Committee for special leave to appeal. The Judicial Committee, in refusing special leave, emphasized the fact that the decision of this Court was concerned with the construction of a section which would have no application in the future: *Hori Ram Singh v. King-Emperor* (1). It appears to the Court that this is a sufficient reason for refusing leave in the present case. It should be added that the amount in dispute in the case appears on the figures which were given to us not to have exceeded Rs. 3,000 or Rs. 4,000 at the outside.

The majority of the Court declined to enter into any of the other questions which were raised at the Bar and reserved their opinion upon all of them. There is therefore nothing to prevent these matters being raised and determined at any future time in an appropriate case.

The application is dismissed.

Application dismissed.

(1) 67 I A 122; 187 Ind. Cas. 1; 1940 O W N 244; (1940) A L J 205; 1940 O L R 190; 41 Cr. L J 413; 6 B R 452; 12 R P C 135; A I R 1940 P C 54; 51 L W 407; (1940) M W N 360; 21 P L T 327; 44 C W N 401; (1940) 1 M L J 706; 71 C L J 307; (1940) Kar. P C 132 (Sup.); 42 P L R 392; 42 Bom. L R 619; (1940) 3 F L J P C 12; 1 L R (1940) Lah. 443 (P.C.).

* See 192 Ind. Cas. 225.—[Ed.]

PATNA HIGH COURT

Appeal from Appellate Order No. 290 of 1940

April 17, 1941

DHAVLE, J.

BIKRAMA LAL—APPELLANT

versus

MAHARAJ BAHADUR RAM RAN

BIJAYA PRASAD SINGH—

RESPONDENT

Bihar Tenancy Act (VIII of 1885), s. 177-A (b)—Exemptions in s. 177-A, if confined to rent executions—House of judgment-debtor when exempt from sale under s. 177-A (b), stated—It must belong to raiyat and occupied by him as such.

Section 177-A, Bihar Ten. Act, gives exemptions which are not, in terms at any rate, confined to rent execution.

Under the Proviso to s. 177-A (b) the houses of *raiya*ts and under-*raiya*ts are saved from execution sales when the execution relates to decrees for arrears of rent due in respect of lands other than the sites of the houses. But execution against the site of a house on a decree for arrears of rent due in respect of other land would obviously be a money execution as distinguished for a rent execution, and it is precisely in such cases that sub-s. (b) of s. 177-A exempts houses from sale. It cannot be said that s. 177-A does not apply to money executions, and that therefore, the house of the judgment-debtor can be sold. But what cl. (b) of s. 177-A saves is a house belonging to the *raiya*t and occupied by him as such.

A. from an order of the Additional Subordinate Judge, Arrah, dated May 31, 1940.

Mr. A. B. N. Sinha, for the Appellant.

Mr. B. P. Sinha, for the Respondent.

Judgment.—This is an appeal by the judgment-debtor. In execution of a decree for arrears of rent the decree-holder respondent proposed to proceed in execution against the appellant's house in Buxar. This was refused by the executing Court on the ground that what the landlord was taking out was a rent execution and that under s. 177-A (b) of the Bihar Ten. Act the house of the judgment-debtor cannot be sold in execution. The landlord appealed, and the lower Appellate Court considered that the decree-holder was entitled to take out a money execution and that this was a money execution, with the result (so the Court took it) that the matter was not governed by s. 177-A (b), and that therefore, the house could be sold.

It has been contended on behalf of the judgment-debtor-appellant that the lower Appellate Court fell into an error as regards the application of s. 177-A. A rent execution strictly so-called is execution against the holding following upon a rent decree strictly so-called, and cases are not unknown where holders of rent decrees

strictly so-called fail to bring about a rent execution by inadvertence, for example, in leaving out one of the judgment-debtors during the execution proceedings. Section 177-A gives exemption which are not, in terms at any rate confined to rent executions. It says that a decree for arrears of rent obtained against a *raiya*t or an under-*raiya*t shall not be executed (a) by the detention in the civil prison of the judgment-debtor, or (b) by the sale of houses and other buildings belonging to the *raiya*t or under tenant and occupied by him; and to cl. (b) an exception is furnished by the proviso that any such house or building... may be sold in execution of decrees for arrears of rent due in respect of the site of such house or building. It follows from this proviso that the houses of *raiya*ts and under-*raiya*ts are saved from execution sales when the execution relates to decrees for arrears of rent due in respect of lands other than the sites of the houses. But execution against the site of a house on a decree for arrears of rent due in respect of other land would obviously be a money execution as distinguished from a rent execution, and it is precisely in such cases that sub-s. (b) of s. 177-A exempt houses from sale. It is impossible to agree with the learned Subordinate Judge that s. 177-A does not apply to money executions and that therefore, the house of the judgment-debtor can be sold. The Assistant Govt. Advocate who appears for the respondent-decree-holder has not contested the point made by Mr. Sinha on behalf of the appellant, so far as the exemption of the *raiya*t's house in execution of a decree for arrears of rent due in respect of land other than the site of the house is concerned. He has, however, contended on the authority of *Bajinath Ram Marwari v. Rai Kumar Sinha* (1), that what cl. (b) of s. 177-A saves is a house belonging to the *raiya*t and occupied by him as such. In the present case, as I understand, the house that the decree-holder desires to bring to sale in execution is situated in Buxar, while the land which was the subject-matter of the rent suit brought by the respondent lies a couple of miles away. The appellant is or was working about the Courts in Buxar, and it is a serious question in the case whether or not the house that the decree-holder desires to proceed against is occupied by the appellant as a *raiya*t. Mr. Sinha has urged that this point should not be now

investigated because it has so far been taken for granted that the house is occupied by the appellant as a *raiyat*. Of this, however, I can see no trace in the papers before me. The result is that while the view of the lower Appellate Court that the house can be sold because s. 177-A does not apply to money executions must be overruled, I am not in a position to dispose of the appeal finally, for the decision must turn on a finding on the question whether or not the house is occupied by the appellant as a *raiyat*. On this point the lower Appellate Court will remand the case to the trial Court for taking evidence and recording a finding. The lower Appellate Court will then dispose of the appeal in accordance with the law. The costs of the hearing in this Court, including a hearing fee of one gold *mohur*, will abide the event, and there will be no order regarding the costs already incurred in the lower Appellate Court.

s. Order accordingly.

OUDH CHIEF COURT

Full Bench

Testamentary Case No. 1 of 1940

March 28, 1941

YORKE, BENNETT AND AGARWAL, JJ.

B. LAKHSHMI SHANKER AND ANOTHER
versus

In the matter of the estate of the late
KUNWAR RAMSHANKER

Succession Act (XXXIX of 1925), ss. 229, 230, 231, 232, 234—Validity of will disputed by executor—He must accept or renounce executorship before validity of will is adjudicated upon, on application of another person—Word "prove", meaning of—Construction of sections of Act—Reference to English Law.

It is implied by ss. 229 and 230 of the Succession Act that an executor who disputes the validity of a will appointing him as such must accept or renounce his executorship under s. 229 before the validity of the will is adjudicated upon on an application for letters of administration by another person. *Motibai v. Karandas Narayandas* (1), 60 Ind. Cas. 974 (2), 94 Ind. Cas. 73 (3) and *Bewsher v. Williams Ball* (4), referred to. [p. 227, col. 2.]

The word "prove" in ss. 231, 232 and 233 of the Succession Act, is used primarily in its ordinary meaning. It is not used in the sense of taking of letters of administration or of taking of probate in the case of an executor. [p. 230, col. 1.]

The Courts should not read into the sections of the Succession Act a construction which is at variance with the ordinary meaning of the words used merely because there is a distinction in English Law between a citation to propound and prove a will and a citation to take probate.

Judgment.—The question referred to the Full Bench is:

Is it implied by ss. 229 and 230 of the Indian Succession Act that an executor who disputes the validity of a will appointing him as such must accept or renounce his executorship under s. 229 before the validity of the will is adjudicated upon on an application for letters of administration by another person?

The question arises out of an application for letters of administration in respect of a will executed by Kunwar Ram Shankar on October 8, 1935. Kunwar Ram Shankar died on March 8, 1937. By this will he appointed his elder son, B. Baijnath Shankar, sole executor. The applicants for letters of administration are his second son, B. Lakshmi Shankar, and the minor son of B. Baijnath Shankar under the guardianship of B. Lakshmi Shankar. A caveat was entered by B. Baijnath Shankar who alleged that the will of October 8, 1935, was revoked by a later will of August 16, 1936.

The applicant prayed that citation might be issued to B. Baijnath Shankar under s. 229 of the Indian Succession Act calling upon him to accept or renounce his executorship. He objected to the issue of such a citation on the ground that it would be premature, representing that it should not issue until the applicants have established that the will of October 8, 1935, is the last will and testament of Kunwar Ram Shankar.

The referring order shows that different views have been taken by Bombay High Court on the one hand and the Calcutta and Madras High Courts on the other, but the facts in the cases cited are not parallel to those in the present case.

In *Motibai v. Karandas Narayandas*, (I. L. R. 19 Bom. 123) (1), the Bombay High Court considered the effect of the reply of an executrix to a citation that she did not renounce the executorship and held that this did not amount to an acceptance. They did not consider whether the citation had issued prematurely.

In *Sarojini Dasi v. Rajlakshmi Dasi*, (I. L. R. 47 Cal. 838) (2), the Calcutta High Court held that letters of administration should not have been granted without issue of a special citation to the executor to accept or renounce his executorship, but added the *obiter dictum* that the executor was not bound to accept or renounce his executorship unless and until the validity of the will was established.

In the Madras case of *Venkataramier v. A. Govindarayaiah*, (A. I. R. 1926 Madras,

(1) 19 B 123.

(2) 47 C 838; 60 Ind. Cas. 974.

605), (3) the Madras High Court no doubt held that an executor may challenge the genuineness of a will and at the same time claim probate if it is proved to be genuine, but this was a case where a will was propounded by one executor and disputed by another. Section 229 did not apply to the facts of that case. Under s. 224 where several executors are appointed probate may be granted to them all simultaneously or at different times. It is open therefore for an executor to apply for probate after probate has been already granted to another executor. There is no provision for the issue of a citation to an executor on an application by another executor. Section 229 only comes into operation on an application for letters of administration.

It appears therefore that there is no Indian authority directly on the point under consideration.

Sections 231, 232 and 234 show in what cases and to whom letters of administration may be granted.

Section 231, provides that if an executor renounces or fails to accept an executorship within the time allowed the will may be proved and letters of administration may be granted to the person who would be entitled to administration in case of intestacy.

Section 232, provides that where no executor has been appointed, where an executor is legally incapable or refuses to act or has died, or where an executor dies after proving the will but before administering the estate a universal or a residuary legatee may be admitted to prove the will and letters of administration with the will annexed may be granted to him.

Section 234, provides that where there is no executor and no residuary legatee or he declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or another legatee having a beneficial interest or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly. Admittedly, it would be under this section that letters of administration would be granted in the present case, if at all.

It will be observed that in all these cases it appears to be implied that the conditions which justify a grant of letters of administration must be satisfied before anyone but an executor "may be admitted to prove the will." In section 231 one of the conditions

is that the executor renounces or fails to accept the executorship; in section 232 one of the conditions is that the executor refuses to act; and s. 234, includes cases where the executor declines to act. No distinction would appear to be intended for this purpose between absolute renunciation of an executorship, failure to accept an executorship and refusal to act. No one is given any *locus standi* any power to take any steps to prove the will unless and until one of the conditions laid down in these sections is satisfied, and it certainly seems to be implied that the person who proves the will shall be entitled to letters of administration. On a consideration only of the terms of these sections we should therefore be disposed to answer the question which has been referred in the affirmative.

This conclusion might also be supported by the argument that there is nothing in the Act which indicates that any other procedure is contemplated. If the other view be adopted it would be necessary for the Court first of all to determine on the application of a non-executor whether the will was proved, and then to ascertain before proceeding further whether the condition which alone would justify a grant of letters of administration to a non-executor was satisfied. We find it very difficult to believe that such a procedure was intended.

Learned Counsel for B. Baijnath Shankar has referred to the provisions of English Law, but we have not been able to find any English authority which is directly on the point.

The Indian Succession Act provides only for the issue of a general citation under s. 283 (1) (c) calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate of letters of administration, a special citation under s. 229 calling upon the executor to accept or renounce his executorship, and a citation under s. 235 calling on the next-of-kin to accept or refuse letters of administration where the question of a grant of letters of administration to a legatee other than a universal or residuary legatee is under consideration. In English Law a citation may issue calling upon anyone concerned, including an executor to propound a will.

In the case of *Bewsher v. Williams, Ball* reported in 164 English Reports, 1195 (4), the testatrix died on April 19, 1859, leaving one will dated March 15, 1863, wherein she appointed the Rev J. Bewsher residuary legatee.

(3) A I R 1926 Mad. 605; 94 Ind. Cas. 73; 23 L W 462; (1926) M W N 323.

(4) 164 E R 1195.

gatee; and another dated March 15, 1857, wherein she appointed Williams executor. Mr. Bewsher propounded the will of 1853 and cited the executor and parties interested in the will of 1857 to propound and prove it if they thought fit to do so. A legatee named Mrs. Ball propounded it. Its validity was contested by Bewsher on the ground of the deceased's insanity, but the will was held valid. The Court was moved to grant letters of administration with the will annexed to Mrs. Ball and objection was taken to this on the ground that the executor and residuary legatee named in the will had not been cited. It was argued that they had been cited to propound and prove the will and had failed to do so and therefore under s. 16 of the Probate Act, 1868, the executor not having appeared on a citation to take probate, the right to the executorship had ceased. It was said by the Court (Sir Cresswell):—

"I do not think that in the citation you speak of the term 'prove' is used according to the meaning or spirit of this section. There is a difference between being cited to propound and prove a will, and being cited to take probate. I cannot make the grant to Mrs. Ball until Mr. Williams has renounced or has been cited to take probate."

Learned Counsel has argued on the basis of this authority that the words, "the will be proved" in s. 231, and "to prove the will" in ss. 232 and 234 do not mean the establishment of the validity of the will by evidence, but rather the subsequent taking of letters of administration, this corresponding to the taking of probate in the case of an executor.

We have considered whether this construction can be placed on the word "prove" in the sections of the Indian Succession Act under consideration. It would no doubt be possible to hold that it means "take probate" in cases where probate is granted to an executor, but it could only mean "take letters of administration" by analogy. We very much doubt whether this was the intention, particularly as the language of ss. 231, 232 and 234 does not in our opinion, support this construction. It would be necessary to hold that where one of these sections says that a legatee may be admitted to prove the will and letters of administration may be granted to him, the meaning is that he may be allowed to take letters of administration and letters of administration be granted him, which is tautologous.

It has been suggested that the words "may be admitted to prove the will" in s. 232 cannot mean "be allowed to establish

the will by evidence," but must have some other meaning, because the contingency referred to in cl. (c) of that section is that "the executor dies after having proved the will" and therefore no further proof is necessary. But the words have also to be considered in connection with the two previous contingencies referred to in cls. (a) and (b), in which it would certainly be necessary for the legatee to establish the validity of the will by evidence. No doubt where the will has already been proved by the executor it would not be necessary for the legatee to do more than produce the "probate" (as defined in the Act). It may also be that the words "to prove the will" mean more than merely to establish the validity of the will by evidence; they may mean "to do whatever may be necessary to obtain probate or letters of administration," as the case may be; but that would in most cases include establishing the will by evidence. So that it does not appear possible to hold that wherever these words are used they refer to a stage subsequent to the establishing of the validity of the will by evidence.

It has also been suggested that it would be anomalous if an executor who has disputed a will propounded by another executor is allowed subsequently to claim probate jointly with him, and yet be barred from asserting his right as executor under a will which has been successfully propounded by a legatee. But it is to be noted that in the former case the successful executor is not displaced by the unsuccessful executor; he merely becomes a joint executor with him, while if an executor who has disputed a will propounded by a legatee is allowed subsequently to obtain probate he ousts altogether the legatee, although the latter has won his case and the executor has lost it.

We were referred to some observations of the Calcutta High Court in *Brojo Lal Banerjee v. Saharajubala Debi*, (I. L. R. 51 Cal. 745) (5), which are pertinent in considering whether the provisions of the Indian Succession Act should be interpreted in the light of English Law. In this case the question under consideration was whether an executor who had renounced his executorship could thereafter apply for probate. The Calcutta High Court observed (at p. 758*)

"A person intermeddling with the estate of the deceased."
(5) 51 C 745; 84 Ind. Cas. 154; A I R 1924 Cal. 864.

ceased is no doubt liable to account for his dealings with the estate. It appears that in England the Court may compel such an executor to take out probate so as to represent the estate. It is unnecessary for us to consider in the present case whether the law is the same in this country as no one applied for compelling the appellant to take out probate. We may, however, observe that the practice in England has grown up under different conditions and is regulated by different statutes, and the practice there need not necessarily be followed by us here.

Further on he said (at p. 759*) :—

It has been contended before us on the analogy of English cases decided under 20 & 21 Victoria Ch. 77 s. 79, that it is open to the executor to retract his renunciation so long as no fresh grant of administration has been made to some other person."

"It seems to have been held in England that the old practice was not abrogated by the statute and the Court is not itself concluded, but may permit a retraction of an executor's renunciation in a fit case..... It is fruitless to endeavour to interpret the rules relating to procedure under the Indian Act by reference to what has been decided with regard to another statute in England on different considerations even if the language of the two statutes had been the same."

We do not consider that we should read into the sections of the Indian Succession Act under consideration a construction which is at variance with the ordinary meaning of the words used merely because there is a distinction in English Law between a citation to propound and prove a will and a citation to take probate. We can find no such distinction in the Indian Act. We hold that the word "prove" in ss. 231, 232 and 234 of that Act is used primarily in its ordinary meaning and we accordingly answer the question which has been referred to us in the affirmative.

s.

Order accordingly.

*Page of 51 C.—[Ed.]

LAHORE HIGH COURT Full Bench

First Appeal No. 224 of 1940.

February 4, 1941

TEK CHAND, SKEMP AND

DIN MOHAMMAD, JJ.

DIWAN CHAND—PLAINTIFF—APPELLANT
versus

DHANI RAM AND OTHERS—DEFENDANTS
—RESPONDENTS

Court Fees Act (VII of 1870), Sch. II, Art. 17, Sch. I, Art. 1—Suit falling under Art. 17—Court-fees payable on plaint and memo. of appeal arising out of such suit—Joint property—Partition suit—Plaintiff claiming to be in actual or constructive possession—Appeal arising from such suit—Plaintiff found not to be in possession—Court-fee payable—Sch. I, Art. 1, applicability of.

The wording of Art. 17, Court Fees Act, which are plain and explicit should be given their ordinary meaning. They show clearly and indubitably that when a suit falls under any one of the clauses of Art. 17, Sch. II, the plaint as well as the memorandum of appeal

arising from such a suit, is chargeable with a fixed court-fee of ten rupees only, irrespective of whether the subject-matter in appeal is or is not capable of being estimated in money value. Therefore in appeal arising from a suit for partition of alleged joint properties, of which the plaintiff claimed to be in actual or constructive possession, a court-fee of Rs. 10 is payable on the memorandum of appeal, even though the trial Court had found the plaintiff not to be in possession of some or all such properties. 170 Ind. Cas. 959 (7), dissented from. R. F. A. No. 279 of 1938, explained. R. F. A. No. 145 of 1940, approved. R. F. A. No. 128 of 1939, **Overruled.** [p. 234, col. 1.]

[Case-law relied on.]

Schedule I, Art. 1, is the residuary article and applies only when there is no other provision in the Act, governing the case under consideration. [p. 231, col. 2.]

Mr. Yashpal Gandhi, for the Appellant.

Mr. S. M. Sikri, for the Advocate-General,
for the Financial Commissioners.

Tek Chand, J.—The question, referred to the Full Bench, relates to the amount of court-fee payable on the memorandum of appeal presented in this Court against the preliminary decree in a suit for partition of alleged joint properties. The suit was brought by the plaintiff-appellant on the allegation, that he and the defendants were joint owners of four houses, described as *alif*, *be*, *jim* and *dal* in the plaint, that he was in actual possession of the entire house *dal* and of a part of house *be* and in constructive possession as a co-parcener or co-owner of the remaining two houses; that it was not possible for the parties to continue to hold these properties jointly, and, therefore, he sued for separation of his one-fourth share by metes and bounds and delivery of possession of the portion allotted to him. The suit was valued for purposes of jurisdiction at Rs. 5,200 and a court-fee of ten rupees was paid on the plaint under Art. 17 (vi) of Sch. II, Court Fees Act.

The defendants pleaded that the plaintiff had no concern with houses *alif* and *jim* which were owned exclusively by them and that house *be* belonged to a third party, of a part of which the plaintiff had taken forcible possession. They admitted that house *dal* was ancestral of the parties and stated that they had no objection to the plaintiff's one-fourth share in it being separated, provided he paid his share of the money, which had been paid by one of the defendants to redeem a mortgage created by the common ancestor. In the written statement the defendants had raised the objection that the plaint was insufficiently stamped, the proper fee payable being *ad valorem* on one-fourth of the market value of the four houses in dispute. This objection, however was subsequently withdrawn in view of the Full Bench decision of this Court

in *Asa Ram v. Jagan Nath* (1), in which it had been laid down that a suit for partition of alleged joint properties of which the plaintiff claimed to be in actual or constructive possession was governed by Art. 17 (vi) of Sch. II and a fixed court-fee of ten rupees was payable on the plaint.

The parties went to trial on the merits and the Subordinate Judge found that the plaintiff was not a co-owner of houses *alif* and *jim* which belonged exclusively to the defendants, that house *be* belonged to a third party but the plaintiff was in possession of a part of it, that house *dal* only was jointly owned by the parties and that the plaintiff was entitled to have his one-fourth share in it separated without any payment. He accordingly passed a preliminary decree for partition of the plaintiff's share in house *dal* and appointed a local Commissioner to suggest the mode of partition. The suit relating to the other three houses was dismissed. From this decree the plaintiff appealed to this Court praying that a preliminary decree for partition of houses *alif*, *be* and *jim* also be passed. He valued the appeal for purposes of jurisdiction at Rs. 5,200 and stamped the memorandum with a court-fee of Rs. 10 only. On an objection by the Stamp Reporter that the proper court-fee payable on appeal was *ad valorem* on one-fourth of the market value of houses *alif*, *be* and *jim*, the case was placed before the Taxing Officer. He was inclined to hold that having regard to the nature of the suit from which the appeal arose the memorandum was sufficiently stamped, but in view of conflicting rulings which had been given from time to time, he referred the matter to the Taxing Judge. The learned Taxing Judge was of the opinion that this difficult and frequently arising question should be authoritatively settled by a larger Bench. Accordingly this Bench has been constituted to hear the reference. Notice of this reference was sent to the Financial Commissioners and we have had the advantage of hearing Mr. Sikri on their behalf.

As stated above, the plaintiff alleged in the plaint that he and the defendants jointly owned all the four houses in dispute. He also averred that he was in actual possession of some of them and in constructive possession of the others. On these allegations he asked for partition of his share. It has been held in *Asa Ram v. Jagan Nath* (1), and this view is now accepted

by most of the High Courts, that the real relief asked in such a suit is the change in the mode of enjoyment of the properties from joint possession to separate possession and that it is not possible to estimate its value in money. It has, accordingly, been held that such a suit falls under cl. (vi) of Art. 17. Mr. Sikri admitted the correctness of this decision so far as the court-fee payable on the plaint in a suit of this kind is concerned. He contended, however, that the position in an appeal arising from such a suit was materially different. In appeal (he urged) we have to look to the subject-matter of the dispute in appeal and if this can be estimated in money value, *ad valorem* court-fee would be payable on it under Art. 1 of Sch. I of the Act, even though the suit, as originally brought, fell within some other article. He pointed out that the suit has since been tried and the Court has found that the plaintiff had neither title in, nor possession of the properties to which the appeal related. He maintained, therefore, that the relief asked in appeal was not merely for change in the mode of enjoyment of these properties, but to establish the appellant's title and possession of his alleged share in them, that this relief was not incapable of being estimated in money and therefore Art. 17 (vi) did not apply.

The contention for the appellant, on the other hand, is that on the plain wording of Art. 17 of Sch. II, court-fee payable on a memorandum of appeal arising from suits falling under any of the clauses of that article is Rs. 10, and that for this purpose what has to be looked at is not the finding of the trial Court but the fact that the appeal is from a decree passed in such a suit. The question for determination, therefore, is whether Art. 17 (vi), Sch. II, or Art. 1, Sch. I governs the case. Schedule I of the Act prescribes *ad valorem* fee at certain specified rates on the documents described in the various articles of that schedule. Article 1, (omitting words which are not necessary for our present purposes) reads as follows:

"Plaint or memorandum of appeal, not otherwise provided for in this Act, ... presented to any Civil Court, except those mentioned in s. 3."

It will be seen that this is the residuary article and applies only when there is no other provision in the Act, governing the case under consideration. If therefore the memorandum of appeal in a particular case falls within Art. 17 of Sch. II, Art. 1 of Sch. I will obviously not apply. Article 17 of Sch. II prescribes a fixed fee of Rs. 10 on

(1) 15 L. 53; 150 Ind. Cas. 994; A I R 1934 Lah. 563; 36 P L R 48; 7 R L 46 (F. B.).

"plaint or memorandum of appeal in each of the following suits :

- (i) * * * *
- (ii) * * * *
- (iii) * * * *
- (iv) * * * *
- (v) * * * *

(vi) every other suit where it is not possible to estimate at a money value the subject-matter in dispute, and which is not otherwise provided for by this Act."

It is clear from the opening part of Art. 17 that in suits falling within any of the six clauses mentioned in this article, the court-fee leviable on plaints as also on the memoranda of appeal arising from such suits is the same. In interpreting this article the Full Bench held in *Asa Ram v. Jagan Nath* (1) that for the purpose of determining the amount of court-fee payable on a plaint in a suit for partition of property, alleged to be joint of the plaintiff and defendants and of which the plaintiff alleges to be in actual or constructive possession, the allegations in the plaint are to be considered and no regard is to be had of the defendants' denial of the plaintiff's alleged title or possession. The provision in the article relating to memoranda of appeal is identical and, therefore, if the appeal arises from such a suit the fee payable thereon is the same and it is immaterial what the findings of the Courts below are and whether the appeal is presented by the plaintiff or the defendant. This view has been taken in a number of cases decided in other Courts. The latest case in Calcutta is *Jyoti Prasad Singha Deo v. Jogendra Ram Ray* (2) where it was held that a suit for partition of joint property is, with reference to the matter of court-fees, governed by Sch. II, Art. 17 (vi), Court Fees Act, and in appeals against decrees from partition suits, the proper court-fees payable are those specified in that article. At p. 191* it was observed :

"The present case seems to be clearly governed by the plain language of Sch. II, Art. 17, cl. (vi) and the moment it is shown, as has been shown in this case, that the memorandum of appeal arises, in the suit where it is not possible to estimate the money-value of the subject-matter in dispute and which is not otherwise provided for by the Act, the plaintiff can claim that the court-fees payable are those provided for in that article. So far as this Court is concerned, it has always been recognized that in appeals against decrees from partition suits, the proper court-fees payable are Rs. 10 and this has been raised to Rs. 15 by the amendment of 1922. It does not matter whether the ground of attack is with reference to the allotment of specific portions of immovable or movable property or the ground of attack is the question of costs.

(2) 56 C 188; 116 Ind. Cas. 383; A I R 1928 Cal. 878; 32 C W N 1105; Ind. Rul. (1929) Cal. 479.

*Page of 56 C.—[Ed.]

Suppose in a partition suit a sum of money has been awarded to one of the parties as owelty money and the party against whom the payment of the owelty money has been directed is aggrieved by such a decree, then he is entitled to prefer an appeal to this Court; and it can hardly be said that in such a case, although the matter arises in a partition suit, the court-fees leviable would be the amount of the owelty money which forms the subject-matter of the complaint in the appeal."

This decision is in accord with an earlier ruling of Sir Richard Garth, C. J., given as far back as 1882 in *Kirty Churn Mitter v. Annath Nath De* (3) where it was held that the stamp fee payable on appeals to the High Court in suits asking for partition, the separation of a share, and for *khas* possession of that share after separation is that leviable under Art. 17 (vi), Sch. II, Court Fees Act. More recently, the Lucknow Chief Court had to consider this question in *Parmeshur Din v. Har Gobind Prasad* (4). In that case, the plaintiff had brought a suit for partition of certain alleged joint property, alleging that he was a co-sharer in joint possession. The lower Court, finding that the property was not owned by the parties jointly but was the self-acquired and separate property of the defendant, had dismissed the suit. The plaintiff appealed paying court-fee under Art. 17 (vi). On objection that *ad valorem* court-fee on the value of the plaintiff's alleged share in the property was payable, it was held by a Division Bench that as the suit from which the appeal arose was for partition of joint properties which the plaintiff alleged were in his actual or constructive possession, the court-fee payable on the plaint was that under Art. 17 (vi) and as the case remained the same in appeal, so far as its nature was concerned "the fee payable was the same and not *ad valorem* on the value of the share sought to be partitioned."

In *Abdul Rahman v. A. B. Crisp*, 126 Ind. Cas. 645 (5) a Division Bench of the Rangoon High Court held that in appeals arising from suits falling under Art. 17 the principle of valuing the appeal must be the same as the principle used in valuing the original plaint for purposes of court-fee. In Allahabad, the leading case on the subject is *Jai Pratap Narain v. Rabi Pratap Narain* (6). There, the plaintiff alleging himself to be

(3) 8 C 757; 11 C L R 95.

(4) 14 Luck 346; 179 Ind. Cas. 59; A I R 1939 Oudh 90; 1938 O W N 1265; 1938 O L R 552; 11 R O 152.

(5) 126 Ind. Cas. 645; A I R 1930 Rang. 164; Ind. Rul. (1930) Rang. 325.

(6) 52 A 756; 124 Ind. Cas. 708; A I R 1930 All. 443; (1930) A L J 984; Ind. Rul. (1930) All. 56.

in joint possession of certain property as a member of a joint Hindu family, sued for partition and separate possession of his share paying a court-fee of Rs. 10 on the plaint. The trial Court found that the parties were not members of a joint family and that the plaintiff was not in possession and dismissed the suit. On the question of insufficiency of court-fee being raised, it was held that the memorandum of appeal was properly stamped. It was, however, observed, following the practice of that Court with regard to appeals as well as plaints that, if subsequently the Court found that the appellant had not established his joint possession, it could require the plaintiff to make good the deficiency on obtaining an adjudication in his favour on the merits.

The only case of Court outside the Punjab cited by Mr. Sikri is *Nand Kishore v. Achambit Kumar* (7), decided by James, J. as Taxing Judge. In that case the learned Judge pointed out that it has not ordinarily been the practice of the Patna High Court to depend exclusively on the averment in the plaint for the ascertainment of what should be the proper court-fee payable, which should be determined on an appreciation of what the plaintiff really sought. Applying this rule of practice to the particular case before him, the learned Judge held that where in a partition suit the lower Court had found that the plaintiff was out of possession of some properties in dispute and the suit had been dismissed *qua* these properties, the memorandum of appeal should bear *ad valorem* court-fee on the value of such properties. This, of course, follows logically from the view which the Patna High Court has all along taken with regard to valuation of partition suits. This view, however, was not accepted by this Court in *Asa Ram v. Jagan Nath* (1), which has authoritatively settled the law on that point so far as this province is concerned.

The learned Counsel cited a number of decisions of the Punjab Chief Court and this Court, but it is unnecessary to refer to the cases decided prior to 1934, when the Full Bench set at rest the conflict relating to valuation of suits for partition of alleged joint properties of which the plaintiff claimed to be in actual or constructive possession. I shall therefore refer to the more recent cases to which our attention was drawn by the

learned Counsel. In *Sukha Nand v. Shiv Devi* (8), the particular question now before us was not considered. It was conceded by Counsel who appeared for the appellant in that case that if the lower Court had decided the question of plaintiff's title and possession after recording evidence *ad valorem* court-fee would be payable on the memorandum of appeal but as in that particular case the Court had shut out all evidence relating to possession, it was claimed that a court-fee of Rs. 10 only was payable. This contention was obviously untenable and was rejected.

In R. F. A. No. 279 of 1938 (unreported) the High Court had found as a fact that the plaintiff had not established his ownership of the properties in dispute and therefore it was held that the claim for partition was not maintainable. The learned Judges also gave it as an additional reason for dismissing the appeal that *ad valorem* court-fee had not been paid on the memorandum of appeal. There was no discussion of the point nor was a considered decision given. The matter has been before the learned Taxing Judge in a number of cases. R. F. A. No. 128 of 1939 is a case on all fours with the case before us. It was held there that the memorandum of appeal must bear *ad valorem* court-fee on the properties, of which the appellant seeks partition but of which the trial Court had found that he was not entitled to partition. In that case the question was not considered in the light of the wording of Art. 17 (vi), to which no reference is made in the judgment. In subsequent cases this case was distinguished: see e. g., R. F. A. No. 145 of 1940, and a court-fee of Rs. 10 was held to be sufficient under Art. 17 (vi).

The above review of the case-law shows that the consensus of authority is in favour of the view put forward by the appellant. Mr. Sikri conceded that this was so. He however referred to a large number of cases decided in this and other Courts, in which a court-fee of Rs. 10 had been held payable, under cl. (vi) of Art. 17, on memoranda of appeal arising from suits for recovery of money, or possession of immovable property, or other reliefs where the appeal related to a matter which it was not possible to estimate in money value. From this, the learned Counsel asked us to infer that the word "suit" in the opening part of Art. 17 should be taken to have been used by the Legislature in its wider significance, as meaning not merely proceedings in the trial Court but also those

(8) A I R 1935 Lah. 14; 157 Ind. Cas. 787.

(7) 16 Pat. 491; 170 Ind. Cas. 959; A I R 1937 Pat. 514; 18 L T 438; 3 B R 780; 10 R P 156 (2).

in the Court of Appeal. He maintained that if this were so, that part of the Article which prescribes the court-fee payable on memoranda of appeal must be taken to be limited to those cases only in which it is not possible to estimate in money value the subject-matter in appeal, irrespective of the nature of the suit from which the appeal arose. In my opinion, this does not necessarily follow from the rulings cited by the learned Counsel and, in any case, I do not see why the wording of Art. 17 which are plain and explicit should not be given their ordinary meaning. They show clearly and indubitably that when a suit falls under any one of the clauses of Art. 17, Sch. II, the plaint as well as the memorandum of appeal arising from such a suit, is chargeable with a fixed court-fee of ten rupees only, irrespective of whether the subject-matter in appeal is or is not capable of being estimated in money value. My answer to the reference therefore is that in appeal arising from a suit for partition of alleged joint properties, of which the plaintiff claimed to be in actual or constructive possession, a court-fee of Rs. 10 is payable on the memorandum of appeal, even though the trial Court had found the plaintiff not to be in possession of some or all such properties.

Din Mohammad, J.—I agree with the judgment of my learned brother, Tek Chand, J.

Skemp, J.—I agree. Reference to my notes of the argument in R. F. A. No. 128 of 1939 shows that Art. 17 ((vi)) was mentioned, but it was only mentioned. The Taxing Officer in his note on the present case says that the argument based on the opening words of Art. 17 (vi) is a new argument; and it certainly is as far as I am concerned. R. F. A. No. 128 of 1939 must be taken as having been wrongly decided.

D. Answer accordingly.

PATNA HIGH COURT

Appeal from Appellate Order No. 217 of 1940

April 2, 1941

CHATTERJI, J.

Thakur HARKISHORE PRASAD
SINHA—APPELLANT

versus

Babu LOKNATH PRASAD
DHANDHANIA—RESPONDENTS

Execution — Ghatwali tenure — Judgment-debtor
ghatwal of ghatwali governed by Bengal Regulation
XXIX of 1814 — Surplus profits are available for

satisfaction of decree—What would be surplus profits is to be determined by Court executing decree—Consideration in determining surplus profits—Allowance to be paid to judgment-debtor for his maintenance and other expenses—Tenure under attachment of government for their dues—Receiver appointed — Commissioner fixing allowances to be paid to ghatwal—Government dues satisfied — Surplus profits under attachment by Civil Court—Allowances fixed by Commissioner are not binding on Civil Court.

Where the judgment-debtor is a *ghatwal* in the Santal Parganas whose *ghatwali* tenure is governed by Ben. Regulation XXIX of 1814 and is inalienable the surplus profits of such *ghatwali* tenure which may be left "after the payment of Govt. revenue, the wages of the *chowkidars* employed by the *ghatwal* and other like charges" are available for the satisfaction of decrees obtained against the *ghatwal*. 76 Ind. Cas. 8 (1) and *Rajkeswar Deo v. Bunshidhar Marwari* (2), referred to.

The question of what would be the surplus profits available to the decree-holders of the *ghatwal* must be determined by the Court executing the decree. Whatever is left to the *ghatwal* out of the income of his tenure "after the payment of Govt. revenue, the wages of the *chowkidars* employed by the *ghatwal* and other like charges" is his personal property and as such liable to be seized and appropriated by the decree-holder. The *ghatwal's* maintenance allowance and other personal expenses do not come within the expression "other like charges". The Court, however, executing the decree must make provision for the maintenance and other necessary expenses of the *ghatwal* judgment-debtor. His maintenance allowance cannot be regarded as salary to be fixed by the executive authorities. Where the surplus profits are under attachment by the Civil Court, it is that Court which has to determine the amount of surplus profits available to the decree-holder and for that purpose to fix the allowance to be paid to the judgment-debtor for his maintenance and other expenses. The Receiver in possession of the judgment-debtor's estate is under the control and supervision of the executing Court and must, therefore, prepare the budget with the sanction of that Court. 180 Ind. Cas. 8 (3), referred to.

Where the profits of the *ghatwali* tenure were attached by the Govt. for the recovery of their dues and a Receiver was appointed for the satisfaction of those dues and after the satisfaction of the Govt. dues the surplus profits are under attachment by the Civil Court, the allowances to be paid to the *ghatwal* fixed by the Commissioner of the Division at that time are not subsequently binding on the Civil Court, which can reduce the allowances according to the circumstances.

A. from an order of the District Judge of Santal Parganas, dated March 4, 1940.

Mr. Sambhu B. Prasad, for the Appellant.

Messrs. S. C. Mazumdar and K. P. Sukul, for the Respondent.

Judgment.—This appeal arises out of an execution proceeding. The judgment-debtor is a *ghatwal* in the Santal Parganas whose *ghatwali* tenure is governed by Ben. Regulation XXIX of 1814 and is inalienable. It is well settled that the surplus profits of such *ghatwali* tenure which may be left "after the payment of Govt.

revenue, the wages of the *chowkidars* employed by the *ghatwal* and other like charges" are available for the satisfaction of decrees obtained against the *ghatwal*—see *Tikait Damodar Narain Singh v. Ganga Ram* (1) and *Rajkeswar Deo v. Banshidhar Marwari* (2). In the present execution case (No. 9 of 1934) which was started in the Court of the Subordinate Judge at Deoghar, the decree-holder prayed for attachment of the surplus profits of the judgment-debtor's *ghatwali* tenure. In the meantime in December 1934 the surplus profits were attached by the Govt. for satisfaction of certain Govt. demands other than revenue, and the tenure was placed in charge of a Receiver. In the said execution case (No. 9 of 1934) the Court ordered that the surplus profits would be made available for the satisfaction of the decree after realisation of the Govt. dues. The Govt. dues were satisfied in December 1937. Thereafter the surplus profits were attached by the executing Court in the said execution case (No. 9 of 1934).

When the surplus profits were under attachment by the Govt. the Commissioner of the Bhagalpur Division fixed certain allowances to be paid to the *ghatwal*, namely Rs. 300 monthly for his maintenance, Rs. 300 annually for *puja* expenses and Rs. 200 annually for house repairs.

In 1939 the rentals of all estates and tenures in the Santal Parganas were reduced by 25 per cent. under Reg. I of 1939 for the purpose of giving relief to the tenants. In consequence of this reduction, the Receiver framed a fresh budget in which he reduced the monthly maintenance allowance of the judgment-debtor *ghatwal* from Rs. 300 to Rs. 250 and the annual allowance for *puja* expenses from Rs. 300 to Rs. 250 and for house repairs from Rs. 200 to Rs. 100. When the budget was submitted to the Subordinate Judge for sanction, the judgment-debtor took objection to the reduction in his aforesaid allowances. The learned Subordinate Judge overruled his objections and with certain modifications with regard to other matters he sanctioned the budget as prepared by the Receiver. The judgment-debtor appealed against his order to the District Judge of Dumka, who dismissed the appeal. The judgment-debtor has now come up to this Court in appeal.

In this appeal the objection is pressed

(1) 3 Pat. 339; 76 Ind. Cas. 8; (1923) Pat. 372; 5 P L T 34; A I R 1924 Pat. 269.

(2) 23 C 873.

only with regard to the monthly maintenance allowance of the judgment-debtor. The contention raised is that the services to be rendered by a *ghatwal* being of a public nature, his maintenance allowance should be fixed by the executive authorities, and in the present case the allowance having already been fixed by the Commissioner of the Bhagalpur Division, it could not be altered by the Civil Court without the Commissioner's sanction. In the first place, this objection does not appear to have been taken in either of the Courts below. In the next place, the question of what would be the surplus profits available to the decree-holders of the *ghatwal* must be determined by the Court executing the decree. Whatever is left to the *ghatwal* out of the income of his tenure "after the payment of Govt. revenue, the wages of the *chowkidars* employed by the *ghatwal* and other like charges" is his personal property and as such liable to be seized and appropriated by the decree-holder. The *ghatwal's* maintenance allowance and other personal expenses do not come within the expression "other like charges". The Court however, executing the decree must make provision for the maintenance and other necessary expenses of the *ghatwal* judgment-debtor. His maintenance allowance cannot be regarded as salary to be fixed by the executive authorities. The surplus profits in the present case being now under attachment by the Civil Court, it is that Court which has to determine the amount of surplus profits available to the decree-holder and for that purpose to fix the allowance to be paid to the judgment-debtor for his maintenance and other expenses. The Receiver now in possession of the judgment-debtor's estate is under the control and supervision of the executing Court and must, therefore, prepare the budget with the sanction of that Court.

A similar question was raised and decided by this Court in *Bansidhar Shroff v. Thakur Ashutosh Ghatwal* (3). In that case it was held that when an executing Court is a Civil Court, that Court has to appoint a Receiver to make an estimate of the collections and expenditure of the estate which he has to submit to the Court for approval and it is the duty of the Court to pass final orders settling the budget.

In the last place, the Commissioner of the Bhagalpur Division fixed the allowances apparently because the surplus profits

(3) A I R 1939 Pat. 242; 180 Ind. Cas. 8; 5 B R 344; 11 R P 436.

were attached by the Govt. and the Receiver was appointed for satisfaction of the Govt. dues. The Govt. dues have been satisfied and now the surplus profits are under attachment by the Civil Court. The allowances which were fixed by the Commissioner at that time cannot now be binding on the Civil Court.

It is also faintly contended that the reduction of the maintenance is not justified. But, as the learned District Judge has rightly pointed out, "this is purely a matter of cutting the coat according to the cloth". Sitting in second appeal, I find it difficult to hold that the learned Courts below were wrong in reducing the amount of the maintenance allowance.

The appeal is dismissed with costs.

s. *Appeal dismissed.*

OUDH CHIEF COURT

Criminal Appeal No. 515 of 1940

April 22, 1941

BENNETT AND GHULAM HASAN, JJ.

KING-EMPEROR—COMPLAINANT

—APPELLANT

versus

BHAGI *alias* BHAGIRATH AND OTHERS

—ACCUSED—RESPONDENTS

Criminal Procedure Code (Act V of 1898), s. 162—Report made to Police by accused after first information report—Accused not questioned by Police—Admissibility of—Evidence Act (I of 1872), ss. 8, 25—Self-exculpatory report made by accused to Police—Admissibility.

Where after the first information report of a murder has been made and recorded, the accused makes a report to the Police by voluntarily going to the Police Station, by way of defence and possibly by way of reply to the report already made and no question is put to him by the Police and his report is not recorded as a report but only noted in the general diary, such a report is not a statement made in the course of investigation within the meaning of s. 162, Criminal P. C., and is not inadmissible. Such report is admissible under s. 8, Evi. Act.

A report made to the Police by the accused which is of a self-exculpatory nature, should not be excluded under s. 25, Evi. Act, as being of a nature of confession made to the Police Officer. 180 Ind. Cas. 1 (1), relied on.

Cr. A. against the order of the Sessions Judge, Fyzabad, dated June 11, 1940.

The Govt. Advocate, for the Crown.

Mr. Ali Hasan, for Accused Nos. 2 and 3 Pandohi and Musai.

Judgment.—This is a Govt. appeal under s. 417 of the Criminal P. C. against the acquittal on May 30, 1940, by

Mr. Ali Hammad, Sessions Judge of Fyzabad, of three men named Bhagi *alias* Bhagirath, Pandohi, and Musai on a charge under s. 302 of the I. P. C.

On the admission of the appeal it was ordered by this Court that non-bailable warrants for the arrest of the accused should be issued under s. 427 of the Criminal P. C. Pandohi and Musai have been arrested, but it has not been found possible to arrest Bhagi. The hearing of this appeal has been delayed on this account. As the District Magistrate has reported that there is little prospect of his arrest in the near future the appeal has been heard against Pandohi and Musai. Pandohi is Bhagi's brother, and Musai is his cousin.

The accused were charged with having committed murder by intentionally causing the death of a man named Binda with spears and *lathis* on the night between November 18 and 19, 1939.

The first report in the case was made at the Musafirkhana Police Station in the Sultampur District at 10 A. M. on November 19, by Sat Narain, brother of the deceased Binda. Sat Narain and his brother lived in Keshopur, some six miles from this Police Station.

Sat Narain's story was that the previous night while he, his brother Binda and his nephew Tung Nath were warming themselves by a fire Bhagi came and asked Binda to accompany him to keep watch over a *jarhan* crop. Binda was reluctant to go, but on being pressed agreed. Some time after midnight Sat Narain heard a cry of "thief" from the direction of the houses of Bhagi and Musai, which, as the sketch plan Ex. 17 shows, are situated to the south of Sat Narain's house. He and others went there and found Bhagi striking a man with a *lathi*, while Pandohi and Musai were kicking him. There were saying that they had caught a man who had been lifting the thatch with a view to enter the house. Sat Narain and the others who had come up asked Bhagi to stop beating him. Bhagi did not stop immediately and when he did the man was found to be dead. It was then discovered that he was Binda.

The report then proceeded to indicate a motive for the crime. During Bhagi's absence from the village his wife had contracted an illicit connection with Binda, and on the death of Harkhu, Bhagi's brother his widow also contracted illicit connection with Binda. Nevertheless on his return home Bhagi effected friendship with Binda

and so the latter had confidence in him. The report suggested that Bhagi had asked Binda the previous night to assist him in watching the *jarhan* crop merely as a pretext to get him away from his house, and had then killed him in the field where there were stains of blood. The sketch plan Ex. 17 it may be mentioned, shows the *jarhan* field as some distance to the north of Binda's house. There were also traces of blood, the report continued, from the field up to Bhagi's house. Consequently Sat Narain suspected that Bhagi, Pandohi and Musai had killed Binda and then had raised a false cry of thief.

The report also showed that Sat Narain had been unable to procure men to bring the body with him and added that his relative Ranchhor and the *chaukidar* would bring it after they had collected men. The evidence of Ranchhor (P. W. No. 8), who is Binda's son-in-law, and the *chaukidar*, Debi Din, (P. W. No. 4) shows that they brought Binda's body to the Police Station and that they were accompanied there by Bhagi and Musai. An entry (Ex. 13) in the Police Station general diary shows that Bhagi and Musai helped to carry the corpse there.

A report (Ex. 12) was made at the Police Station at 10.45 A. M. by Musai, the contents of which were corroborated by Bhagi. The report was recorded in the general diary by the Head Constable Mahadeo Singh (P. W. No. 15) who had recorded Sat Narain's report. Musai's report was to the effect that he and Bhagi had found a thief lying on the ground under a *nim* tree behind his house and that Bhagi had struck him with a *lathi*. It was then found that the thief had died and the corpse was identified as that of Binda. Musai could not say who had killed Binda. He had called the *chaukidar* and come with him to the Police Station to make this report against Binda that he had tried to break into the house to commit theft. He had come at the request of Bhagi and also of one Sukhnandan Brahman—"otherwise we will be implicated."

It is noted after this entry in the general diary that as a report had already been made against Bhagi and Musai under s. 302 of the I. P. C. they were taken into custody and their persons examined and searched. A fresh abrasion was found on Bhagi's right elbow and what appeared to be blood-stains were found at two places on Musai's shirt. On their admission in jail two abrasions were noted on Bhagi's elbow

and one abrasion on the middle of Musai's left thigh.

The Head Constable explained that he did not record Musai's report on the prescribed form as in his opinion it did not amount to a report either of a cognisable or of a non-cognisable offence.

We may mention here that the Sessions Judge held that this report was inadmissible. For reasons which we shall give later we cannot concur in this view.

The *post mortem* examination was performed by the Civil Surgeon of Sultanpur on the afternoon of November 20. His report and evidence show that Binda was about 35 years of age. No less than 43 injuries were found on his body. There were a large number of incised wounds, incised punctured wounds, and abrasions, mostly on the legs, thighs, arms and head. There were ruptures of the left lung, peritoneum, spleen, and left kidney. Death had probably occurred from shock and hæmorrhage, and the injuries having apparently been caused a little time before death.

No Sub-Inspector was present at the Police Station when the report was made and the Head Constable sent a constable (not a witness) to the village. The Second Officer, M. Abdul Majid, arrived at the Police Station within an hour. He prepared an inquest report and sent the corpse to the mortuary at Sultanpur. He took possession of Musai's shirt. He then went to the village which he reached about 4 P. M. He prepared the plan Ex. 17. He searched the joint house of Bhagi and Pandohi and recovered therefrom a *lathi* and a *kurta*. He also took a *lathi* from Musai's house. He examined the *jarhan* field where it was suspected that Binda had been murdered and found what he thought was blood stained earth some of which he took into his possession. He did not find any blood-stains near the houses of the accused. There was no sign of anyone having tried to lift the thatch of Musai's house. He was unable to find Pandohi and he deputed constables to arrest him.

The Station Officer, M. Bashir Ahmad, took over charge of the investigation on the morning of November 20, M. Abdul Majid remaining in the village with him until the 22nd. Pandohi appears to have been arrested shortly after the arrival of the Station Officer. Pandohi gave some information to the Station Officer and various articles were discovered with his assistance. There were:—

(1) a blanket Ex. V from a heap of straw at the back of his house :

(2) a spear-head Ex. XI from a sugarcane field :

(3) a *chadar* Ex. III and *angocha* Ex. VI which were found buried in the mud of a tank.

Of these *Mst. Dropadi* (P. W. No. 6) wife of Binda, identified the *chadar* as that of her husband, and a witness named Nand Kumar (P. W. No. 16) identified the spear-head as that of Bhagi. There were eleven small holes in the *chadar* which appeared to have been caused by a sharp-pointed instrument.

These and some other articles, thirteen altogether were sent to the Chemical Examiner who found blood-stains on the eight of them by the spectroscopic test and blood-stains on the remaining five by the benzidine test, though not by the spectroscopic method. They were all sent on to the Imperial Serologist who found five articles stained with human blood; the blood-stains on four others were disintegrated and he could not determine their origin; no blood was detected on the remaining four.

Of the five articles found to be stained with human blood two were articles of clothing taken from the deceased. The third was earth taken from the alleged scene of the murder; the fourth was the *kurta* taken from the house of Bhagi and Pandohi, and the fifth was the blanket Ex. V which had been taken from the same house. The prosecution suggestion is that the body had been carried in this blanket from the *jarhan* field to the place where it was found.

The Chemical Examiner had detected blood-stains on Musai's shirt, but the Imperial Serologist could not determine their origin as the blood-stains were disintegrated.

As regards the motive for the crime we have the evidence of Binda's brother Sat Narain and Bhagi's wife *Mst. Mendia*. From the evidence of Sat Narain it appears that on Harkhu's death his widow *Mst. Chhutka* went to live with her brother-in-law Bhagi. Sat Narain stated in the Magistrate's Court that there was no *dharrua* form of marriage between the two, while in the Sessions Court he stated that there was, but this discrepancy on a minor point is not sufficient to discredit his evidence about their relations. It would appear, therefore, that Bhagi had strong reason for enmity with

Binda in that Binda had deprived him not only of his own wife, *Mst. Mendia*, but also had intrigued with the woman *Mst. Chhutka* whom he had taken to live with him after his brother's death. *Mst. Mendia* herself fully supported the prosecution allegation of illicit intercourse between her and Binda, stating that she was turned out of her husband's house because of this illicit connection which resulted in her pregnancy. She admitted that she had given out at the time that a man named Sukh-nandan was responsible for her pregnancy, but said that she had done this at the instance of Binda. We have no doubt that this evidence establishes the existence of a motive.

The Sessions Judge was of opinion that the prosecution had failed to establish any motive. He said that there was no legal evidence to bring home the connection of the deceased with *Mst. Chhutka*. We have, however, the definite evidence of Sat Narain on this point. He was not cross-examined about it, and there is no apparent reason why his evidence should be rejected.

To support the allegation that Bhagi came and took Binda away on the night of November 18, on the pretext that he required his assistance in watching the field, there is the evidence of Sat Narain, Binda's brother, and Tung Nath his nephew, as well as that of *Mst. Dropadi*, Binda's wife. The Sessions Judge disbelieved this story because he did not think that it was proved that Bhagi had any interest in this *jarhan* field. The accused Bhagi and Pandohi denied, that they had joint cultivation in it with Binda, and it was admitted that the *patta* was in the names only of Binda and his brother Sat Narain. Moreover the prosecution witness Jiawan admitted that the *jarhan* crop had been harvested by Sat Narain.

On the other hand there is evidence that Bhagi had an interest in the crop. It was not stated by Sat Narain in the first information report that they had a joint interest in this field, but in his evidence he said that all three accused had at various times kept watch over the crop there. He was not cross-examined particularly with regard to their interest in the crop. The crop had been harvested and had been stacked in the field, and if Bhagi had an interest in it, it was not unnatural that he should have suggested keeping watch over it. The Sessions Judge thought that there was a contradiction in Sat Narain's evidence about Bhagi going on previous oc-

casions with Binda to the field. Bhagi is said to have returned to his village from abroad the previous Kunwar and "according to his own showing he used to come every two or three years". The Sessions Judge thought it impossible to reconcile this with Sat Narain's statement that Bhagi used to go in previous years with Binda to keep watch over the field. We do not think that there is contradiction because it is quite possible that Bhagi did go with Binda and others whenever he re-visited his village. We can find no good reason to reject the story that Binda was taken away by Bhagi on the night of November 18, on this pretext. According to the evidence of Sat Narain Bhagi asked this witness to lend him a *tatti* of straw and the witness allowed him to take his *tatti*. Bhagi promised to supply Binda with a blanket. A *tatti* of straw was found in the *jarhan* field, and the prosecution suggestion is that the blanket supplied by Bhagi was the one recovered from his house (Ex. V).

The Civil Surgeon deposed that death probably occurred two hours after the last meal and on the evidence that the deceased took his last meal about 7 or 7-30 p. m. the Sessions Judge concluded that the murder was committed about 10 or 10-30 p. m. It might, we think, have been committed rather earlier than this, as Bhagi is said by Sat Narain to have come for Binda about two and half hours after night-fall, and the evidence of *Mst. Dropadi* shows that he came not long after Binda had taken his evening meal.

It is not possible to fix the time of the discovery of the corpse with any certainty, but it was no doubt in the early hours of the following morning. Sat Narain gives the time as about 1-30 A. M. but it may have been later. As no blood-stains were found between the *jarhan* field and the place where the corpse was lying it would appear that bleeding had had ceased before it was removed from the field. The statement by Sat Narain in his report that there were blood-stains between the two places was not confirmed by the investigating officers.

The Sessions Judge entirely rejected the story that the corpse was found behind the houses of the accused, together with the story that they themselves had drawn attention to it by raising a cry of thief and beating and kicking it. He said that the story of the body being brought to this place was "*ab initio* improbable and ap-

pears to be a pure fiction". He was of opinion that the absence of blood-stains proved that it was false. If, he said, the murder was committed between 10 and 10-30 p. m. there must have been some effusion of blood when the body was brought to the *kulia*, (lane between the house of the accused) since blood remains fluid for some time after death and rarely begins to coagulate until four hours and sometime not until twelve hours after death.

We do not think that there is any force in this argument because it may very well be that the body was not brought to the *kulia* until more than four hours after death. Moreover if it was carried there in a blanket it is quite possible that no blood-stains would have been found either in the *kulia* or at the place where the body was alleged to have been dragged. We are quite unable, therefore, to agree with the Sessions Judge that the absence of blood-stains at these places throws any doubt on the prosecution evidence that the body was found behind the houses of the accused.

A criticism of the Sessions Judge about this blanket which we are entirely unable to follow is based on the fact that "it contains no small holes made with some sharp pointed instrument." The Sessions Judge remarked that

"if the blanket was really in the use of the deceased at the time he was murdered then it must have contained such holes as are said to have been noticed in other articles of the deceased."

No doubt this would be so if the deceased kept the blanket round his body while he was being attacked, but in our opinion it is extremely unlikely that he would have done so. In any event as we do not know the exact circumstances of the attack upon him it cannot be said that he was using the blanket it must have been pierced by the sharp-pointed instrument or instruments which caused some of his injuries.

Before considering other criticisms of the Sessions Judge we may first refer briefly to some other prosecution evidence. The witness Sahtu deposed that some time prior to the alarm of thief he had seen the three accused together with a fourth man, whom he did not recognise, carrying a bundle and coming from the north towards the south. He accosted them and recognised the voice of Bhagi replying. He also recognised all three accused from their appearance.

Another witness, Sarju Din, (P. W. No. 3)

stated that as he was going to his *jarhan* field that night he saw the three accused going in the same direction. He went with them part of the way.

The *chaukidar*, Debi Din, (P. W. No. 4) deposed that Musai had come to him two *gharis* before sunrise and told him that his house had been broken into by four thieves, that he and his cousins Bhagi and Pandohi had seized one of them and the others had escaped. He had beaten the man who had been caught. He asked Debi Din to accompany him to the Police Station to make a report. Debi Din went back with him and found the dead body of Binda lying in front of Bhagi's door.

Finally there is the evidence of a witness named Durga Din (P. W. No. 11) who stated that he went to Bhagi's house on hearing that thieves had been there and questioned Bhagi. Bhagi had replied:

"*To kuch hona tha woh ho gaya*" which may be translated:—

"What had to be, has taken place".

The Sessions Judge rightly, we think, rejected these stories of Sahtu and Sarju Din. Sahtu admitted that he did not tell Sat Narain what he had seen when the body of Binda was found. Jiawan said that Sahtu told him and as Jiawan is his nephew it is possible that he did. But Sahtu admitted that Bhagi had got him outcasted so that in any case we should not be inclined to rely on this witness, and to some extent our distrust of him must be extended to his nephew Jiawan.

The Sessions Judge held that Sarju Din was unreliable because he "did not disclose his knowledge to the Police prior to November 20, 1939, when his statement was recorded by the second officer." This appears to be incorrect as the second officer deposed that he did not record the statement of anyone on the 20th. It was the Station Officer (as his evidence shows) who recorded the statement of this witness. But this does not affect the criticism and we agree with the Sessions Judge that the evidence of Sarju Din is of no value.

The Sessions Judge rejected the evidence of Debi Din and Durga Din about the finding of the body near Bhagi's house in view of the absence of blood-stains there. We do not consider that this is a sufficient reason, and apart from this no reason has been shown why these witnesses should not be believed. Debi Din was not cross-examined at all about Musai coming to him and asking him to accompany him to the Police Station to make a report, and Durga

Din was not cross-examined about his talk with Bhagi. We do not, however, lay much stress on Durga Din's story.

On the other hand we regard the evidence of the *chaukidar*, Debi Din, as very important since it very definitely corroborates the prosecution story as to the manner in which the body was found, and even if the report made by Musai at the Police Station is rejected as inadmissible we should still have to consider whether that story could be reconciled with the innocence of the accused. Debi Din was only cross-examined very briefly about the presence of Sat Narain and Sahtu at the place where the body was lying when he went there on the information given to him by Musai. He lives in another village about a mile from Keshopur and no reason whatever has been suggested for his making a false statement.

The Sessions Judge also thought that the medical evidence disproved the prosecution story, as it indicated that the injuries appeared to have been caused a little before death. He thought that if the victim had been beaten after death injuries caused by such beating would have been noticed by the Civil Surgeon. But the question whether any of the injuries might have been caused after death was not put to the Civil Surgeon whose attention was no doubt directed primarily to the more important injuries which must have been caused before death. He simply made a statement about the injuries generally that they appeared to have been caused a little before death. We do not consider that this is sufficient to disprove the prosecution story. It was a dark night and the accused were only pretending to beat and kick the man, that is, if the prosecution story is believed.

The Sessions Judge has also said that it is not at all likely that

"the accused would have been prepared to incur the risk of detection and to get themselves involved in further troubles by removing the dead body close to their house even if they had committed the crime. In any case, they would have created some sort of evidence to indicate that the house of Musai was visited by burglars".

With regard to this criticism we would first of all observe that it is always unsafe to argue that a criminal would not have acted in any particular manner after committing a murder. Individuals vary in their mentality and the mental condition of a man who has just committed a murder is rarely quite normal. Apart from this we do not think there is anything improbable in what the accused are alleged to have done.

If we accept the prosecution evidence that Bhagi had good reason to dislike Binda, and if we also accept the prosecution evidence that he came and took Binda away that night, he must have known that suspicion would naturally fasten on him, and he and his relatives may well have thought that the best solution would be to allege an attempted burglary and an attack by them on one of the burglars, his identity at the time being unknown to them. No doubt they would have made this defence stronger by creating some sort of evidence to show that there had been an attempt to break into the house, but their failure to take this precaution is just what might be expected in the circumstances. It is rare to find that a man who has just committed murder thinks of everything that common sense might suggest to a person who can reflect on the position calmly and dispassionately.

We come now to the all important question whether the report, Ex. 12, made by Musai at the Police Station is admissible. All that the Sessions Judge said to justify his rejection of it was :—

"Exhibit 12 cannot be said to be the first information report recorded under s. 154 or 155 of the Criminal P. C. It was not even signed by Musai. It is therefore inadmissible in evidence under s. 8 of the Evi. Act. The fact that Musai went to the *thana* along with the dead body and in the company of the *chaukidar* is by itself of no importance and cannot add strength to the story."

In our opinion there is nothing in this criticism which renders the report inadmissible and the learned Counsel for the accused has not attempted to argue that there is. The report was not regarded by the Police as the report of an offence on which any action was desired or was necessary. The Head Constable who recorded it was not asked to explain his reasons for this view, but we may note two possible reasons. The first is that it was a report against a man who was dead; the second is that, as the report itself shows, it was made by way of defence and possibly by way of reply to the report already made by Sat Narain. So far as the s. 8 of the Evi. Act is concerned it is under that section that the report would be admissible if at all.

It is, however, necessary to consider whether the report is inadmissible under s. 25 of the Evi. Act, as a confession made to a Police Officer, or under s. 162 of the Criminal P. C. as a statement made to a Police Officer in the course of an investigation. The learned defence Counsel has not contended that it is a confession, but he has contended

that it is a statement to a Police Officer in the course of an investigation.

We have, however, considered whether the report should be excluded as being of the nature of a confession and we are clearly of opinion that it should not. It contains the statement :—

"I do not know who killed Binda and with what instrument".

It was clearly of an exculpatory nature as the following passage shows :—

"Sukhnandan Brehman of Keshopur and Bhagi Ahir asked me to go to the *thana* along with the corpse and make a report against Binda that *orahi* (lifting thatch with a bamboo and thus making a passage for committing theft) was used, otherwise we will be implicated. Hence Bhagi and I have come to make a report."

It was recently held by their Lordships of the Privy Council in *Pakala Narayana Swami v. Emperor* (A. I. R 1939 P. C. 47) (1) that no statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. And they added :—

"Moreover a confession must either admit in terms the offence, or at any rate all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession, e. g. an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death, with no explanation of any other man's possession".

Their Lordships proceeded to consider the definition of "confession" in Stephen's Digest of the Law of Evidence which defines a confession as an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime, and they observed :—

"The definition is not contained in the Evi. Act, 1872: and in that Act it would not be consistent with the natural use of language to construe confession as a statement by an accused 'suggesting the inference that he committed the crime'."

It was argued strongly that the statement was made in the course of the investigation into Binda's murder and it was pointed out in support of this argument that Sat Narain's report had been recorded three quarters of an hour before, and that the second officer had returned to the Police Station before the statement was made. It was also suggested that Musai and Bhagi had already been taken into custody, though the entry in the diary indicates that they were taken into custody and their persons

(1) A I R 1939 P C 47; 180 Ind. Cas. 1; 1939 O L R 134; (1939) M W N 185; 40 Cr. L J 364; 11 R P C 166; 1939 O W N 282; 20 P L T 265; 49 L W 349; 43 C W N 473; (1939) A L J 298; 41 Bom. L R 428; 41 P L R 272; 69 C L J 273; 5 B R 449; (1939) 1 M L J 756; 18 Pat. 234; 66 I A 66; (1939) Kar. (P C) 123 Sup. (P O).

searched immediately after the report was made.

The evidence of the Head Constable, Mahadeo Singh, shows that the second officer was present when the report was made, but not a single question was put either to him or to the second officer suggesting that Musai was examined during the course of an investigation which had already commenced. In fact the second officer was not questioned at all about the report, either in examination-in-chief or in cross-examination, and it would appear that he returned to the Police Station just when the report was about to be recorded.

The position would be quite different if after the report of Sat Narain had been recorded the Head Constable or the second officer had called up Musai and Bhagi and examined them. There is nothing to indicate that this was done, and on the contrary the report itself shows that it was a voluntary report made with a definite object. We have also the evidence of the *chaukidar* that Musai had come to the Police Station in order to make the report. We have therefore no hesitation in finding that the report was not made in the course of the Police investigation, and in holding that it is admissible.

The accused were not examined in a very satisfactory way. In the Magistrate's Court both Pandohi and Musai denied killing Binda, said they did not know how he had died and alleged that they had been implicated as a result of enmity with Sat Narain.

In the Sessions Court Pandohi said he did not cultivate any *jarhan* field jointly with Sat Narain or Binda as was alleged by the prosecution. He denied that he had handed over the blanket to the Sub-Inspector. He said that he was on bad terms with Sat Narain, Jiawan and Sehtu, and that the other witnesses deposed against him under Police influence.

Musai also denied in the Sessions Court his joint cultivation of the *jarhan* field; he denied that there was any injury on his person when he was arrested and he denied that the shirt taken from his person belonged to him. As regards the prosecution witnesses he made the same statement as Pandohi.

The accused should have been questioned by the Sessions Judge in regard to other points. No question for instance was put to Musai either about his alleged visit to Debi Din two *gharis* before sunrise or about his subsequent report at the Police Station.

It is quite clear, however, that the accused, possibly on the advice of their Counsel,

had no desire to put forward in Court by way of defence the story which they had originally imagined would be a good defence. And the reason is clear. On the medical evidence that Binda had died several hours before his body was discovered it was impossible to allege that he had been attacked as he was trying to break into Musai's house. Therefore the story was manifestly false and if pressed would not help the accused at all, but on the contrary would be extremely prejudicial to them. So it was presumably decided to say nothing more about this story and contend that the report was inadmissible.

The Sessions Judge found that the presence of blood-stains in the *jarhan* field showed that the murder was committed there and we concur. But we cannot agree with him that the accused had no motive for crime, that Binda is not proved to have been taken away by one of them on the night of the murder, and that the body was not carried to the vicinity of their houses and discovered there in the manner alleged by the prosecution. We consider that the evidence establishes the contrary beyond reasonable doubt.

The Sessions Judge referred to the ruling in *Emperor v. Mendai* (1939 O. W. N. 700) (2) that

"where a charge of murder is based purely on circumstantial evidence that evidence must point conclusively to the guilt of the accused and must practically exclude the possibility of the murder having been committed by other persons".

We are of opinion that the circumstantial evidence in this case satisfies this test, for if the accused were not concerned in the murder of Binda we cannot imagine any explanation which will account for their conduct. Musai's report fully supports the prosecution evidence about the discovery of the body. The case against Musai is further strengthened by the injuries on his person and the presence of blood-stains on his shirt, though it could not be proved whether the stains were of human blood or not. Against Pandohi there is the fact that he produced a blanket which was found to be stained with human blood. The Chemical Examiner's report shows that there were ten blood-stains on this blanket and that the largest was six inches in length.

In our opinion the evidence is such as to leave no reasonable doubt about the guilt of Musai and Pandohi while it does not exclude the possibility of others also being

(2) 1939 O W N 700; 183 Ind. Cas. 307; 12 R O 23; 1939 O L R 498; 40 Cr. L J 764; 14 Luck 635.

guilty, it definitely indicates that they were concerned in the murder.

We accordingly allow the Govt. appeal, set aside the order of acquittal passed by the Sessions Judge, and convict Musai and Pandohi on the charge under s. 302 of the I. P. C. As the murder was brutal, apparently premeditated, and treacherous, and there was no immediate provocation, there is no reason why the extreme penalty of the law should not be imposed, except such reason as may be found in the length of time that has elapsed since the murder was committed. This, we think, is no reason why the capital sentence should not be passed. We express no opinion on the question whether it should be carried out. We therefore sentence Musai and Pandohi under s. 302 to be hanged by the neck until they are dead.

In conclusion we note that there are two apparent mistakes in the judgment of the lower Court. The Sessions Judge observed in dealing with the time of death that

"the medical evidence disclosed that semi-digested food was found in the stomach of the deceased which fact affords an indication to the effect that the deceased was alive two or three hours before his death".

Presumably the Sessions Judge intended to say that the deceased died two or three hours after he has last taken food. Secondly in discussing the evidence of Jiawan the Sessions Judge remarked that

"the witness has no hesitation in saying that Sehtu did tell Binda what he had seen shortly after it was discovered that the victim was Binda".

The Sessions Judge apparently meant to say that Jiawan had no hesitation in saying that Sehtu had told him, Jiawan, what he had seen.

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Appeal allowed.

PATNA HIGH COURT

Appeal No. 639 of 1938

April 4, 1940

HARRIES, C. J. AND DHAVLE, J.

AKHAURI HALIWANT SAHAY AND

ANOTHER—PLAINTIFFS—APPELLANTS

versus

DEO NARAIN MALI AND OTHERS—

DEFENDANTS—RESPONDENTS

Limitation Act (IX of 1908), ss. 23, 26, 28—Owner of gairmazrua-am and ahar land completely dispossessed by other person by building chabutra on land—Suit for possession beyond 12 years is barred—S. 23 does not apply—S. 23, if distinguishes between private and public suits—Encroachment—Extinction of owner's title—Whether gives good title to wrong doer—Limitation Act (IX of 1908), provides for acquisition of ownership by possession—Civil Procedure Code (Act V of 1908), O. I., r. 8—Public

right of irrigation interfered with—Suit by members of public in individual capacity—Half-hearted resort to O. I., r. 8—Whether prevented from obtaining relief as members of public specially injured—Practice—Pleadings—Limitation—Owner of land dispossessed and his irrigation rights obstructed—He cannot circumvent law by suing for injunction in respect of irrigation rights.

• Where an owner of land recorded as *gairmazrua-am* and *ahar* is dispossessed completely by building a *chabutra* on that land by another person, a suit for possession brought by the owner after more than 12 years is barred by limitation. Section 23, Lim. Act, does not apply to such a suit as the case is not one of a continuing wrong but of complete ouster.

[Case-law discussed.]

Section 23, Lim. Act makes no distinction between private suits and public or representative suits.

Under s. 28, Lim. Act, the owner's title to the portion encroached upon and built over is extinguished at the end of 12 years, the period limited for instituting a suit for possession of the land; and the extinction of the owner's title operates to give a good title to the wrong-doer. *Gossain Das Chunder v. Issur Chundar Nath* (4), relied on. [p. 245, col. 1.]

The Lim. Act not only deals with the limitation of suits, but also contains in Part IV (ss. 26 to 28) a set of provisions relating to acquisition of ownership by possession. *Rajrup Koer v. Abdul Hossein* (2), relied on. [*ibid.*]

Where a public right of irrigation has been interfered with by a person by encroaching upon *ahar* land and members of the public have brought a suit substantially in their individual capacity, the half-hearted resort to O. I., r. 8, Civil P. C., would not prevent the plaintiffs from obtaining relief as members of the public, specially injured by the defendants' interference with the "public" right of irrigation. [p. 246, col. 1.]

An owner of *ahar* land whose rights of irrigation have been obstructed and who has been dispossessed, can bring a suit for possession and he cannot be allowed to circumvent the law of limitation by suing for injunction in respect of irrigation rights. *Kanaku Sabai v. Muttu* (5), relied on.

A. from the appellate decree of the Additional District, Judge, Shahabad, dated May 30, 1938.

Messrs. D. N. Varma and Kanhaiyaji, for the Appellants.

Mr. M. Rahman, for the Respondents.

Dhavle, J.—This is an appeal by the plaintiffs against the dismissal of their suit for recovery of possession of a certain portion of plot No. 230 after removal of a *chabutra* erected thereon by the defendants for sitting and for tying their cattle. The plot was recorded as *gairmazrua-am* and is an *ahar*. Plaintiffs are the sixteen-anna proprietors of the *tauzi*, and their case was that the land is public land and was used for storing the irrigation water of the plaintiffs, and that the act of the defendants in erecting the *chabutra* after filling up a part of the *ahar* had put the plaintiffs, the other residents of the *mauza* and the public to loss and caused difficulty in irrigation, etc.

According to the plaintiffs, the defendants' encroachment on the *ahar* was effected in 1343 *Fasli*, about a year before the suit. The defendants denied any encroachment and claimed to have erected the *chabutra* and been in possession of it for more than twelve years. They also urged that the suit was barred under O. I. r. 8, Civil P. C. A Pleader Commissioner found that there had been an encroachment over the *ahar* to the extent of 1 *katha* 2 *dhurs* and 8 *dhurkis*. The trial Court dismissed the suit, holding that the plaintiffs had been out of possession for more than twelve years, whether as landlords or as members of the public. As to the objection based on O. I. r. 8, the learned Munsif held that though the plaintiffs had obtained permission to proceed under that provision of the law, the case was one of a private nuisance, in the removal of which the plaintiffs were interested as they had *zerat* lands in the village to irrigate from the *ahar*, and that therefore the plaintiffs were entitled to maintain the suit in their "own personal capacity."

Plaintiffs appealed, and the lower Appellate Court upheld the finding of encroachment. The finding that the *chabutra* was erected more than twelve years before the suit was not assailed, but it was urged on behalf of the plaintiffs that the suit should have been decreed because there is "no limitation in the case of an encroachment upon a public *ahar* under s. 23, Lim. Act." The learned Judge below held that this section of the Lim. Act had no application as the suit had been brought by the plaintiffs in their individual capacity and the prayer was for recovery of *khas* possession, so that the suit could not properly be regarded as one for removal of an encroachment from public property. Action had been taken under O. I. r. 8, but the plaint was not framed as for a representative suit, and the permission given under O. I. r. 8 could not alter the character of the suit. The learned Judge therefore held that the suit had been rightly dismissed on the ground of limitation. It has been contended on behalf of the plaintiffs-appellants that the lower Appellate Court fell into an error as regards s. 23, Lim. Act, and also as regards O. I. r. 8. The former section only provides that in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the wrong continues. It certainly makes no distinction between private suits and public or representative suits; but does the section apply to the

case? A trespass or nuisance may or may not be a continuing wrong, according to circumstances. If the act complained of creates a continuing source of injury and is of such a nature as to render the doer of it responsible for the continuance, the wrong would be a continuing wrong.

A good instance is found in a recent English decision: *Konskier v. Goodman, Ltd.* (1). In pulling down the upper storeys of a certain house the defendants had a license from the neighbouring owner to pull down part of his chimney stack on an undertaking to make good any damage caused. They omitted to remove a quantity of rubbish which they had allowed to fall on the roof. The rubbish was in course of time carried down by a drain pipe from the roof and choked a gully in the basement. A heavy storm of rain in consequence flooded the basement after the plaintiff had taken a lease of the house. Plaintiff sued for damages. Salter, J. gave him a decree on the ground that the defendants' was an act of continuing negligence. The Court of appeal held that there could be no continuing negligence without a continuing duty, but that the plaintiff was entitled to a decree upon a different ground—the continuing trespass, which arose on the undisputed facts of the case. The learned Advocate for the appellants began with *Rajrup Koer v. Abdul Hossein* (2) where the defendants had cut a *khund* or channel, besides making another diversion, in the side of a *pain* constructed by the plaintiff on defendant's land, their Lordships of the Judicial Committee held that these obstructions to the flow of water were in the nature of continuing nuisances, as to which the cause of action arose *de die in diem*.

A similar view was taken in *Hukam Chand v. Maharaj Bahadur Singh* (3) as regards the action of the Swetambari Jain in placing *charans* of a certain description in place of older *charans* of a different description in certain temples on the Parasnath Hill. But the present is not a case of mere trespass and obstruction, for the owner of the *ahar*—be it the plaintiffs as sixteen-anna landlords, or be it the public—has been completely dispossessed of the

(1) (1928) 1 K B 421; 97 L J K B 263; 138 L T 481; 44 T L R 91.

(2) 6 C 394; 7 I A 240; 4 Sar. 199; 7 C L R 529; 4 Ind. Jur. 530; 3 Suther 816; 4 Shome L R 7 (P C).

(3) 12 Pat. 681; 144 Ind. Cas. 346; Ind. Rul. (1933) P C 187; A I R 1933 P C 193; (1933) M W N 882; 65 M L J 163; 38 L W 306; (1933) A L J 1325; 35 Ben. L R 990; 37 C W N 1021; 14 P L T 559; 58 C L J 56 (P C).

site covered by the *chabutra*. Under s. 28, Lim. Act, the owner's title to the portion encroached upon and built over was extinguished at the end of twelve years, the period limited for instituting a suit for possession of the land; and the extinction of the owner's title operates to give a good title to the wrong-doer, *Gossain Das Chunder v. Issur Chunder Nath* (4). The suit is actually one for recovery of *khas* possession; but even if it had been a suit for an injunction in respect of irrigation rights, the owners could not have been allowed to circumvent the law of limitation by doing so when they could have sued for possession: *Kanaka Sabai v. Muttu* (5). The interference with the right to the flow of water in *Rajrup Koer v. Abdul Hossein* (2) was a wrong of which the continuing character could not be denied; it was indeed within the illustration to s. 24, Lim. Act of 1871:

"A diverts B's watercourse. At every moment of the time from which the diversion continues and B retains his right of re-entry, a fresh right to sue arises and a fresh period of limitation begins to run."

I have referred to this illustration, though it is not to be found in the present Act, because the Lim. Act, as was pointed out by their Lordships of the Judicial Committee in *Rajrup Koer v. Abdul Hossein* (2) not only deals with the limitation of suits, but also contains in Part 4 (ss. 26 to 28) a set of provisions relating to acquisition of ownership by possession, and the illustration indicates how the injury continues only as long as "B retains his right of re-entry." The distinction between a mere continuing trespass and dispossession has been referred to in several cases. Thus in *Ramphul Sahoo v. Misree Lall* (6) Mitter, J., in dealing with the question whether the suit, which was for the removal of a drain built by the defendant upon plaintiff's land was barred by time observed:

"If the plaintiff had been dispossessed from any portion of his land by an adverse possession having been taken by the defendant, the case would then fall within cl. (12); but if on the other hand, no adverse possession had been taken by the defendant, then each act of trespass on the plaintiff's land would constitute a fresh cause of action, and whether the period be six years or twelve years, the plaintiff would be competent to rely upon the last act of trespass as constituting a cause of action, unless the defendant had acquired an indefeasible right of easement by user."

From this point of view the Privy Council decisions from *Rajrup Koer v. Abdul Hossein* (2) and *Hukam Chand v. Maharaj Bahadur Singh* (3) (already referred to), which have been cited by the learned Ad-

vocate for the appellants are not in point at all; they were not cases of dispossession. The learned Advocate has also cited *Bhagwan Dutt v. Asrafi Lal Mahta* (7) in which Kulwant Sahay, J., sitting singly, held, following the two Privy Council decisions, *Nazimulla v. Wazidulla* (8) and the decision of Jwala Prasad, J. in *Jagroshan Bharthi v. Madan Pande* (9) that s. 23, Lim. Act, applied to an encroachment on public pathway running over *gairmazrua-am* lands which had been made more than 12 years before the date of the suit. Now, it is true that in *Nazimulla v. Wazidulla* (8) it was held that an obstruction to a way is no less a continuing nuisance than an obstruction to a water-course, but it does not appear how far any question of adverse possession by the defendants after the ouster of the plaintiffs arose on the pleadings in that case, though the observations of the learned Judges do seem to imply that no such question can arise in the case of a continuing wrong.

In *Jagroshan Bharthi v. Madan Pande* (9) Jwala Prasad, J. was dealing with a case under s. 133, Criminal P. C. and observed that no length of user can justify an encroachment upon a public way; but there does not seem to have been any question of limitation before the learned Judge, the point for decision being whether the Magistrate was right in refusing to proceed with the enquiry on the ground that there was no public nuisance as "a sufficient width of the road" was left for public use. The familiar common law maxim "once a highway, always a highway," which is sometimes referred to in Indian cases, rests on the ground mentioned by Byles, J. in *Dawes v. Hawkins* (10) at p. 858 that "the public cannot release their rights, and there is no extinctive presumption or prescription"; but even in England power has been given to Justices of the Peace under certain circumstances, to divert or extinguish highways and there are instances of a highway ceasing to be a highway, as when access becomes impossible in consequence of the ways leading to it having been legally stopped up. We have in our Lim. Act, besides s. 28, Art. 146-A which provides a period of

(7) A I R 1934 Pat. 34; 146 Ind. Cas. 408; 6 R P 260.

(8) 21 C L J 640; 29 Ind. Cas. 385; A I R 1916 Cal. 733.

(9) 6 Pat. 428; 105 Ind. Cas. 238; A I R 1927 Pat. 265; 28 Cr. L J 910; 8 P L T 452; 8 A. I Cr. R 306.

(10) (1860) 8 C B (N s) 848 (858); 29 L J P C 343; 7 Jur. (N s) 262; 4 L T (N s) 288; 125 R R 910.

(4) 3 C 221.

(5) 13 M 445.

(6) 24 W R 97.

30 years for suits by or on behalf of any local authority for possession of any public street or road or any part thereof from which it has been dispossessed. . . . The common law maxim was therefore not applied in *Municipal Commissioners v. Saran-gapani Mudaliar* (11), where the learned Judges declined to treat a *pial* built on a strip of land forming part of a highway as a continuing wrong and said that there was no authority for holding in India that the public, any more than a private proprietor is to be exempted from the consequences of its own laches.

The same view as regards dispossession from a highway was taken in *Sundaram Ayyar v. Municipal Council of Madura* (12), where Bhashyam Ayyangar, J., pointed out that the operation of s. 28, Lim. Act, upon Art. 146-A is to extinguish the right of highway 30 years after dispossession by encroachment, and that s. 23 would cease to have operation from the moment when the wrong ceases to be such by virtue of the title conferred by statute upon the wrongdoer. See also *Basaveswara Swamy v. Bellary Municipal Council* (13). In *Ashutosh Sadhukhan v. Corporation of Calcutta* (14), it was held that the Municipality had lost its right under Art. 146-A to a portion of what the Municipality claimed as a public street or drain on which the plaintiff had built a wall and platform about 50 years previously and that the erection of the wall was not a continuing wrong so as to make s. 23 applicable :

"The injury was complete on the erection of the wall and there was no continuing injury within the meaning of the Statute. The effect may continue, but this does not extend the time of limitation."

The case before us does not relate to a highway but the learned Advocate for the appellants only cited the ruling in *Bhagwan Dutt v. Asrafi Lal Mahta* (7) because it does seem to have held that s. 23, Lim. Act, will save limitation even in cases of complete ouster. In my opinion that is not a correct view of the section. The learned Advocate also referred to *Sarat Chandra Mukherjee v. Nerode Chandra Mukherjee* (15), where it was held that sheds erected on a common passage were a continuing wrong. That, however, was not a case for possession, and speaking with all respect the bearing of s. 28, and Art. 146-A on s. 23 was not consi-

(11) 19 M 154.

(12) 25 M 635; 12 M L J 37.

(13) 38 M 6; 17 Ind. Cas. 158; A I R 1916 Mad. 613; 23 M L J 479; 12 M L T 405; (1912) M W N 1080.

(14) 28 C L J 494; 49 Ind. Cas. 93; A I R 1919 Cal. 807.

(15) A I R-1935 Cal. 405; 156 Ind. Cas. 390; 7 R O 703.

dered, even though the decision in *Ashutosh Sadhukhan v. Corporation of Calcutta* (14) was referred to and distinguished. My conclusion on this part of the appeal is that s. 23, Lim. Act, has no application, not indeed on the ground adopted by the learned Judge below that this is not a public suit, but on the ground that this is a case not of a continuing wrong but of complete ouster in respect of the area on which the defendants have built their *chabutra* and of which even according to the plaintiff they are in wrongful possession. The finding of fact that the *chabutra* was built more than 12 years before the suit which was not disputed in the lower Appellate Court therefore concludes the appeal.

In this view it is not really necessary to deal with the appellant's contention that the lower Appellate Court was wrong in holding that the suit was not a representative suit, even though the plaintiff took the permission of the Court under O. I, r. 8 and gave the required notice. Notwithstanding the action taken by the plaintiffs the cause title remained in the plaintiffs' individual names and the prayer was that possession may be delivered to the plaintiffs on dispossession of the defendants after removal of the *chabutra*, etc. The public is only mentioned in one paragraph of the plaint. The suit thus appears substantially to have been brought by the plaintiffs in their individual capacity but the half-hearted resort to O. I, r. 8 would not, in my opinion, have prevented the plaintiff's from obtaining relief as members of the public, specially injured by the defendants' interference with the "public" right of irrigation if the claim to the encroached portion had not been barred by limitation. I would dismiss the appeal with costs.

Harries, C. J.—I agree.

s.

Appeal dismissed.

FEDERAL COURT

Case No. III of 1941

April 17, 1941

GWYER, C. J., VARADACHARIAR
AND BEAUMONT, JJ.

Mst. ATIQA BEGAM AND ANOTHER
—APPLICANTS—RESPONDENTS

versus

THE UNITED PROVINCES—APPELLANT
OPPOSITE PARTY

Government of India Act, 1935, (25 & 26 Geo. V
Ch. 42), s. 208 (b)—Leave to appeal to Privy Council—

Grounds—Question must be of importance and really a substantial one—Question of interpretation of s. 292, Government of India Act as to whether it deprives Legislatures of power to legislate retrospectively, is not a substantial question.

When dealing with an application for leave to appeal to Privy Council the Federal Court must be satisfied that the matter is one of importance and that there is really a substantial question to be determined. On the question whether s. 292 of the Constitution Act can be interpreted as depriving Legislatures in India of the power to legislate with retrospective effect, there is no room for such serious doubt on the point as to justify Federal Court in holding that that is a substantial question on which leave to appeal to His Majesty in Council is to be granted. *Valin v. Langlois* (1), referred to.

Where it cannot be said that any decision to be obtained from their Lordships of the Privy Council, if the appeal should be permitted to go to them, is likely to have a material bearing upon future litigation there is no question of general public importance justifying the leave.

App. for leave to appeal to His Majesty in Council under s. 208 (b) of the Govt. of India Act, 1935.

Mr. Shiva Prasad Sinha, Senior Advocate, Federal Court, Messrs. (Prem Mohanlal Verma and Lakshmi Saran with him) instructed by Mr. T. K. Prasad, Agent, for the Applicants:

Dr. Narain Prasad Asthana, Advocate-General of the United Provinces (Mr. Sri Narain Sahai with him) instructed by Mr. Gurdayal Sahay, Agent, for the Opposite Party.

Varadachariar, J.—This is an application asking for leave, under s. 208 (b) of the Constitution Act, to appeal to His Majesty in Council, from a decision* of this Court given in December last. The constitutional question raised in the case related to the interpretation of s. 292 of the Constitution Act.

In the special circumstances described in the judgment in that case, the Govt. of United Provinces had to direct remission of rent for certain years in the *zamindaris* in the United Provinces; and when the validity of the remission was successfully questioned in judicial proceedings in the High Court, the U. P. Legislature passed the impugned Act (No. XIV of 1938), entitled the U. P. Regularization of Remissions Act, 1938. The validity of this enactment was in turn questioned by the present applicants when the matter was pending before the High Court at Allahabad; and a Full Bench of the High Court held that this Act was *ultra vires* the Provincial Legislature on various grounds. One ground on which alone all the three learned Judges who constituted the Full Bench agreed was

that s. 292 of the Constitution Act precluded Legislatures in India from enacting any law with retrospective effect, so as to affect rights accrued before the date of the enactment. The tenant affected by the decree of the High Court did not appeal to this Court, but the Govt. of United Provinces, which had taken steps to get itself impleaded as a party just before the case was finally disposed of by the High Court preferred to the appeal to this Court.

At the hearing of the appeal objection was taken to the maintainability of the appeal by the U. P. Govt.; on the ground that there was no decree against the Govt. and that the Govt. was not a proper party to the litigation at all. On the merits, the conclusion of the learned Judges of the High Court that the Act contravened the limitation imposed upon the Legislature by s. 292 of the Constitution Act was contested on behalf of the appellant, but it was sought to be supported on various grounds by the learned Counsel who appeared for the plaintiffs-respondents. This Court, by a majority, held that the appeal was competent; and it unanimously held that the impugned Act was *ultra vires* the Provincial Legislature and that s. 292 of the Constitution Act did not on its true construction deprive Legislatures in India of the power to pass legislation with retrospective effect. It is against this decision that the applicants now seek to appeal to His Majesty in Council.

The amount of the disputed remission is very small, not even a hundred rupees; and even as to that amount, this Court did not (for the reasons given in the judgment) disturb the decree passed by the High Court in the petitioners' favour. The application for leave is supported on three grounds: (1) that the constitutional question involved is of general public importance; (2) that the impugned enactment, namely, Act XIV of 1938 of the U. P. Legislature affects the claim of the *zamindars* of the United Provinces as a body to a large amount of rent remaining in arrears; and (3) that the decision of the majority of this Court on the question of the right of the U. P. Govt. to maintain the appeal to this Court is open to criticism.

It is true that the learned Judges of the Allahabad High Court interpreted s. 292 of the Constitution Act as depriving Legislatures in India of the power to legislate with retrospective effect. But, with all defence to them, this Court is unable to hold that there is room for such serious doubt on the point as to justify it in holding that that is a sub-

* See 192 Ind. Cas. 138—[Ed.]

stantial question on which leave to appeal to His Majesty in Council is to be granted. When dealing with an application of this kind the Court must be satisfied that the matter is one of importance and that there is really a substantial question to be determined: *Valin v. Langlois* (1). As observed by the Judicial Committee in that case, "it is not to be presumed that the Legislature of a Dominion has exceeded its powers unless upon grounds really of a serious character."

After giving anxious consideration to the arguments advanced in support of the High Court's view, this Court unanimously came to the conclusion that s. 292 of the Constitution Act could not reasonably bear the construction sought to be put upon it by the plaintiffs. It will be observed from the judgment of this Court that many other questions which would have been relevant to the decision of the case had to be left open in the special circumstances in which this Court had to deal with the case. If, therefore, the matter is to be permitted to go on appeal to His Majesty in Council at all, it will be much more satisfactory that it should go in a case which is properly constituted so as to give their Lordships an opportunity of dealing with all the points arising in a litigation of this kind.

In considering the extent of interest indirectly affected by the U. P. Act XIV of 1938, must be pointed out that the operation of that Act was only temporary, as it sought to regularize certain remissions of rent which according to the opinion of the High Court in another case had been granted in violation of certain provisions of the then existing Rent Act. Those sections in the Rent Act have themselves been repealed by another Act of the U. P. Legislature passed in the year 1938 and the question is hardly likely to arise in the same form in respect of claims for rent accruing due after 1938. Claims to rent accrued due prior to 1938 can hardly be enforced in any future litigation, as nearly three years have now elapsed. The Court asked for information as to whether any large number of suits relating to rent accrued due prior to 1938 and likely to be affected by Act XIV of 1938 were pending; but no specific information on the point was available. Reference has been made in para. 13 of the petitioner's petition to certain circumstances bearing upon the indirect consequences of the decision of this Court, but even there no information on the above question is available. It cannot therefore be said that any decision to

(1) (1879) 5 App. Cas. 115; 49 L. J. P. C. 37; 41 L. T. 662.

be obtained from their Lordships, if this appeal should be permitted to go to them— is likely to have a material bearing upon future litigation and that in that sense the question is of general public importance.

The only other point raised is the procedural question as to the maintainability of the appeal to this Court by the U. P. Govt. That is a matter of importance only to the clients in the particular case and as this Court did not, even while entertaining the appeal, disturb the decree of the High Court in the plaintiffs' favour, it is not possible to accept the contention that this procedural question is one which will justify the grant of leave to appeal. The application is accordingly dismissed. There will be no order as to costs.

D. *Application dismissed.*

PATNA HIGH COURT

Criminal Revision No. 696 of 1940

February 3, 1941

DHAWLE, J.

BHUTNATH KHAWAS—PETITIONER

versus

DASRATHI DAS—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 439, 561-A—Government of India Act, 1935, (25 & 26 Geo. V, Ch. 42), s. 224 (1)—No appeal from order of acquittal—High Court, if has jurisdiction to expunge remarks made against witness in trial Magistrate's judgment, on application of such witness.

The superintendence given to the High Court under sub-s. (1) of s. 224 of the Govt. of India Act, 1935, is not to be construed as giving to a High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision.

Section 439 of the Criminal P. C., will not enable the High Court to expunge passages from a judgment which is not under appeal. So also, all that s. 561-A, Criminal P. C., does is to preserve the inherent powers of the High Court without conferring any additional power and no Court can claim inherent power to alter the judgment of another Court. 66 Ind. Cas. 1005 (3) and 190 Ind. Cas. 205 (5), relied on.

Cr. R. against an order of the Magistrate, 2nd Class, Jamshedpur, dated May 20, 1940.

Dr. Sir Sultan Ahmad and Mr. B. C. De, for the Petitioner.

Mr. Bhabananda Mukherji, for the Opposite Party.

Order. — Bhutnath Khawas, the petitioner, as Forest Officer of the Dhalbhum estate, lodged an information of theft with the Police against one Dasarathi Das for cutting away a *mohul* tree from a plot in *Mauza Narsingharh* belonging to the estate. The trying Magistrate held that the case

was totally false, malicious and vexatious, and acquitted the accused and ordered the Forest Officer (so I understand) to pay compensation to him. After moving the Sessions Judge in revision unsuccessfully Bhutnath applied to this Court, not so much against the acquittal of Dasarathi Das as for expunging certain observations made by the trying Magistrate in his judgment against Bankim Chandra Chakravarty, the Manager of the estate who had been examined as a witness for the prosecution. At the hearing a question arose whether an application of this kind could be entertained at the instance of Bhutnath; and upon this Bankim Chandra Chakravarty himself put in an application praying that the observations objected to may be expunged.

Sir Sultan Ahmad who appeared for Bhutnath, and afterwards for Bankim Chandra as well, made it quite clear from the very beginning that his grievance was not the acquittal of Dasarathi Das—this Court does not as a rule interfere in revision with acquittals—but the observations of the Magistrate against Bankim Chandra.

The question whether an application of this kind can be entertained at the instance of Bankim Chandra Chakravarty himself, when the Court is not dealing with the orders passed in the case, does not appear to have been decided in this Court, but has been the subject of some difference of opinion in other High Courts. My attention has been drawn to Criminal Reference No. 45 of 1936 decided by Khaja Mohammad Noor, J. on August 14, 1936, as an instance in which this Court ordered certain remarks to be expunged from the judgment of a Magistrate. That, however, was a case of remarks not against a witness but against an Advocate, and the question how far the High Court has power to order such remarks to be expunged was neither raised nor discussed. The only reported decision of this Court that I have come across, which can at all be said to be in point, is *Birnarayan Singh v. Emperor* (1). The petitioner in that case was a Sub-Inspector of Police charged with extortion, who had been acquitted, but the judgment proceeded, after the acquittal, to make certain observations about the case ending with the words: "Enter true. Sections 385 and 384-II, I. P. C." Jwala Prasad, J. found that this was unjustified and held that this Court had jurisdiction to order it to be expunged. "It has been said", said the learned

ed Judge,

"that s. 439 of the Criminal P. C. does not intend to cover a case of this kind, where the order passed is not based upon the evidence but upon an impression, the order being to enter true. When the order is deleted, the reasons in the preceding paragraph must also go. The High Court has also power to deal with a case of this kind under its general superintendence under the Govt. of India Act. The power of the High Court to delete irrelevant orders of this kind has been upheld in the case of *Emperor v. Thomas Pellako* 16 Ind. Cas. 643 (2), where the irrelevant remarks and the Judge's opinion on certain matters contained in the judgment were ordered to be expunged and deleted on the ground that they were ill-judged and should not have found a place in a judgment in a criminal trial."

It is not very easy to say from this how far the learned Judge really held that s. 439 of the Criminal P. C. empowers this Court to order observations to be expunged from the judgment of an inferior Court when the operative order of that Court is itself not in question and this Court is not called upon to deal with the merits of the decision itself. This question was considered by Gokul Prasad and Stuart, JJ. in *Emperor v. Dunn* (3) and the conclusion was arrived at that s. 439 does not empower the High Court to amend the judgments of lower Courts by expunging objectionable passages in cases in which the Court has no authority to interfere with the effective orders passed by the lower Courts. The learned Judges observed that

"If it is held that the grievances of persons who are unjustly criticized by Courts of law in circumstances which obviate the effective orders of the Courts coming before superior Courts in appeal or revision are so great as to require a special enactment for their protection, the matter is one for the consideration of the Legislature. But as the law stands we are satisfied that we have no authority."

This was in 1922, and in the following year s. 561A was added to the Criminal P. C. providing that nothing in the Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Court or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. This new section was relied upon by Sulaiman, J., as he then was, in *Panchanan Banerji v. Upendra Nath Bhattacharj* (4), to order the deletion of certain passages, which were against the character of the complainant, from a judgment of acquittal. It has, however, been very recently pointed out by Beaumont, C. J. in *Rogers v. Shrini-*

(2) 16 Ind. Cas. 643.

(3) 44 A 401; 66 Ind. Cas. 1005; 20 A L J 261; A I R 1922 All. 107; 23 Cr. L J 349; 4 U P L R (A) 165.

(4) 49 A 254; 98 Ind. Cas. 719; L R 8 A-5 Cr.; 25 A L J 100; 27 Cr. L J 1407; A I R 1927 All. 193.

(1) 3 P L T 239; 67 Ind. Cas. 195; 23 Cr. L J 371; A I R 1922 Pat. 97.

was *Gopal Kawale* (5), that all that s. 561-A does is to preserve the inherent powers of the High Court without conferring any additional power and that no Court can claim inherent power to alter the judgment of another Court. Jwala Prasad, J. also referred in Birnarayan Singh's case to the power of general superintendence given to the High Court under the Govt. of India Act, but the latest Govt. of India Act (26 Geo. V) makes it perfectly clear that the superintendence given to the High Court under sub-s. (1) of s. 224 of the Act is not to be construed—see sub-s. (2) as giving to a High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision. It was also pointed out in the Bombay case how s. 439 of the Criminal P. C. will not enable the High Court to expunge passages from a judgment which is not under appeal, affirming the view taken in *Dunn's case* (3) from 44 Allahabad. The order of acquittal in the present case is not under revision (being on the face of it so well-founded on the evidence that no application would have been entertained in revision against it, as was very rightly appreciated by learned Counsel). I can see no reason for differing from the view taken in *Roger's case* (5) regarding the powers of the Court in this matter. I must accordingly hold that in the circumstances of this case the Court has no jurisdiction to expunge the remarks, of which first his subordinate Bhutnath Khawas and then Bankim Chandra Chakravarti himself have made a grievance.

In this view I do not propose to discuss the remarks objected to. It may, however, be useful to draw the attention of the learned Magistrate to the fact that though he was apparently entitled from the evidence before him to infer that Bankim Chandra Chakravarty had not told or admitted all he knew, it was not a happy way of referring to this lack of candour to speak of his "suppressing telling the truth" and later on of his deliberately perjuring himself. The learned Magistrate would do well to refrain from using words with which he is not very familiar, perjury being apparently one of them.

The application in revision is dismissed.

s.

Application dismissed.

(5) I L R (1940) Bom. 415; 190 Ind. Cas. 205; 42 Bom. L R 478; A I R 1940 Bom. 266; 41 Cr. L J 555; 13 R B 106.

RANGOON HIGH COURT

Civil Miscellaneous Appeal No. 6 of 1940

May 3, 1940

ROBERTS, C. J. AND BLAGDEN, J.

EBRAHIM MOHAMED BODI—

APPELLANT

versus

K. BA GYI—RESPONDENT

Presidency Towns (Rangoon) Insolvency Act (III of 1909), s. 8 (2) (b), 36—Letters Patent (Rangoon), cl. 13—“Judgment”, meaning of—Insolvency proceedings, whether “suits”—Decision whether witness should or should not be further examined under s. 36, if judgment—Refusal to exercise jurisdiction, if judgment—Exercise of powers under s. 36—Examination under s. 36, nature of—Right of—Discretion under s. 36 in refusing to summon witness or further examine him, if can be interfered with in appeal—Scope of examination under s. 36—Examination, when should be ordered—Fact that litigation against witness may ensue, if ground for refusing to examine witness—Witness legally represented at examination, if entitled to costs.

The word “judgment” in cl. 13, Letters Patent (Rang.) means and is a decree in a suit by which the rights of the parties at issue in the suit are determined. For the purposes of appeals the various proceedings in an insolvency should be regarded as a series of “suits” arising out of one failure, and that is a “judgment” for this purpose which finally determines the substantive rights of those concerned in any one such “suit”. A decision, therefore, which finally determines the question whether a witness should or should not be further examined under s. 36 of the Presi. Towns Insol. Act, is a “judgment” within the meaning of cl. 13 of the Letters Patent and is therefore appealable. A “judgment”, properly so called, must be an exercise of jurisdiction, and therefore a refusal to exercise jurisdiction, at all events if it be a lawful refusal, cannot be a “judgment”. 157 Ind. Cas. 1107 (2), explained, 93 Ind. Cas. 211 (3) and 111 Ind. Cas. 836 (4), distinguished. [p. 252, col. 2; p. 253, cols. 1 & 2]

Section 36 confers on the Court an extraordinary and inquisitorial, though certainly a necessary power, to be exercised in the interests of the due administration of the insolvent's estate without fear, but not without scrupulous regard to considerations of economy and of fairness to the person examined. *In re Maundy Gregory* (5), referred to. [p. 253, col. 2.]

The only right which the section gives to the Official Assignee or to any creditor who has proved is a right to apply to the Court to summon a witness. It is in the discretion of the Court whether or not it will do so at all, and, if it does do so, the examination of the witness is, in theory, an examination by the Court; it is only as a matter of practice that the person applying for the summons is permitted to attend and question the person summoned at all. *Ex parte Eckersley* (6), distinguished. [*ibid.*]

The discretion of the Court under s. 36 in refusing to summon or further to examine a witness is not lightly to be interfered with on appeal. It is not enough for the appellant to show that the discretion was wrongly exercised, but he must go further and show either that it was not exercised at all, or, if exercised, was exercised either unjudicially, or on a wrong principle of law, or on a wrong appreciation of the facts. But a right decision even if reached in the wrong way will not be interfered with. [p. 254, col. 1.]

It is impossible to lay down any hard and fast rule limiting the scope of a private examination under s. 36

and though the Court may (not must) think it proper to confine it to questions arising out of the matters stated in the affidavit leading to the summons there is certainly no rule that only those matters themselves may be put to the witness. 121 Ind. Cas. 772 (1), **Overruled.** [p. 254, col. 2.]

Section 36 is not in terms restricted to the examination of persons who are thought to be indebted to or possessed of part of the debtor's estate but extends to "any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property". 118 Ind. Cas. 794 (9), dissented from. [p. 255, col. 1.]

The Court ought not to make an order for the examination of a witness under s. 36 of the Act unless there is ground for thinking that the order is likely to be of some use. Sub-sections (4) and (5) of s. 36 make it quite clear that the mere fact that litigation against the witness may ensue cannot be a ground for refusing the examination. 121 Ind. Cas. 772 (1), **Overruled.** [p. 255, col. 2.]

A witness who is legally represented at an examination under s. 36 is not entitled to costs of such representation. It is a measure of prudence which he takes at his own expense. A witness who is, rightly or wrongly, made a respondent to an appeal from an order under s. 36 and served as such but against whom no substantive relief was asked for and who would not have been out of pocket by reason of the appellate decision, had it gone against him, if he had not contested the appeal is not entitled to costs. *In re Scharrer, Ex parte Tilly* (10), referred to. *In re Maundy Gregory* (5), distinguished. [p. 255, col. 2; p. 256, col. 1.]

C. Misc. A. against the order of the High Court, in Insolvency Case No. 49 of 1938, dated January 2, 1940.

Mr. B. K. Dadachanji, for the Appellant.

Mr. U Kyaw Myint, for the Respondent.

Blagden, J.—The appellant in this case is, it appears, the sole unsecured creditor of one U Po Sein against whom he has a decree for some Rs. 30,000 odd. On this decree an interest of U Po Sein was, on January 13, 1938, attached. That attachment lasted till April 25, 1938, and therefore at the last moment, February 3, 1938 at the latest, U Po Sein suffered an act of insolvency under s. 9 (e), Rangoon Insolvency Act, hereinafter called "the Act." Within three months of that date, to wit on April 25, 1938, the appellant presented an insolvency petition against U Po Sein founded on this act of insolvency. The proceedings under this petition were somewhat protracted and it was not until June 15, 1938 that U Po Sein was adjudicated insolvent. This however does not matter because by s. 51 of the Act the insolvency of U Po Sein must be deemed to have relation back to and to have commenced at midnight of 3rd/4th February 1938 at the latest. This moment of time is important. By s. 52 (2) (a) of the Act, the property divisible amongst his creditors (which by s. 17 of the Act vested in the Official Assignee) therefore included

(at least) all such property as belonged to U Po Sein at midnight of February 3rd/4th, 1938.

The respondent K. Ba Gyi comes into the matter in this way. According to the insolvent's schedule lodged on February 23, 1939 he was on June 15, 1938 a secured creditor of U Po Sein for Rs. 5,000 (the debt and security dating from July 25, 1932) and the security was thereby estimated to produce a surplus of Rs. 5,000. This made two things obvious, namely (1) that if the insolvent's estimate of the value of the security was anything like correct—and such estimates are, of course, apt to be optimistic—he was never likely to prove in the insolvency at all (see the proviso to s. 17 of, and Sch. II to the Act) and (2) that if the appellant, the only unsecured creditor, wished this particular point really investigated it was vital for him to know whether this debt, this security and not least this date (July 25, 1932) were or were not genuine, and, as hereinafter appears, he had reason to suspect that the debt had in fact been to a large extent repaid by midnight of February 3rd/4th, 1938. The public examination of the insolvent was concluded on July 4, 1939 and on the 28th of that month the present appellant applied to the Court for the private examination under s. 36 of the Act of the present respondent and of six other persons not material to the present appeal. In support of this application he filed an affidavit para. 15 of which reads as follows:

"15. In the schedule one K. Ba Gyi is also shown as a secured creditor for the sum of Rs. 5,000. In her affidavits in Civil First Appeal No. 106 of 1933 of this Hon'ble Court sworn on December 11, 1933, and also in Suit Civil Regular No. 29 of 1934 of this Hon'ble Court sworn on or about April 29, 1935 Ma Kyin Yone the insolvent's wife stated to the effect that Rs. 6,000 was borrowed from K. Ba Gyi on an equitable mortgage, that out of this sum of Rs. 6,000 Rs. 4,000 had been paid up and only Rs. 2,000 were due when she swore those affidavits."

Pursuant to this application the present respondent was on December 20, 1939, examined under s. 36 of the Act. According to his evidence, the transaction alleged by the insolvent to have taken place was, subject to an immaterial discrepancy as to its date, genuine. But it was not an isolated transaction, there having been repayments and renewals of the loan, not all recorded in any existing book of the witness. His deposition concluded as follows:

"I begin new books of account on June 15, of each year. The debit entry in the account of U Po Sein is dated May 19, 1938. The book for 1937-38 was started on June 15, 1937. Up to June 14, 1937, I had another book which has been destroyed. This is a ledger. I

know book-keeping. I carry forward the balance from the old to the new book in each account."

Q. On May 18, 1938 nothing was due to you ?

A. No.

Q. This entry (Ex. B-1) shows that Rs. 5,000 a fresh sum, was paid on May 19, 1938 ?

A. Yes. No fresh mortgage was registered. I always however had the title deeds in my hands for the overdraft account. Ex. B is the account."

From this it will be seen at once that the examination had, in a sense, "gone beyond" what was stated in para. 15 of the applicant's affidavit. But to serve any useful purpose a private examination must elicit something more than is stated in the evidence on which the order for the examination is made, since that evidence is filed merely to show the Court that there are grounds for enquiry and it would be a vain thing if the Court were restricted to ascertaining from the witness facts of which it was already aware. It is also very apparent that the applicant had elicited information for more valuable to him than, on the facts as he previously supposed them to be, he could in his most sanguine moments have expected. The insolvency had notionally commenced at a date long anterior to that on which (according to the respondent) he made his advance and in consequence his security became ineffective as such. Unless therefore he could bring himself within s. 57 of the Act by proving affirmatively that he had no notice of the presentation of any insolvency petition his security appears, on his own showing, worthless in view of ss. 17, 51 and 52 (2) (a) of the Act while s. 46 (2) of the Act leaves it extremely doubtful if he had, on the same version of the facts even a provable debt. There might have been further matters which Mr. Dadachanji, for the present appellant might have wished to put to the witness and which the Registrar if asked to do so might have properly allowed him to ask. But Mr. Dadachanji told us very frankly that he could not now remember whether or not he had in mind any specific question as being desirable at that stage, though he was anxious to continue a general examination of the witness. Certainly, it does not seem that the Registrar was asked to consider allowing any specific further question to be put, and in the absence of any such request, I think, that he might, if unfettered by authority, well have taken the view that the applicant had elicited from the witness all he could possibly hope for and that further questions were a waste of time. That however is not quite the course he took. The following is his note of what occurred at this stage in the pro-

ceedings :

"Dadachanji for Bodi, creditor. Khoo for witness K. Ba Gyi. Examination under s. 36 begins: Mr. Khoo draws my attention to *G. H. Ghanchee & Sons, In the matter of* (1). The affidavit in support of the application to examine the witness (para. 15) shows that the intention of the creditor Bodi was to show that Rs. 2,000 and not Rs. 5,000 was due to K. Ba Gyi. The examination before me this morning has gone beyond the scope of para. 15 and possibly beyond the limit of s. 36. The matter is submitted to the Judge for further orders, on January 2, 1940."

On January 2, 1940, the matter came before my brother Ba U and his order reads as follows :

"The insolvency Registrar was perfectly justified in doing what he had done. If Mr. K. Ba Gyi wants to realize his share he must come before the Court and prove his case in the manner laid down by the Insol. Act. If and when he does this he can be subjected to searching cross-examination with regard to the amount due to him. It is unnecessary to go into this now. It will only result in waste of time. The order of the Registrar is confirmed."

Thence the matter comes before us by way of appeal. U Kyaw Myint took the preliminary objection that no appeal lies. In support of this proposition he relies on s. 8 (2) (b) of the Act which allows an appeal from the insolvency Judge in cases not covered by s. 8 (2) (a) (and the present case, he rightly concedes, is not so covered)

"in the same way and be subject to the same provisions as an appeal from an order made by a Judge in the exercise of the ordinary original civil jurisdiction of the Court."

He then draws our attention to cl. 13 of the Letters Patent and *Dayabhai Jivandas v. A. M. M. Murugappa Chettiar* (2), and cases there cited which, so far as this High Court is concerned, settle that the word "judgment" in that clause means and is a decree in a suit by which the rights of the parties at issue in the suit are determined. *Abdul Gaffoor v. Official Assignee* (3), shows that for "an order made by a Judge in the exercise of the ordinary original civil jurisdiction of the Court" to be appealable it must be either (a) within O. XLIII, r. 1, Civil P. C.; (which this order is clearly not) or (b) a judgment. The present order, he says, is not a judgment because it does not determine the rights of the parties to the insolvency. He rightly admits that this ingenious argument (carried to its logical conclusion) involves the startling proposition that no order made by the insolvency Judge as such is appealable at all, since no one order made in the course of a particular insolvency determines the rights of every-

(1) 7 R 675; 121 Ind. Cas. 772; A I R 1930 Rang. 32; Ind. Rul. (1930) Rang. 100.

(2) 13 R 457; 157 Ind. Cas. 1107; A I R 1935 Rang. 267; 8 R Rang. 135 (S B).

(3) 3 R 605; 93 Ind. Cas. 211; A I R 1926 Rang. 64; 4 Bur. L J 254.

body concerned in that insolvency. It is curious, if this be so, that this Court should have heard hundreds of such appeals and (in, for example, the case last cited) declined to hear others, not on the ground that they were appeals from the insolvency Judge but on the ground that the particular order concerned was not a "judgment." Moreover, the Letters Patent were already in existence when, in 1926, the Presi. Towns Insol. Act (now the Act) was applied to Rangoon. In so applying it, the Legislature can hardly have meant to emulate that freak of nature which torments the desert traveller with visions of non-existent oases by extending before the citizens of Rangoon by [s. 8 (2) of the Act] an alluring prospect of a right of appeal well knowing that cl. 13, Letters Patent, made that right illusory.

It has, I think, to be remembered that neither this Court in *Dayabhai Jivandas v. A. M. M. Murugappa Chettiar* (2), nor their Lordships of the Privy Council in the judgments there cited had in mind the peculiar nature of an insolvency. For the purposes of this point the various proceedings in an insolvency should, in my opinion, be regarded as a series of "suits" arising out of one failure, and in my opinion that is a "judgment" for this purpose which finally determines the substantive rights of those concerned in any one such "suit:" for example, an order of adjudication on a creditor's petition is a "judgment" although it happens almost at the outset of the insolvency, but an order adjourning the hearing of the petition is not a "judgment." In *Abdul Gaffoor v. Official Assignee* (3) a Bench of this Court held that an order refusing to issue a commission to examine a witness in Madras could not be appealed. But there the witness's evidence was desired not as an end in itself but for the purposes of a then pending petition for the annulment of the adjudication, so that the Court's refusal was in reality an interlocutory order in that petition. Here there was, immediately before the decision of Ba U, J., no material proceeding pending other than the examination of Mr. K. Ba Gyi. This may or may not lead to further proceedings, but, for the moment, his further examination was desired as an end in itself and the decision of Ba U, J., finally determined the question in dispute before him, namely, whether the witness should or should not be further examined. The distinction is perhaps fine, but I think it is real. There is less difficulty in distinguish-

ing *Arjuna Iyer v. Official Assignee, Rangoon* (4) for whereas, in the present case, the Court heard and determined a disputed question, there the Court in its discretion declined to entertain the question at all and left the appellant to his remedy if any by a regular suit. A "judgment," properly so called, must in my opinion be an exercise of jurisdiction, and therefore a refusal to exercise jurisdiction, at all events if it be a lawful refusal, cannot be a "judgment." This preliminary objection, therefore, in my opinion, fails. The substantial question remains whether we should now direct that Mr. K. Ba Gyi be further privately examined. Sub-ss. (1) and (3) of s. 36 of the Act reads thus:

"36. (1) The Court may, on the application of the Official Assignee or of any creditor who has proved his debt, at any time after an order of adjudication has been made, summon before it in such manner as may be prescribed the insolvent or, any person known or suspected to have in his possession any property belonging to the insolvent, or supposed to be indebted to the insolvent or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property; and the Court may require any such person to produce any documents in his custody or power relating to the insolvent, his dealings or property.

(3) The Court may examine any person so brought before it concerning the insolvent, his dealings or property, and such person may be represented by a legal practitioner."

These sub-sections are for all material purposes identical with sub-ss. (1) and (3) of s. 25, English Bankruptcy Act, 1914, except that the right of the witness to legal representation at the examination is, in this country, expressly conferred by statute, while in England it is only sanctioned by long-established practice. The section confers on the Court an extraordinary and inquisitorial, though certainly a necessary power, to be exercised in the interests of the due administration of the insolvent's estate without fear, but not without scrupulous regard to considerations of economy and of fairness to the person examined: see for example *In re Maundy Gregory* (5). It is to be observed that the only right which the section gives to the Official Assignee or to any creditor who has proved is a right to apply to the Court to summon a witness. It is in the discretion of the Court whether or not it will do so at all, and, if it does do so, the examination of the witness is, in theory, an examination by the Court, it is only as a matter of practice that the person applying for the summons is permitted to attend

(4) 6 R 363; 111 Ind. Cas. 836; A I R 1928 Rang. 246.

(5) (1935) 1 Ch. 65; 104 L J Ch. 1; 152 L T 58; 78 S J 550; 50 T L R 492.

and question the person summoned at all. In this connection attention was called to *Ex parte Eddersley* (6), where in the course of the judgment it is said :

"Where the statute has plainly said that the trustee has a right to examine persons as therein directed, I may not withhold from the Queen's subjects that right which the law has given them."

This was said in connection with s. 96, Bankruptcy Act, 1869, which was in similar terms to s. 36 (1) of our Act. I must therefore observe that the statute has not, plainly or otherwise, said what is attributed to it, and has in fact said nothing of the kind. The observation cited was unnecessary to the perfectly proper decision in that case and formed part of an unconsidered judgment of Vice-Chancellor Bacon sitting as Chief Judge in bankruptcy. He was a Judge of wide learning and experience whose decisions are entitled to great respect; but, as the Court of Appeal has not infrequently had occasion to observe, his unconsidered dicta are often characterized rather by the attractive vigour than by the accuracy of the language in which they are expressed. That the discretion of the Court in refusing to summon or further to examine a witness is not lightly to be interfered with on appeal is a proposition which Mr. Dadachanji, who appeared for the appellant, rightly accepts. He admits that it is not enough for him to show that the discretion was wrongly exercised, but that he must go further and show either that it was not exercised at all, or, if exercised, was exercised either unjudicially, or on a wrong principle of law, or on a wrong appreciation of the facts. That one or other of these things must be shown in order to sustain an appeal from the purported exercise by a lower Court of a discretionary power is too well-settled to need authority; but we must not forget that there is such a thing as a right decision reached in the wrong way. To take the most glaring example one could imagine of a failure to exercise discretion judicially or indeed at all, let us suppose that a Judge having a discretion to make or not to make a particular order decided not to make by the spin of a coin, substituting for his own judgment the arbitrament of chance. Even if this absurdity were shown to have occurred, still the Court of Appeal would not, I apprehend, make a different order if it thought that, on the facts as they were when the case came before it, a right decision had, by a fortunate accident, been reached.

Mr. Dadachanji, if I follow aright his careful argument, says that there was here (6) (1883) 48 LT 832.

no exercise of discretion because there was applied a supposed hard and fast rule against "going beyond" the evidence on which the summons was issued. I have already tried to show how absurd the literal application of any such rule would be. What I think the learned Registrar had in mind was the correct principle that s. 36 should not be used for purposes of what is sometimes termed a "roving commission" or "fishing enquiry." Both terms are apt to create confusion because they are necessarily inexact, though the expression "fishing" has a fairly well-known meaning in relation to interrogatories, the scope of which is of course much narrower than that of a private examination in an insolvency. Suffice it for the moment to say that it is impossible to lay down any hard and fast rule limiting the scope of a private examination and that though the Court may (not must) think it proper to confine it to questions arising out of the matters stated in the affidavit leading to the summons there is certainly no rule that only those matters themselves may be put to the witness.

Alternatively, which is perhaps only another way of putting the same point, Mr. Dadachanji says that the discretion was exercised on what was really a wrong principle of law because the Court below conceived itself bound by *G. H. Ghacnhee & Sons, In the matter of* (1) to allow no further questions. He says that this decision does not decide that the Court was so bound, and that in any event it is not binding on us and he asks us to overrule it. If that decision were merely to the effect that the machinery of s. 36 is not, save in exceptional circumstances, to be used by one party to an actually pending suit for the purpose of his examining his opponent I should entirely agree with it: see *In re Franks; Ex parte Gittins* (7) and *In re Desportes* (8). To let one litigant see the other's brief is obviously wrong. But it is clear that the decision goes further. The Registrar there was of opinion that the Official Assignee intended to examine the witness in order to prepare for future litigation, and following certain observations of Davar, J., in *Dada Nurmahomed & Bros. v. Ismail Karim* (9), (not officially reported), he apparently disallowed the examination on that ground. Das, J. upheld his order, observing that

"Section 36 was not intended for the purpose of

(7) (1892) 1 Q B 646; 66 LT 30; 40 WR 384; 9 Morrell 90.

(8) (1893) 10 Morrell 40; 5 R 221; 68 L 233.

(9) AIR 1929 Bom. 230; 118 Ind. Cas. 794; 31 Bom. LR 420; Ind. Rul. (1929) Bom. 490.

enabling the Official Assignee to cross-examine a claimant and get from him the proof of his case."

As I have tried to indicate, he did not by "claimant" mean merely claimant in actually pending litigation, and therefore with all respect, I think that both he and Dayar J., were, if the latter is correctly reported, wrong. The section is not in terms restricted to the examination of persons who are thought to be indebted to or possessed of part of the debtor's estate but extends to "any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property." In England the corresponding section is constantly employed to examine, for example, persons claiming to be creditors with a view to considering a motion to expunge or reduce their proofs. I have had some experience of its operation in practice and not only does it not work injustice but the contrary is in my opinion the case. Moreover, if one looks at sub-ss. (4) and (5) it becomes quite clear that the mere fact that litigation against the witness may ensue cannot be a ground for refusing the examination. Suppose the witness admits that he owes the insolvent's estate Rs. 10 and has in his possession the insolvent's watch: the Court may under these sub-sections order him there and then to pay the money and to hand over the watch. But if he denies one or both of these things is the examination to be stopped on the witness's bare denial, or is it to proceed on the terms that if eventually it becomes clear that the witness's denials are false the Official Assignee is to do nothing about recovering the money and the watch? That the answer to the former question is no is clear from *In re Scharrer: Ex parte Tilly* (10) and that the answer to the latter is also no is plain common sense. In my opinion we ought to disapprove *G. H. Ghanchee & Sons, In the matter of* (1) and I am fortified in this opinion by the fact that both this decision and the cases there cited have been doubted in *Goolbai v. Pherozshaw B. Petit* (11) with which I respectfully and entirely agree.

Then it is said that Ba U, J., acted on a misapprehension as to the facts in that he assumed that sooner or later Mr. K. Ba Gyi "must come before the Court and prove his case in the manner laid down by the Insol. Act" when there will be a full opportunity for cross-examining him. This does seem to me, with great respect, a quite unfounded assumption, though I am not sure that it

(10) (1888) 20 Q B D 518; 59 L T 188; 36 W R 388; 5 Morrell 79.

(11) 57 B 665; 145 Ind. Cas. 648; A I R 1933 Bom. 309; 35 Bom. L R 546; 6 R B 98.

materially affects the result at which he arrived, as doubtless if Mr. K. Ba Gyi brought a regular suit for the purpose of bringing his security to sale he would have to make the Official Assignee a party. Mr. Dadachanji has therefore in my opinion made out two or possibly three, grounds on which we are entitled if we think fit to vary Ba U, J.'s order although his power to make that order was discretionary. It remains to be considered whether exercising our own unfettered discretion we should order a further examination or not. I am for myself much impressed by Ba U, J.'s observation "it will only result in waste of time" though as I have said I do not quite agree with the grounds on which he formed that opinion. Moreover the last paragraph of the head-note in *Goolbai v. Pherozshaw B. Petit* (11) reads:

"The Court ought not to make an order for the examination of a witness under s. 36 of the Act unless there is ground for thinking that the order is likely to be of some use."

This strikes me as both sound law and sound sense even if the word "further" be inserted before the word "examination." Mr. Dadachanji's examination of the witness has already produced results of which he had (if I may take an expression from another section of the Act) "no reasonable or probable ground of expectation." I can imagine some specific questions which might possibly make his client's prospects even brighter, but as there may be litigation between the parties about the matter I will not indicate what questions I have in mind. It may well be that Mr. Dadachanji would prefer not to put those particular questions at this stage and if so that is certainly a wise, and more than likely a right decision from his client's point of view. What he does ask us to do is to give him general liberty to continue the witness's examination in the hope of further windfalls. Whether a continuance of the examination will produce any result beneficial to the estate is, of course, a matter of speculation, but for my part I think it very unlikely. On the whole I think that Mr. Dadachanji's client has now got adequate materials on which to decide whether or not to take proceedings against Mr. K. Ba Gyi, and that he should make his mind up about it now. The appeal should, therefore, in my opinion, be dismissed. With regard to costs, a witness who is legally represented at an examination under s. 36 is not, I think, entitled to costs of such representation: It is a measure of prudence which he takes at his own expense. The position of Mr. K. Ba Gyi as to the appeal is somewhat different because (rightly or wrongly) he was made

respondent and served as such : see as to this *In re Scharrer: Ex parte Tilly* (10) to which I have already referred in another connection. But no substantive relief was asked for against him, and he would not have been out of pocket by reason of our decision, had it gone against him, if he had not contested the appeal and I therefore think we ought to dismiss the appeal without costs. In *In re Maundy Gregory* (5), to which I have also referred, a witness was given costs of an appeal. But there he was himself the appellant, and the matter arose out of his refusal to answer a question. Unless he could justify that refusal (which he did) he would have been in contempt and liable to punishment. Possibly, Mr. Bodi may be advised to apply to the insolvency Judge for his costs out of the estate, to which the Official Assignee would have been entitled had this application and this appeal been properly made and preferred by him. We should therefore, I think, make an order for Mr. Bodi's costs to be taxed if he so desires, and, while expressing no opinion as to what should be done on that application, we should grant him liberty to make it.

Roberts, C. J.—I agree with the conclusions expressed by my learned brother. The order appealed from was made in the exercise of a discretionary power : and having regard to the answers already given in the examination under the Rang. Insolvency Act, I make no doubt but that the exercise of his discretion by the learned Judge in insolvency was not only one with which we ought not to interfere, but was in the circumstances a wise exercise of it. The examination of a person under this section is at least in theory, an examination by the Court; it is entirely a matter for the Court's discretion how far it should extend. The statutory power given to the Court does not entitle a creditor to demand this or that latitude in putting questions, but the decision in *G. H. Ghanchee & Sons, In the matter of* (1) cannot now be regarded as good law; and, as has been stated in *Goolbai v. Pherozeahaw B. Petit* (11) by the Bench of the High Court in Bombay, one of the objects of the section is to enable the Official Assignee to discover whether he has grounds for embarking on litigation on behalf of the creditors or not. I have not acquired the experience of my learned brother with regard to the English Law and practice in bankruptcy cases analogous to the case under appeal here. But I entertain no doubt that we ought not to interfere in the present matter, though it must be conceded that we have jurisdiction to do so,

for the reasons which he has given. The appellant's learned Advocate has not been able to suggest any specific question which he was debarred from putting, and no hardship has been occasioned to his client. Any attempt to convert the latitude given to the Advocate of a creditor in these circumstances into a right to try and establish, by devious questioning and cross-examination of a speculative character, some accidental advantage ought to be discouraged. And it is for this reason that in my respectful judgment the learned Judge in insolvency exercised a wise discretion and the appeal against his order must be dismissed.

D.

Appeal dismissed.

MADRAS HIGH COURT

Criminal Revision Case No. 478 of 1940
Criminal Revision Petition No. 454 of 1940

July 26, 1940

LAKSHMANA RAO, J.

In re PONNUSWAMI REDDIAR

AND ANOTHER—PETITIONERS

Practice—Appeal—Appeal presented and request for time to obtain necessary record made—It should not be disposed of on same day.

An appeal should not be disposed of on the same day on which it is presented in spite of the request of the Advocate for time to obtain the necessary records.

Cr. R. C. and Cr. Rev. P. under ss. 435 and 439 of the Criminal P. C., 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional First Class Magistrate, Ariyalur in Criminal Appeal No. 26 of 1940 (C. C. No. 545 of 1940 on the file of the Court of the Stationary Sub-Magistrate, Perambalur).

Mr. A. V. Narayanasami Ayyar, for the Petitioners.

The Public Prosecutor, for the Crown.

Order.—The appeal was presented on July 2, 1940 and it should not have been disposed of the same day in spite of the request of the Advocate for time to obtain the necessary records. The order of the Sub-Divisional Magistrate is therefore set aside and the appeal is remanded to the Sub-Divisional Magistrate of Musiri for disposal according to law.

N.-S.

Order set aside.

NAGPUR HIGH COURT

First Appeal No. 13 of 1938

December 8, 1939

STONE, C. J. AND BOSE, J.

RAJARAM—DEFENDANT No. 1

—APPELLANT

versus

Shrimant MADHAORAO AND ANOTHER—

RESPONDENTS

Contract—Building contract—Contractor contracting to build up building according to plan and of particular kind—Building owner appointing supervising engineer—Collusion between contractor and engineer—Building when nearly complete found very defective, as to necessitate its pulling down—Joint decree for damages held could be passed—Measure of damages—Passing of running bills by engineer, whether precludes owner from challenging work done.

A contractor contracted to build a building of a particular kind in a particular way and according to plans. The building owner appointed a supervising engineer. There was collusion between the contractor and the engineer. When the building was nearly complete it proved to be so defective and out of level as to make it necessary to pull it down :

Held, (i) that the owner was entitled when there was either such gross incompetence or gross negligence or gross dishonesty to put an end to the whole contract; and this apart from any special clause in it;

(ii) that a joint decree against two persons could be passed even when the liability of one was in contract and that of the other in tort and even though the connection between the plaintiff and the one was a direct one while that between the plaintiff and the other was indirect;

(iii) that the measure of compensation was the loss which the owner would suffer in erecting a structure of the kind for which he had contracted. [p. 258, col. 2.]

(iv) that the passing of running bills by the supervising engineer did not preclude the plaintiff from challenging the work done.

F. A. from the decree of the Court of the 3rd Additional District Judge, Nagpur, dated October 30, 1937 in Civil Suit No. 1-B of 1935.

Mr. J. Sen, for the Appellant.

Mr. M. R. Bobde, for Respondent No. 1.

Mr. N. T. Mangalmurti, for Respondent No. 2.

Judgment.—(The earlier portion of the judgment is not material for the purposes of the report.—*Ed.*) We are thus here concerned on any view with a bad building, and the question is: What is the proper remedy? The building owner says that he does not want it at all. It is no use to him: it cannot be put right: it has to be removed. The contractor says that he is agreeable to pull it down and to rebuild it. Alternatively he says if it is not pulled down it can be put right by lifting it in various ways so as to rectify the errors. The lower Court has in fact found that the right way to treat this matter is to consider how much the building owner has

paid. Certain of those payments are referable to another piece of work and to a part of the present work that can be dissociated from the bad building. Therefore one deducts the sums referable to the work that has been properly done from the total payments made: the balance shows how much has been paid on account of this bad building. That is treated as money that is paid for nothing because this building has got to be removed; and accordingly the lower Court has given a decree for Rs. 10,115-12-0 and the contractor has been permitted to take this material away. As the lower Court has found collusion between the 1st defendant and the 2nd defendant it has given a joint decree against them. What we have now to consider is: (1) whether this is the proper measure of damage, (2) whether there should be a joint decree.

To consider the second question first: This is a case where, so far as the contractor is concerned, he is responsible to the building owner in contract. His contract was to put up a building of a particular kind in a particular way. He contracted to build according to plans. Those plans show a square and level building. If he delivers a building that is out of level so grossly as to make it useless or so unsightly as to make it necessary to pull it down then of course he has broken his contract. If the building owner chooses to throw up the contract—and that we consider is the position he takes up here—then this is a case where it is argued nothing has been done under the contract of any value so that the contractor is not entitled to sue on a *quantum meruit*, and the building owner has paid so many thousands of rupees for nothing. If this suit were laid in contract—or it may be in *quasi contract*—for money paid for no consideration the building owner it is urged would be entitled to get back his money. The contractor is liable for negligence also. As against the supervising engineer the building owner can sue him in contract or in tort for negligence, and the measure of damage would be again what the building owner suffered. In a recent case which came up to the Privy Council from Australia *Grant v. Australian Knitting Mills Ltd.* (1), their Lordships had to consider a much more difficult case where A sues B and C as a consequence of an injury that A sustained following upon the purchase from B of a defective article manufactured by C. Between A and B there was privity of contract and no negligence on the

(1) (1936) A C 85; 105 L J P C 6; 154 L T 18; 79 S J 815; 52 T L R 38.

part of *B* because *B* was not aware of the defect which was latent. Between *A* and *C* there was no privity of contract but there was negligence in the manufacture of the article. The main question was:—Was *C* liable, that is to say for negligence in manufacture, and could a decree be given against both *B* and *C* for the damage suffered? It was decided that it could, the decree being against *B* in contract and against *C* for negligence; and the decree was in the same form as the present decree is and would result in each being liable: if one was proceeded against wholly he would have his remedy for contribution against the other. These latter points were not decided in that case but they would follow directly from the granting of a joint decree against both.

We have now to consider the damages. What is the measure of damage in this somewhat unusual case where a building has been put up and nearly completed and yet proves so defective that there is a mass of evidence to the effect that it should be pulled down?

The contractor has pressed us with the view that this is a case where the building owner should recover only nominal damages, alternatively only 10 per cent., the retention money. The latter point is founded on the contract. We do not propose to examine it because we do not think that there is much weight in that branch of the argument. The retention money was not intended to cover defects going to the whole root of the contract but only to guard against the possibility of the building owner having to complete the work even though he had paid the running bills relying on the supervising engineer's signature. The point has also been made that this is a case where a supervising engineer has given progress certificates which are final. There is nothing, we think, in this point. Progress certificates have not been given. Running bills have been passed but such passing does not preclude the building owner from challenging the work done.

The other point is a little more difficult. Here one has a building owner appointing a supervising engineer. The supervising engineer so acts that the builder spends thousands of rupees in part payment for a building which will, as the supervising engineer should well know, have to be pulled down. It is said that an engineer is employed as agent: agent's knowledge is principal's knowledge; the engineer knew the defects, therefore the principal knew: the principal stood by, and now he cannot recover. A somewhat more complicated case was con-

sidered in *Mayor & Co. of Kingston-upon-Hull v. Harding* (2). That was more complicated because in that particular case it was not a building owner who was suing a contractor but a building owner suing a surety who had assured the true performance of the building contract. It was a case where the building contract provided that the engineer's certificate should be final and the engineer has given his certificate. The jury in an action between the building owner and the builder had held that it was fraudulently obtained and consequently not effective. Then the building owner, having been unable to get satisfaction from the contractor, sued the surety and the surety said: "I am not liable because you (building owner) had a supervising engineer who allowed things to be done for which you are now holding me responsible."

It came before the Court of Appeal, and Bowen, L. J., (at p. 508*) observed as follows:

"The doctrine of law on this subject established in the case of *M'Taggart v. Weston* (3), and probably before the case, and expounded by subsequent authorities, particularly in the case of *Dawson v. Larves* (4) and other cases referred to in *Mayor of Durham v. Fowler* (5), is this: more omission on the part of the employer, mere passive acquiescence in acts which are improper on the part of the employer will not release the surety."

It is apparent from Lord Esher's judgment in the same case that the fact that the surety was there being sued caused the Court the only trouble that they had. Had the builder been sued it would have been a clear case.

In any event it is clear from these decisions that a joint decree against two persons is possible even when the liability of one is in contract and that of the other in tort and even though the connection between the plaintiff and the one is a direct one while that between the plaintiff and the other is indirect. We have therefore no difficulty in holding that a joint decree against the two defendants is possible and that it should be passed in this case. The defence which might otherwise have been available to the contractor, namely, that as the building was passed by the plaintiff's expert and agent up to the stage it has now reached it must be accepted as far as it goes, cannot be raised once it is found that the supervising engineer and the

(2) (1892) 2 Q. B. D. 494; 62 L. J. Q. B. 55; 4 R. 7; 67 L. T. 539; 41 W. R. 19; 57 J. P. 85.

(3) (1819) 3 Cl. & F. 525; 10 Blight 618.

(4) (1854) 1 Kay 280; 2 Eq. 230; 23 L. J. Ch. 434; 2 W. R. 213.

(5) (1890) 22 Q. B. D. 394; 58 L. J. Q. B. 246; 60 L. J. 456; 53 J. P. 374.

*Page of (1892) 2 Q. B. D.—[Ed].

contractor were in collusion. We do not say that this defence would have been legally sound had the facts been otherwise. But as the point was argued, all we say is that the question does not arise in this case.

We now have to assess the damages and we think that the principle on which this should be done is to be found in the American Law Institute's Restatement of the Law, Contracts pp. 574 to 577. Dealing with the question of damages in the case of Construction Contracts, the learned authors state:—

"The purpose of money damages is to put the injured party in as good a position as that in which full performance would have put him; but this does not mean that he is to be put in the same physical position. Satisfaction for his harm is made either by giving him a sum of money sufficient to produce the physical product contracted for or by giving him the exchange value that that produce would have had if it had been constructed..... Sometimes defects in a completed structure cannot be physically remedied without tearing down and rebuilding at a cost that would be imprudent and unreasonable. The law does not require damages to be measured by a method requiring such economic waste."

We think that that accurately states the law which obtains, or which should obtain, here.

The example given to illustrate the rule is this:

"A contracts to construct a school house for B for \$ 50,000. When completed the foundations sink and the building is dangerous. B has paid A \$ 30,000. At a cost of \$ 40,000 more, B tears down the walls, strengthens the foundations, and rebuilds the superstructure, this being necessary to make the building safe. B can get judgment for \$ 20,000, this amount being the cost of tearing down and rebuilding, less the part of the contract price not yet paid."

The first question, therefore, is to see whether the building must be pulled down and started afresh or whether rectification is possible. On this the defendant's experts state that rectification is possible and that it can be done at comparatively small cost. The plaintiff's expert thinks that rectification is not possible if what is required is a reasonably satisfying building for the price paid.

We think that Ditchburn, P. W. No. 6, has better qualifications and much wider experience than the defendants' experts. It does not appear from the evidence of the latter that they have ever seen rectifications of this nature carried out or that they have ever done it themselves. As we have to choose between these two sets of opinions we prefer that of Ditchburn. This is particularly so as, though extraordinary feats of engineering are possible given the requisite knowledge, skill and machinery, we do not think they would be available in a place like Nagpur where constructional ability is not of a high order and where anything out of the ordinary is not often attempted. One has only to look

to the results produced in this case by persons who are said to have qualifications, which, judging from their own and their Counsel's statements, as well as from the high prices charged and paid for their work, are regarded as extremely high in this locality. If this is the sort of state these local experts can get a building into one trembles to think what would happen to any difficult and complicated engineering feat entrusted to their care.

It is true the contractor has offered to do the rectification himself but, seeing the work he has already done, it is not surprising that the plaintiff is not prepared to entrust anything more to his hands.

The contractor has, as a matter of fact, offered to pull the whole thing down to the plinth level and start afresh from there without extra charge, and has undertaken to rebuild, using the old materials, to the satisfaction of any engineer the plaintiff chooses to name: a fair enough offer but not one which we can force the plaintiff to accept.

In the first place, Ditchburn says this would not be satisfactory: the materials would be second-hand and the result in a measure patch-work. We agree with the lower Court that the plaintiff who has agreed to pay high rates for a really first class building should not have one which, at the best, would not be in that class, foisted upon him. But also as a matter of law the plaintiff is entitled, when there is either such gross incompetence; or gross negligence or gross dishonesty, it does not matter which, as here, to put an end to the whole contract: and this apart from any special clause in it. If we were to compel the plaintiff to accept the contractor's offer it would mean that we are depriving him of a right to which he is legally entitled. Moreover, as the lower Court remarks, the plaintiff has already afforded the defendants this opportunity by his letters, Ex. 1-D-7 and Ex. P-7. They did nothing about it, so he was fully justified in putting an end to the contract altogether. We are consequently of opinion that rectification is not the right remedy in this case.

As regards damages, the plaintiff wanted a first class building at a certain price. He is entitled, therefore, to be put as nearly as may be in the same position as he would have been in if things had been rightly and properly done.

The lower Court holds in para. 22 of its judgment that the plaintiff has paid the contractor Rs. 17,036-15-0 and has supplied him with materials worth Rs. 424-11-0. That is to say the plaintiff has up to date, according

to the lower Court, invested a sum of Rs. 17,461-10-0 in this building. For this money he has obtained what he has described as blocks A, B and C in his plaint. Of these, there is no complaint about blocks A and C except in a small matter which according to the lower Court can be set right at a cost of Rs. 10. We have, therefore, to deduct the sum spent on blocks A and C before we can arrive at any conclusion respecting block B.

The lower Court's figures are based on the statement in the plaint and its schedule. But they are not accepted by the contractor. He states in para. 9 of his written statement that the payment towards the works in dispute totals only Rs. 16,780-15-0 and not the Rs. 17,461-10-0 mentioned in the plaint.

The contractor's figures appear to be based on the plaintiff's measurement book, Ex. P-6. This shows that the following sums were passed for payment on the dates shown against them below.

	Rs.	a.	p.
21-3-32	1,830	2	0
23-5-32	3,957	13	9
9-7-32	4,009	6	0
26-7-32	2,487	9	3
	12,284	15	0
Add as per Schedule to the plaint	4,500	0	0
Total	16,784	15	0

There is a small difference of Rs. 4, which we can ignore; it is probably a misprint. But though these seem to have been the sums passed for payment we find that the sums actually paid were those given in the plaint.

The plaintiff's cashier, P. W. No. 4, speaking from the plaintiff's account books, states that he himself made the payments and that they were as follows:

	Rs.	a.	p.
23-3-32	1,830	2	0
25-5-32	4,209	13	9
11-7-32	4,009	6	0
26-7-32	2,487	9	3
19-8-32	500	0	0
27-8-32	4,000	0	0

These add up to the plaintiff's figure. The defendants have not shown us any accounts on their side, nor have they called for any receipts, consequently we see no reason to disbelieve P. W. No. 4 and the plaintiff's books, especially as the lower Court has accepted the plaintiff's figure. We, therefore, hold that the sums actually paid to the contractor totalled Rs. 17,037-3-6.

The next dispute is about Rs. 424-11-0 the cost of materials supplied. The defendant's

case is that only Rs. 85-8-0 is properly chargeable to this head and he complains that the plaintiff has included an item of Rs. 339-3-0 twice over in the schedule to his plaint.

The schedule shows that on March 23, 1932 Rs. 2,122-5-0 was actually due to the contractor but he was only paid Rs. 1,830-2-0 because a sum of Rs. 80-3-0 was deducted on account of materials supplied. A similar deduction was made on May 25, 1932, in respect of a sum of Rs. 259. The two together total the Rs. 339-3-0.

We do not think there is anything in this connection. Had we been considering the sum properly payable to the contractor on the basis of sound work of course he would have been right. The plaintiff would not have been entitled to charge this over again. But we are not now considering what the contractor ought to get but what damages the two defendants should pay to the plaintiff. We cannot arrive at that figure without knowing how much the plaintiff has actually put into this building: not what he would have had to pay if it had been properly constructed, but how much he has actually spent. This sum totals up to the Rs. 17,461-10-0 which the lower Court has accepted.

We have next to see how much of this went into blocks A and C. The figure given by the plaintiff in his plaint is Rs. 4,149-10-9. The contractor's figure is Rs. 7,345-14-0. We have to choose between the two.

The lower Court has accepted the contractor's figure and the cross-objection and the revision which we have dismissed relate to Rs. 1,000 out of this. The balance was apparently not questioned in either of these two proceedings. But, however that may be, the lower Court points out that when the contractor questioned the plaintiff's figure and gave one of his own the plaintiff chose to reply, and though he questioned other portions of the paragraph in the written statement (namely para. 9) he did not question the accuracy of the contractor's figures on this point. Had he not replied the question would have been in issue but as he chose to file long and elaborate replies to practically every statement made, the matter assumes a different aspect. In these circumstances, and bearing in mind that the cross-objection and the revision have already been dismissed, we think it right, as the lower Court did, to adhere to the contractor's figure of Rs. 7,345-14-0. When we deduct this from the total of Rs. 17,461-10-0 we find that Rs. 10,115-12-0 is the sum expended over block B. The question now is how much of this should be returned to the plaintiff.

We have already decided that rectification would not be the right remedy in this case. We agree with the plaintiff's expert Ditchburn that the building will have to be pulled down, but we are of opinion that the foundations will still be serviceable—in fact they will be all the better for having an opportunity to settle. Nobody has made any complaint about them, either as regards the quality of the materials used or the manner in which they have been laid. The reinforced concrete coping with which these foundations are finished off will of course have to be removed in order to enable the under neath to be properly levelled but up to that point we think the building must be regarded as sound and serviceable.

Exhibit P-6, which contains particulars of the first running bill, shows that it was paid for work upto the plinth stage. The total of the work done up to that stage was Rs. 2,122-5-0, and deducting Rs. 80-3-0, the value of the materials supplied by the plaintiff, we get a figure of Rs. 2,042-2-0 chargeable to that head. But out of this will have to be deducted the value of the materials which were used for the reinforced coping on top of the foundations. We have not been shown any evidence about this by either side and the matter is not of much importance any way, but as far as we can make out from the first running bill, Items Nos. 6 and 7 relate to this head, and the amount of referable to these items is the difference between Rs. 1,852-5-0 which seems to be a running total at the end of Item No. 7 and the Rs. 1,675-8-0 which heads column 6. That is to say the total is Rs. 176-13-0. That makes the total properly debitible to the foundations as Rs. 1,865-5-0 (that is to say, Rs. 2,042-2-0 less Rs. 176-13-0). This figure must be deducted from the Rs. 10,115-12-3 awarded by the lower Court. That leaves a sum of Rs. 8,250-7-3.

The next question is whether any of the material used in other parts of the building will still be serviceable to the plaintiff for a new building. Ditchburn says that it will not be fair to saddle him with these used materials. We agree that so far as the bulk of them is concerned that would not be right, but no complaint has been made about either the quality or the workmanship of the woodwork and it seems to us that most of it will still be serviceable. We think, therefore, that the door frames and shutters and the window frames and the sky light frames as also the wooden beams and trusses which support the roof of the upper storey should be re-used and their cost as

charged in these bills' less 20 per cent. for deterioration and the rough state in which they will now necessarily be, should be deducted. We also think that the iron girders can be used again and that in their case also their cost as charged to the plaintiff less 20 per cent. should be deducted. That means that the decree of the lower Court will be modified by substituting for the figure of Rs. 10,378-10-0 the figure which will now be obtained by deducting from Rs. 8,250-7-3 the value as charged in the running bills of the door frames and shutters, the window frames and sky light frames and the iron girders, as also the wooden beams and trusses which support the roof of the upper storey, less 20 per cent. There will also be added to the decree a clause directing the defendant No. 1 to restore to the plaintiff within the two months allowed the door frames, shutters, girders etc., which we have mentioned above, and of which a list will be given later, in good and serviceable condition for re-use, with a right to the plaintiff to apply to this Court to amend the decree in respect of any such material as is returned in an unserviceable condition.

This latter part of the case was not argued before us as we cut Counsel short on the extent of the damages to be allowed until we had decided the principle along which they should be awarded. The parties will therefore now file an agreed list, if that is possible, of the materials we have specified above and the cost debitible to them in accordance with the running bills. If they are unable to agree each will file his own list and we will determine the point. The 20 per cent. will be deducted by us and this list or these lists should not show the deduction :

The costs of this appeal and those in the Court below will be according to success and failure. A fresh period of two months from the date of the decree will now be fixed.

The following clause in the lower Court's decree will also be modified.

"and restore the ground to the same position in which it was before the construction of the building" will now read as :

"and restores the ground to the same position in which it was before the construction of the building with the exception of the foundations after removal of the reinforced cement coping. That will remain."

We add that we have not overlooked the fact that ordinarily the plaintiff would also be entitled, after all these matters have been taken into account, to the difference between the price which he would have had to pay if the building had been properly constructed and that which he will be obliged to pay for the reconstruction if the latter exceeds the

former. But here the plaintiff's own case is that the prices agreed were high and that the market rates were much lower. It follows the plaintiff will not, on his own showing, now have to pay as much for the reconstruction as he would have had to pay under the original agreement. Consequently, he is not entitled to anything along these lines and so we need not consider exactly what it will cost him to rebuild.

We also add that we have not overlooked the fact that the 20 per cent. rebate which we have allowed to the plaintiff on the price of such of the materials as in our opinion will still be serviceable, hits the contractor; also that he gets the benefit of whatever materials he removes; and that at the first blush this would appear to overlook the supervising engineer. But really it does not.

The liability, as we have pointed out, is joint and several and the measure of compensation is the loss which the plaintiff will suffer in erecting a structure of the kind for which he had contracted. This is a matter which is independent of personalities and so whoever is responsible in law for this loss must suffer a decree to be passed against him for the full amount. If there is inequality as between the defendants *inter se* that is a matter which they will have to settle between themselves. So far as the plaintiff is concerned there is only one standard.

We may add that at first we had thought of directing that the decree be executed in the first instance against the contractor and then against the supervising engineer only for such balance as was irrecoverable from his co-defendant. But in view of the unfounded attacks made on the plaintiff by the second defendant, which were persisted in in this Court in spite of warning; we see no reason why we should, in the exercise of our discretion, discriminate between the two. In the eye of the law they are both jointly and severally liable and we think that the law should be allowed to follow its normal course.

D.

*Decree modified.***LAHORE HIGH COURT**

Second Appeal No. 42 of 1940

October 22, 1940

BHIDE, J.

CHHABBA RAM—PLAINTIFF—APPELLANT
versus

NATHU RAM—DEFENDANT—RESPONDENT

Court Fees Act (VII of 1870), s. 7 (xi) (cc)—Tenant refusing to vacate after notice to quit—Ejectment suit falls under s. 7 (xi) (cc).

Even though a notice of ejectment is served on a tenant, he does not cease to be a tenant "holding over" for the purposes of s. 7 (xi) (cc), Court Fees Act. Consequently a suit to eject him falls under s. 7 (xi) (cc) and cannot be treated as a suit against a trespasser. 99 Ind. Cas. 438 (3), followed, 74 Ind. Cas. 93 (1), 116 Ind. Cas. 374 (2) and 84 Ind. Cas. 202 (4), not approved.

S. A. from a decree of the District Judge, Dera Ghazi Khan, dated October 26, 1939.

Mr. Achhru Ram, for the Appellant.

Mr. Jivan Lal Kapur, for the Respondent.

Judgment.—This was a suit for ejectment of a tenant and for recovery of Rs. 18-4-9 on account of arrears of rent and cost of notice. The suit was decreed by the trial Court but on appeal the learned District Judge has held that the plaint was not properly stamped and that court-fee should have been paid *ad valorem* on the property as the suit was really against the defendant as a trespasser. Permission was asked for amendment of the plaint but the prayer was not granted and the plaintiff's suit was dismissed. From this decision the plaintiff has preferred a second appeal. The Counsel for the appellant has urged that the position of the defendant was that of a 'tenant holding over', that the court-fee was sufficient as the suit properly fell under s. 7 cl. (xi) (cc), Court-Fees Act, and lastly that in any case the District Judge, was not justified in dismissing the suit so far as the recovery of rent was concerned.

The main point for decision in the appeal is whether the plaint was properly stamped. The plaintiff sued the defendant on the footing that he was a tenant. The learned District Judge has himself found that the defendant was at first a tenant of the plaintiff. He has, however, held that after the notice of ejectment was served on the defendant, he became a trespasser and, therefore, *ad valorem* court-fee was payable. In support of this view, the learned District Judge has relied on *Narayan v. Tukaram* (1) and *Govinda Ram v. Dulu Pade Dutta* (2). The

(1) A I R 1923 Nag. 310; 74 Ind. Cas. 93; 8 N L J 63.

(2) A I R 1928 Cal. 753; 116 Ind. Cas. 34; 32 C W N 1113.

learned Counsel for the appellant has urged that these rulings do not lay down correct law. In every suit for ejectment of a tenant notice has to be served on the defendant and if the service of such notice by itself is sufficient to alter the status of the defendant into that of a trespasser, the provision of s. 7, cl. (xi) (cc) would be rendered nugatory. He has relied on *Vithaldas v. Gulam Ahmad* (3), in support of his contention that the suit was properly stamped under s. 7 cl. (xi) (cc). The learned Counsel for the respondent relied on *Champat v. Balakdas* (4), but it appears that this ruling was overruled by *Vithaldas v. Gulam Ahmad* (3). It was held in *Vithaldas v. Gulam Ahmad* (3) by a Division Bench of the Judicial Commissioners' Court that even though a notice of ejectment is served on a tenant, he does not cease to be a tenant "holding over" for the purposes of s. 7 (xi), (cc), Court Fees Act, as the cause of action accrues from the date on which the tenant refuses to quit in compliance with the notice. The learned Counsel for the respondent urged that the plaintiff had taken up the position that no notice was necessary. This position was apparently taken in the alternative if notice was held to be not proved. It seems to me that in view of the principle laid down in *Vithaldas v. Gulam Ahmad* (3), the present suit could not be treated as one against a 'trespasser'. In my opinion, the true principle governing a case of this description has been laid down in the Division Bench ruling reported in *Vithaldas v. Gulam Ahmad* (3). Following that principle I accept the appeal and setting aside the decree of the learned District Judge remand the case to him for decision of the other points arising in the case. Costs will follow final decision. Parties are directed to appear before the learned District Judge on November 18, 1940.

D.

Appeal accepted.

- (3) A I R 1927 Nag. 156; 99 Ind. Cas. 438; 23 N L R 5.
 (4) A I R 1925 Nag. 131; 84 Ind. Cas. 202; 20 N L R 124.

PATNA HIGH COURT

Appeal from Appellate Decree No. 9 of 1940

March 17, 1941

ROWLAND, J.

NOOR MOHAMMAD—APPELLANT

versus

ABDUL FATEH AND OTHERS—

RESPONDENTS

Tort—Malicious prosecution—Suit for damages—

Some of defendants Police Officers—Cause of action against them, based on their acts done purported to be official Acts—Notice under s. 80, Civil Procedure Code (Act V of 1908), if necessary—Question whether acts were done in good or bad faith, if material—Bar of s. 80, Civil Procedure Code applying as against some of defendants—Whole suit is unsustainable.

The question of the good faith or the bad faith of the public officer either as regards his belief in the legality or propriety of his act or the limit of his powers or the existence of facts justifying the exercise of such powers is irrelevant in the consideration of the question whether the officer is entitled to notice under s. 80 of the Civil P. C. The section does not require that the act should have been done in good faith; it merely requires that it should purport to be done by the officer in his official capacity. If the act was one such as is ordinarily done by the officer in the course of his official duties, and he considered himself to be acting as a public officer and desired other persons to consider that he was so acting, the act clearly purports to be done in his official capacity within the ordinary meaning of the term 'purport'. The motives with which the act was done do not enter into the question at all. 46 Ind. Cas. 86 (2) and 80 Ind. Cas. 72 (3), relied on.

The plaintiff brought a suit for damages for malicious prosecution against a number of defendants out of whom defendants Nos. 4 and 5 were Police Officers. The act on which the plaintiff rested his cause of action against the Police Officers was that they arrested the plaintiff and led him to the Police Station as a person accused of theft.

Held, that it was as Police Officers that defendants Nos. 4 and 5 took the plaintiff to the Police Station and although there may be a discrepancy as to whether one of them was in uniform or not that was an irrelevant matter because it was known to all parties concerned that they were Police Officers and it was perfectly clear that they purported to act as such whether in good or bad faith. Thus it was essential that notice under s. 80, Civil P. C., should be served on these defendants before instituting the suit;

Held, further that the bar of s. 80, Civil P. C., applied to the suit as a whole and not only to the claim for relief against those two defendants. The suit was therefore unsustainable *in limine*. *Raghubans Puri v. Jyotis Swarupa* (4), 132 Ind. Cas. 634 (5) and 104 Ind. Cas. 257 (6), referred to.

A. from a decision of the Subordinate Judge, Second Court, Patna, dated September 9, 1939.

Mr. Hareshwar Prasad Sinha and Kazi Nazrul Hassan, for the Appellant.

Mr. D. L. Nandkeolyar, for the Respondent.

Judgment.—This appeal by the first defendant of the original suit arises out of a suit for damages for false and malicious prosecution. The plaintiff has been given by the concurrent decision of both Courts a decree for Rs. 124-11-0 damages and his costs. The suit was brought against five defendants of whom the fourth and fifth were Police Officers. Defendant No. 4 raised the plea *inter alia* that the institution of the suit was barred by the provisions of s. 80 of the Civil P. C. because no notice under that section had been served on

himself or defendant No. 5 though the acts on which the plaintiff rested his cause of action against them were acts done in their official capacity as Police Officers.

The main point of law in this case is whether in the face of s. 80 of the Civil P. C. the suit could proceed. I may here state briefly the facts on which the plaintiff relied.

On January 19, 1937 Noor Mohammad defendant No. 1 procured the arrest of the plaintiff Khub Lal Muchi in the house of Amir Buksh an uncle of Noor Mohammad. The plaintiff was taken to the Police Station by defendant No. 4 Ram Chander Singh Haveldar and defendant No. 5 Bishundeo Sukul constable. Defendant No. 1 Noor Muhammad going with them and at the Police Station Noor Muhammad laid a first information report of theft against the plaintiff Khub Lal. The Sub-Inspector investigated the case and sent up charge-sheet. The plaintiff was put on his trial and was acquitted. All the defendants figured as witnesses for the prosecution. After his acquittal the plaintiff moved the trying Magistrate to order the prosecution of the informant under s. 211 of the I. P. C. for having wilfully brought a false case against him. The Magistrate refused to order such a prosecution and the plaintiff then went to the Civil Court and brought this suit. The Courts below have not been very clear as to what exactly were the admitted facts and what were the facts in issue which the plaintiff had to prove. It was common ground that the plaintiff was arrested at Amir Buksh's house : the fact in issue was whether he had gone there for theft or under circumstances suggesting a criminal intent, or had gone there on an invitation from defendant No. 1. Neither Court has stated what is the evidence for and against the plaintiff's version or has noticed that the plaintiff himself is the only witness to support it. The judgments are not altogether satisfactory for neither Court seems to have observed that there is no direct evidence of conspiracy and they have recorded a finding of conspiracy without apparently realizing that they were doing so on conjecture. The conjecture is based on the fact that antecedent events had happened which might be supposed to constitute a motive for such a conspiracy; but a criminal conspiracy of this kind ought to be proved and not presumed. On the point of law the view taken by the Subordinate Judge is that s. 80 Civil P. C. does not apply to the suit unless it is proved that

defendants Nos. 4 and 5 acted in their official capacities and not in collusion and conspiracy with the other defendants. The view was at one time expressed in certain decisions of the Calcutta High Court that s. 80 did not apply unless not only the act complained of was an act which the defendant might have done in exercise of functions belonging to his official capacity, but also he showed that he was acting in good faith within the powers entrusted to him by law; but these decisions must be held to have been overruled so far as the Calcutta High Court is concerned in *Dakshina Ranjan Ghosh v. Omar Chand Oswal* (1). It was held that to read into the section words which would limit its application to cases in which an officer acted *bona fide* in the exercise of his powers would not be legitimate, and that the duty of the Courts was to give effect to the natural meaning of the language used in the sections of the Code. The same view was arrived at in the Madras High Court in *Koti Reddi v. Subbiah* (2). Sadasiva Ayyar, J. puts the matter clearly in saying that

"the question of the good faith or the bad faith of the public officer either as regards his belief in the legality or propriety of his act or the limit of his powers or the existence of facts justifying the exercise of such powers is irrelevant in the consideration of the question whether the officer is entitled to notice under s. 80 of the Civil P. C."

The Allahabad High Court has taken a similar view in *Abdul Rahim v. Abdul Rahman* (3) observing that :

"On the language of the section the question seems to us to admit of no doubt. The section does not require that the act should have been done in good faith; it merely requires that it should purport to be done by the officer in his official capacity. If the act was one such as is ordinarily done by the officer in the course of his official duties, and he considered himself to be acting as a public officer and desired other persons to consider that he was so acting, the act clearly purports to be done in his official capacity within the ordinary meaning of the term 'purport'. The motives with which the act was done do not enter into the question at all."

Therefore the grounds on which the Courts below have held that s. 80 of the Civil P. C. did not come into effect, so as to require that the plaintiff should before bringing his suit give notice to defendants Nos. 4 and 5 are not sustainable. We have simply to see what act was done by these

(1) 50 C 992; 75 Ind. Cas. 173; A I R 1924 Cal. 145; 38 C L J 104; 28 C W N 10.

(2) 41 M 792; 46 Ind. Cas. 86; 7 L W 586; 34 M L J 494; 23 M L T 357; (1918) M W N 414; A I R 1918 Mad. 62.

(3) 46 A 884; 80 Ind. Cas. 72; A I R 1924 All. 851; 22 A L J 812; L R 5 A 599 Civ; 10 O & A L R 837.

defendants and whether it purported to be an official act. The act done was that they arrested the plaintiff and led him to the Police Station as a person accused of theft. That was an act which every Police Officer has a statutory power to do under s. 54 firstly of the Criminal P. C. It was as Police Officers that defendants Nos. 4 and 5 took the plaintiff to the Police Station and although there may be a discrepancy as to whether one of them was in uniform or not that is an irrelevant matter because it was known to all parties concerned that they were Police Officers and it is perfectly clear that they purported to act as such whether in good or bad faith. Thus it was essential that notice should be served on these defendants before instituting the suit.

The question then arises whether the bar of s. 80 applies to the suit as a whole or only to the claim for relief against these two defendants. The operative portion of s. 80 is "no suit shall be instituted against" etc. and the consequence of instituting a suit in face of a statutory prohibition is that under O. VII, r. 11, Civil P. C. the plaint should be rejected. It has been held in the Allahabad High Court in *Raghubans Puri v. Jyotis Swarupa* (4) that a Court cannot reject a plaint in part. It has also been held in the Calcutta High Court in *Jagadish Chandra Deo v. Debendra Prasad Bahadur* (5), that the proper course in a case like the present is to reject the plaint. The Privy Council decision in *Bhagchand Dagadusa v. Secretary of State for India in Council* (6) makes it quite clear that the requirements of s. 80 cannot be evaded or explained away and that a suit instituted in contravention of s. 80 is "unsustainable in limine."

In the result the decisions of both the Courts must be set aside. In lieu thereof it must be ordered that the plaint be rejected and that the appellant shall have his costs throughout from the plaintiff.

Leave to appeal under the Letters Patent is refused.

s.

Decision set aside.

(4) 29 A 325; A W N 1907, 68.

(5) 58 C 850; 132 Ind. Cas. 634; A I R 1931 Cal. 503; 35 C W N 161; Ind. Rul. (1931) Cal. 586.

(6) 51 B 725; 104 Ind. Cas. 257; 53 M L J 81; A I R 1927 P C 176; 25 A L J 641; 29 Bom. L R 1227; (1927) M W N 561; 46 C L J 76; 1 Luck 291; 32 C W N 61; 26 I, W 809; 54 I A 338 (P C).

CALCUTTA HIGH COURT

Appeal No. 160 of 1939

May 3, 1940

EDGLEY, J

PULIN BEHARI DAS AND ANOTHER—

JUDGMENT-DEBTORS—APPELLANTS

versus

Syed REASAT ALI AND OTHERS—DECREE-HOLDERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXI r. 17 (1), (4), ss. 151, 47, 145—Execution application—Correct number of suit and decretal amount not mentioned—Defect, if can be remedied—Execution application duly registered—Judgment-debtor taking no steps to have order for registration set aside—Order, if legal and valid—Dismissal of execution application as time-barred—On decree-holder's application under s. 151, Court reconsidering previous order and reviving execution case—Order under s. 151 held, not illegal—Remedy of aggrieved judgment-debtor—Assam Debt Conciliation Act (X of 1936), ss. 7, 8 (3), 16 (4), 21—Debt Settlement Board, whether has inherent final jurisdiction to determine existence and amount of debt—Finality under s. 8 (3), nature of—Decision by Board that debt does not subsist as it is time-barred amounts to decision that it has no jurisdiction to deal with the debt—Jurisdiction of Civil Court, if ousted under s. 8 (3) or s. 16 (4) to deal with it—Application under s. 4—Board holding particular debt to be time-barred—Civil Court, if should suspend proceedings in respect of such debt though application may be pending before Board.

Where in the form of an execution application the correct number of the suit had not been mentioned and the amount for which the decree was passed was incorrectly given the defects are not material and can easily be remedied under O. XXI, r. 17 (1), Civil P. C. [p. 266, col. 2.]

Where an application for execution is duly registered under O. XXI, r. 17 (4) and the judgment-debtors take no steps to have this order for registration set aside the order must be regarded as a legal and valid order.

Where on an application of the decree-holder under s. 151, Civil P. C., the executing Court reconsiders its previous order dismissing the decree-holder's execution application as time-barred and revives the execution case, the order under s. 151 cannot be said to be illegal. The remedy of the aggrieved judgment-debtor is by way of revision under s. 115.

Decision of the Debt Conciliation Board on the question of jurisdiction is final under s. 8 (3), Assam Debt Conciliation Act, but the finality only attaches to the actual decision with regard to jurisdiction and not to any incidental finding on which that decision may be based.

A Board in Assam has no inherent final jurisdiction to determine questions relating to the existence and amount of a debt though the Board might have to consider such questions incidentally, for example, under s. 4 of the Act, in order to enable it to decide whether or not it had jurisdiction to deal with a particular application.

Where the Board holds that a particular debt was not subsisting as it was time-barred, the order amounts to an order that it has no jurisdiction to deal with the particular debt as it was time-barred, and therefore, finality only attaches to the order in so far as it purports to decide that the Board had no jurisdiction to deal with the matter, but, in so far as the order may have purported to decide whether the alleged debt was in existence or its amount, no finality would attach thereto and therefore it would not oust under s. 8 (3) or

s. 16 (4) the jurisdiction of the Civil Court to deal with the debtor. 184 Ind. Cas. 118 (1), referred to.

Where an application under s. 4 is made to the Board for the settlement of debts, and the Board holds that a particular debt mentioned in the application is time-barred the Civil Court is under no obligation to suspend the execution proceedings before it in connection with that decree even though the application under s. 4 may be pending before the Board.

A. from the appellate order of the District Judge, Sylhet, dated March 10, 1939.

Messrs. *Priyanath Dutt* and *Himanshu Chandra Choudhury*, for the Appellants.

Messrs. *Jatindra Nath Lahiry* and *Paresh Lal Shome*, for the Respondents.

Judgment.—This appeal is directed against the order of the learned District Judge of Sylhet, dated March 10, 1939, under which he dismissed an appeal against the decision of the trial Court, in which the learned Munsif directed that certain proceedings taken in Execution Case No. 362 of 1938 should proceed.

The main points urged on behalf of the appellants in this case are (1) that the application for execution was barred by limitation and (2) that the Courts below should have suspended all proceedings in execution on account of the fact that the appellants had approached the Debt Conciliation Board at Sylhet for the settlement of their debts, including the debt covered by the decree which was the subject-matter of the above-mentioned execution proceedings. The admitted facts of the case are briefly as follows: On February 7, 1934, the decree-holders obtained a decree against the appellants for the sum of Rs. 666. Thereafter, on February 8, 1937, the decree-holders put this decree into execution in Execution Case No. 91 of 1937. On February 27, 1937, an order was recorded by the Court to the effect that the application for execution was time-barred, but on the same day the decree-holders filed a petition for the reconsideration of this order under s. 151, Civil P. C. On March 1, 1937, the execution case was revived and the application for execution was duly registered, but two days later, this execution case was dismissed for default. On February 7, 1938, the judgment-debtors applied to the Debt Conciliation Board at Sylhet for the settlement of the debts due from them to all their creditors and their application apparently included the debt due to the respondents under the decree in Money Suit No. 1569 of 1933. On April 11, 1938 it appears that the judgment-debtors produced before the Board a certified copy of the order, dated February 27, 1937, under which

the decree-holders' application for execution had been rejected as being time-barred, but they did not disclose the fact that a few days later this application had been restored on the decree-holders' petition under s. 151, Civil P. C. After perusal of the order of the learned Munsif, dated February 27, 1937, the Debt Conciliation Board held that the debt due on the decree in Money Suit No. 1569 of 1933 was not subsisting as it was time-barred. On May 5, 1938 the decree-holders applied to the Board for a review of this order under s. 19, Assam Debt Conciliation Act but their application was rejected. On September 13, 1938, the decree-holders again applied to the Court for the execution of this decree and it was in connection with this application for execution that the judgment-debtors raised two objections: (1) to the effect that the application for execution was barred by limitation and (2) that the Civil Court had no jurisdiction to deal with the matter in view of the orders which had been passed with reference thereto by the Debt Conciliation Board.

As regards the question of limitation the main argument of the learned Advocate for the appellants in this case is that the previous application for execution, which was filed on February 8, 1937, cannot be regarded as an application in accordance with law within the meaning of Art. 182 (5), Lim. Act, and he relies on certain irregularities connected with the filing of the application for execution, to which reference has been made in the judgment of the learned District Judge. For instance, it would appear that the correct number of the suit had not been mentioned and the amount for which the decree was passed was incorrectly given. The defects in the form of the application, such as they were, were not material and might easily have been remedied if the Court had followed the provisions of O. XXI, r. 17 (1) of the Code, which it failed to observe. Moreover, the Court wrongly assumed that the application was time-barred, and in my view the order rejecting it which was made on February 27, 1937 was obviously illegal.

I am in entire agreement with the learned Judge in the opinion which he records to the effect that the execution proceedings in connection with this matter were inefficiently conducted by the Court and the ministerial officers concerned. It would appear that, in connection with this matter, no large measure of blame can be attached to the decree-holder and, in any case, the record shows that, on March 1, 1937, the application for execution was duly registered under the pro-

visions of O. XXI, r. 17 (4), Civil P. C. The judgment-debtors took no steps to have this order for registration set aside and, this being the case, it must be regarded as a legal and valid order. In this connection, it has been argued that the executing Court had no jurisdiction to revive the execution case on March 1, 1937, under the provisions of s. 151, Civil P. C. Having regard to the special circumstances of the case, I am not prepared to say that in this particular case the executing Court acted illegally in making the order under s. 151 of the Code, but in any event, if the judgment-debtors felt themselves aggrieved by this order, they should have moved this Court in revision under s. 115, Civil P. C., for its modification. This they failed to do. In view of the circumstances set forth above, I am of opinion that the proceedings in Execution Case No. 91 of 1937 were taken in accordance with law. The latter case was dismissed on March 3, 1937 and, as the application in the present case was filed on September 13, 1938, it is clear that the present execution proceedings were taken in proper time.

As regards the second objection which has been urged on behalf of the appellants, the trial Court held that the order recorded by the Debt Conciliation Board on April 11, 1938, was made without jurisdiction and the learned District Judge was of the opinion that, as regards the debt which was the subject-matter of the execution proceedings, there had been no final adjudication by the Debt Conciliation Board and, therefore, it could not be said that the Civil Court had no jurisdiction to deal with the matter. From the provisions of the Assam Debt Conciliation Act, 1936, it would appear that, under s. 8 (1) of the Act, if the Board after examining the debtor considers it desirable to effect a settlement between him and his creditors, it is enjoined to call upon every creditor of the debtor to submit a statement of debts owed to such creditor by the debtor. Sub-section (2) goes on to say that :

"Every debt of which a statement is not submitted to the Board in compliance with the provisions of sub-s. (1) shall be deemed for all purposes and all occasions to have been duly discharged."

On behalf of the judgment-debtors in this case it was suggested during the course of the argument that the order, dated April 11, 1938, had the effect of discharging the debt within the meaning of s. 8 (2) of the Act and, in this view, it was urged that the jurisdiction of the Civil Court would be barred by the provisions of s. 16 (4) of the Act. I am not prepared to accept this contention.

The above-mentioned order indicates that the creditors had in fact submitted a statement of their debts but that they had failed to file any document in support of their claim as contemplated by the provisions of s. 9 of the Act. It, therefore, follows that the order cannot be regarded as falling within the purview of s. 8 (2) of the Act. In effect, the order in question merely amounted to a decision on the part of the Board that they had no jurisdiction to deal with this particular debt as it was barred by limitation. As regards the question of the jurisdiction, it is provided by s. 7 of the Act that the Board may at any stage dismiss an application for want of jurisdiction and there is a further provision in sub-s. (3) of r. 8 to the effect that the decision of the Board with regard to jurisdiction under s. 7 or s. 8 shall be final and shall not be questioned in any Civil Court. Having regard to the terms of the order which was recorded on April 11, 1938, I must hold that it merely amounted to a decision that the Board had no jurisdiction to deal with the matter. In this view of the case I consider that the Civil Court would be competent to deal with any application for the execution of the decree, which might thereafter be filed in such Court, and to decide for itself in those proceedings whether the debt was in fact time-barred.

In this connection, it has been suggested by the learned Advocate for the appellants that the order, dated April 11, 1938, should be taken as a final determination of the Board to the effect that the debt did not exist, which would prevent the question of the existence of such debt being again raised directly or indirectly in the Civil Court. In other words, it is contended that a Debt Conciliation Board in Assam would have an inherent final jurisdiction to determine questions relating to the existence and amount of a debt such as has been expressly conferred upon Debt Settlement Boards in Bengal under the provisions of s. 18, Ben. Agri. Debtors Act. I am not prepared to accept this argument. Of course, a question relating to the amount or existence of a debt might have to be considered incidentally (e. g., under s. 4 of the Act) in order to enable a Board to decide whether or not it had jurisdiction to deal with a particular application. The Board's decision on the question of jurisdiction would be final under s. 8 (3) of the Act. At the same time, under this sub-section, finality only attaches to the actual decision with regard to jurisdiction and not to any incidental finding on which that decision may be based. The general principles which

regulate the scope of the authority of the Civil Court with regard to Debt Settlement. Boards in Bengal have been summarized by Ghose, J. as follows in *Nur Miya v. Noakhali Nath Bank Ltd.* (1).

"In some of the reported cases, this Court has pointed out that the Act has set up its own tribunal and has laid down the principle that where the Act has expressly provided that certain matters are to be decided by that tribunal the Civil Court must refrain from going into those matters, but where there is no express provision in respect of the tribunal under the Act, the ordinary Court must act in the exercise of its powers."

If the principle formulated above be applied in respect of the order of the Board, dated April 11, 1938, it appears that finality only attaches to the order in so far as it purports to decide that the Board had no jurisdiction to deal with the matter, but, in so far as the order may have purported to decide whether the alleged debt was in existence or its amount, no finality would attach thereto. If it had been the intention of the Legislature to confer exclusive jurisdiction upon Debt Conciliation Boards to decide questions of fact with regard to the existence or amount of debts, some provision on the lines of s. 18, Ben. Agri. Debtors Act, would have been inserted in the statute but this has not been done. In my judgment therefore even if the decision of the Board, dated April 11, 1938, could be regarded as a determination to the effect that the alleged debt did not exist, this would not have the effect of ousting the jurisdiction of the Civil Court under s. 8 (3) of the Act. Further, the matter clearly does not come within the purview of s. 16 of the Act. This contention must accordingly be overruled. Finally, it has been argued by the learned Advocate for the appellants in this case that the Civil Court should have suspended all further proceedings in the matter under the provisions of s. 21 (1), Assam Debt Conciliation Act, which is in the following terms :

"When an application has been made to a Board under s. 4, any suit or other proceedings then pending before a Civil Court in respect of any debt for the settlement of which application has been made shall be suspended until the disposal of the application."

It is true that the debt in respect of the decree for Rs. 666 which was obtained on February 7, 1934, was included in the original application to the Debt Conciliation Board, but the order of the Board which was recorded on April 11, 1938, must be regarded as disposing of the application in respect of that particular debt inasmuch as it amounted to a decision that the Board had no jurisdiction to deal with the matter. It

(1) I L R (1939) 1 Cal. 437; 184 Ind. Cas. 118; A I R 1939 Cal. 298; 43 C W N 322; 69 C L J 126; 10 R C 204.

therefore follows that the Civil Court was under no obligation to suspend the execution proceedings in connection with that decree after the order of April 11, 1938 had been recorded by the Board. In my view the decision of the lower Appellate Court is correct. I consider that the appellants have failed to show that the application, dated September 13, 1938, was time-barred and it is also clear that the jurisdiction of the Civil Court to deal with this matter has not been curtailed by anything contained in the provisions of the Assam Debt Conciliation Act of 1936. The judgment of the lower Appellate Court is therefore affirmed and this appeal is dismissed with costs. The hearing fee is assessed at 3 gold mohurs.

D.

Appeal dismissed.

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Civil Revision No. 591 of 1940

January 7, 1941

ALMOND, J. C.

WAQF MASJID—DEFENDANT—PETITIONER
*versus*SARDAR KHAN SHARIF KHAN—
—PLAINTIFF AND ANOTHER—DEFENDANT
—RESPONDENTS

Civil Procedure Code (Act V of 1908), ss. 10, 151, 115—Order under s. 10 refusing stay of subsequent suit pending previous one — Order though not open to revision held could be interfered with under s. 151.

The defendant B did not object to the valuation put by plaintiff A of the suit at Rs. 300 but later on when apparently he thought that he had not raised a defence which might have been of benefit to him he approached another Court over the same subject-matter, put a valuation of Rs. 1,200 and virtually created a situation in which conflicting decisions may be given by two different Courts. The Court in which the subsequent suit was filed by B, refused to stay it under s. 10, Civil P. C., pending the previous suit on the ground that the Court in which the suit was previously instituted by A had no pecuniary jurisdiction to try it :

Held, that the order of the Court under s. 10 refusing to stay subsequent suit was an interlocutory one and it could not be subject of revision. The powers conferred by s. 151, Civil P. C., should not be exercised lightly but the case was eminently one in which they should be exercised in order to avoid "an idle multiplicity of suit" by ordering the subsequent suit to be stayed pending the decision of the previous suit: 93 Ind. Cas. 285 (1), 182 Ind. Cas. 234 (2) and 113 Ind. Cas. 783 (3), referred to.

C. R. from an order of the Sub-Judge, First Class, Peshawar, dated October 26, 1940.

Kazi Mohammad Shafiq and Lala Lal Chand, for the Petitioner.

Kazi Mohitadulla, for Respondent No. 1.

Order.—This is an application for revision of the order of the Sub-Judge, First Class, Peshawar, refusing to stay under s. 10, Civil P. C., a suit pending in his Court. The prayer in revision is that I should make an order staying the suit under the provisions of ss. 10 and 151, Civil P. C. The facts of this case are as follows: On July 5, 1939, Waqf Masjid and Hujra through Ghulam Sarwar Khan brought a suit against Sardar for possession of a house. He alleged that he was the *mutwalli* of a certain *waqf* which owned 300 *jaribs* of land, that in order to arrange for the cultivation of this land he had built the house in suit in 1933-34 and had put the defendant, Sardar, who was cultivating some of the *waqf* land in possession of the house on condition of his paying Khakshora, Tora and other customary dues, that as Sardar did not cultivate the land in accordance with the plaintiff's wishes, he ejected him from the land in 1937, that he now required possession of the house which Sardar refused to give denying the ownership of the plaintiff. He therefore prayed for possession of the house and for Rs. 100 on account of Khakshora and Tora. He valued the suit at Rs. 300, i. e., Rs. 200 value of the house and Rs. 100 value of the other relief claimed. This case was pending in the Court of the Sub-Judge, Fourth Class, Charsadda. On July 18, 1939, Sardar put in his written statement in which he denied the allegations of the plaintiff and alleged that he had been in possession of the site on which the house is built for more than 12 years, that he had spent a considerable amount of money in filling and levelling the site and had then built a house upon it. He denied that the plaintiff was the owner of the house. He further alleged that he was entitled to improvements and that the suit was time-barred. As regards the valuation of the suit he merely said that the matter was a question of law.

The suit proceeded in that Court and had not yet been decided when on January 15, 1940, Sardar brought a suit against Waqf Masjid and Hujra through Ghulam Sarwar Khan and, secondly, Abdul Hinan. This suit was transferred to the Court of the Sub-Judge, First Class, Peshawar. Sardar sued for a declaration that the house which is admittedly the subject of the first suit was situated in Khasra No. 130 and not in No. 129, that the plaintiff was the owner in possession for 14 years and that defendant No. 1 had no connection with the house. He valued the suit for purposes of jurisdiction at Rs. 1,200. In his plaint he alleged that the house in

dispute was situated in Khasra No. 130 which he had acquired from defendant No. 2, Abdul Hinan, by an oral exchange more than 12 years ago, that he had subsequently built on the site, that he had spent much money on levelling the site, that as a precaution against any dispute arising between his heirs and Abdul Hinan an exchange deed was written on November 15, 1937 to give effect to this exchange and that a mutation was attested thereon on May 1, 1939. He then referred in paras. 5 and 6 to the suit pending in Charsadda and alleged that defendant No. 1, i. e., Ghulam Sarwar Khan had brought a suit and was trying to prove in that suit that the house was situated in Khasra No. 129 and not in No. 130, that Ghulam Sarwar Khan was making an entirely unjust attempt to get a decree against him and therefore the necessity for a declaratory suit had arisen. The declaration which he asked for was that the house in dispute was situated in Khasra No. 130 and not in Khasra No. 129 and that defendant No. 1 had no connection with it.

In his written statement, the defendant Ghulam Sarwar Khan reiterated the case which he had set up as plaintiff in the Charsadda Court and said that the exchange deed of November 15, 1937, was not really an exchange deed at all but it had been drafted as an exchange deed in order to defeat pre-emptors and that he himself had brought a suit for pre-emption of the land mentioned in that document. He further alleged that the land referred to in that document was not the same as the one which was covered by the house which was in dispute between him and the defendant. He asked that the suit should be stayed under s. 10, Civil P. C. Abdul Hinan was proceeded against *ex parte*. The Subordinate Judge of the first class, Peshawar issued a commission for the valuation of the house and came to the conclusion in spite of the report of the Commissioner that it was worth Rs. 1,200. He therefore held that he could not stay the suit under s. 10, Civil P. C., as the Court at Charsadda being empowered to hear cases only up to Rs. 1,000 was not a Court which had jurisdiction to grant the relief claimed by Sardar.

In the revision application before me learned Counsel for respondent Sardar has argued that as the order of the trial Court is an interlocutory one, it cannot be subject of revision in view of many rulings of this Court. That contention is undoubtedly correct as it has frequently been held in this Court that no revision application can lie

against an interlocutory order. The question is therefore whether I should interfere under the provisions of s. 151, Civil P. C. That course has been taken in circumstances somewhat similar to those of the present case in three cases to which I have been referred by learned Counsel for the petitioner. They are, *Harnand Lal v. Chaturbhuj* (1), *Mehtab Shah v. Ali Haider Shah* (2) and *Kodu Mal Jethanand v. Tilakram* (3). In the first of these cases it was held that the High Court had inherent powers to make an order under s. 151, Civil P. C. In the second case it was held that the High Court could make the order under s. 115, and in the last case reference was merely made to the inherent powers of the Court and its power of superintendence. In my opinion, the present case is clearly one in which the powers conferred by s. 151 should be employed. The subject-matter in the two suits is obviously identical. In the case which was instituted in the first instance Sardar did not object to the valuation of the suit put upon it by Ghulam Sarwar Khan but later when apparently he thought that he had not raised a defence which might have been of benefit to him he approached another Court over the same subject-matter, put a valuation of Rs. 1,000 on to the suit and virtually creates a situation in which conflicting decisions may be given by two different Courts. The powers conferred by s. 151, Civil P. C., should not be exercised lightly but I think the present case is eminently one in which they should be exercised in order to avoid what has been described as "an idle multiplicity of suits." For these reasons I accept this application and under the provisions of s. 151, Civil P. C., direct that the proceedings in the Court of the Sub-Judge, Peshawar, be stayed pending the decision of the suit in the Charsadda Court. The petitioner will have his costs of his application in this Court and Pleader's fee is fixed at Rs. 16.

D.

Application accepted.

(1) A I R 1926 All. 212; 93 Ind. Cas. 285; 48 A 356; 24 A L J 375.

(2) A I R 1925 Lah. 144; 82 Ind. Cas. 234.

(3) A I R 1929 Lah. 12; 113 Ind. Cas. 783; 10 Lah. L J 470.

RANGOON HIGH COURT

First Appeal No. 99 of 1939

April 4, 1940

MYA BU AND MOSELY, JJ.

CHAN WAN HONG TONG—APPELLANT

versus

A. K. A. C. T. V. CHETTYAR—

RESPONDENT

Transfer of Property Act (IV of 1882), s. 53—Suit under, impeaching mortgage or sale—Burden to show that they are colourable transactions is on plaintiff—Evidence Act (I of 1872), ss. 101, 114—All evidence on record—Onus is immaterial—Party in possession of important documentary evidence, withholding it—Presumption.

Where a suit is brought under s. 53, T. P. Act, impeaching a mortgage or sale, the burden is on the plaintiff to show that the transaction was only a colourable transaction by proving inadequacy or absence of consideration and other circumstances suggesting that the sale or the mortgage was not meant to be acted upon. 105 Ind. Cas. 788 (1) and 137 Ind. Cas. 879 (2), relied on. [p. 271, col. 2.]

It is academic to argue the question of burden of proof at a stage when all the evidence is on record. [p. 272, col. 1.]

Even if the burden to prove something does not lie on a party, the Court can draw an adverse inference if such party having important documentary evidence in his possession throwing light on the fact withholds it from Court. 39 Ind. Cas. 659 (3), 50 Ind. Cas. 775 (4) and 114 Ind. Cas. 592 (5), relied on.

Mr. Cowasjee, for the Appellant.

Messrs. Clark and P. K. Basu, for the Respondent.

Mosely, J.—In Suit No. 8 of 1934 of the District Court of Pyapon the A. K. A. C. T. V. Chettyar Firm sued Chan Wan Hong Tong, a Chinese merchant, under O. XXI, r. 63, and under s. 53, T. P. Act, for a declaration that certain properties which Maung Sein Done *alias* Chan Cheing Tong, a Chinaman, purported to have first mortgaged and then sold to Chan Wan Hong Tong were liable to attachment and sale in satisfaction of the Chettyar firm's decree. In Civil Regular Suit No. 10 of 1935 of the same Court Chan Wan Hong Tong sued the Chettyar firm and Maung Sein Done, under s. 77, Regis. Act, to have a sale deed registered. The suits were consolidated and tried together in the suit brought by Chan Wan Hong Tong, who is referred to in the judgment briefly as "the plaintiff." On the date fixed for hearing, Chan Wan Hong Tong's witnesses were ready, but not those for the Chettyar firm, and by consent Chan Wan Hong Tong produced his evidence on all the matters in issue in both suits, though it was for the Chettyar firm in their suit to prove that the transactions which they impugned were, as they alleged, sham or fraudulent or collusive. The attachments made by the

Chettyar firm had previously been removed in Civil Miscellaneous No. 19 of 1934 of the District Court. The learned Judge found in the course of detailed and careful judgment that the transactions between Chan Wan Hong Tong and Maung Sein Done were not genuine but only colourable, *benami* and fraudulent, and that they were void against the creditors of Maung Sein Done. For this reason he refused to direct that the sale deed be registered, thinking it unnecessary to discuss other questions raised in the suit for registration of the sale deed. Civil Regular Suit No. 10 of 1935, was, therefore, dismissed.

Chan Wan Hong Tong has filed two separate appeals against this decree. We are here considering Civil First Appeal No. 99 of 1939, an appeal brought by Chan Wan Hong Tong against the decree in Civil Regular Suit No. 8 of 1934 declaring that the sale was a sham and fraudulent transaction. The properties in question, a house in Pyapon and a single holding measuring 289 odd acres in Pyapon township, were attached by the Chettyar firm on November 29, and December 2, 1933 in Civil Execution Case No. 64 of 1933. One application for removal of the attachment (Civil Miscellaneous No. 58 of 1933) was dismissed as it was not filed by an authorized agent. The Judge's reasons are summed up at pp. 35 and 36 of his judgment. The consideration for the sale deed of May 6, 1932, said to be Rs. 66,255, is said to have been the principal and interest on the deed of mortgage for Rs. 50,000, a duly registered deed of February 27, 1930. The consideration for the mortgage is said to have been the amount due on Ex. W, promissory note for Rs. 50,000 at Re. 1-4-0 per cent, executed on August 1, 1928. Exhibit W again is said to have been the consolidation of the amounts due on two promissory notes, Ex. B of March 5, 1927, for Rs. 30,000 in favour of Shaung Ah Wan Ma which is said to be the Burmese equivalent of Seong Wan, and Ex. C of December 9, 1927 for Rs. 20,000. These again are said to have been renewals of old promissory notes. Exhibit C is said to have been a renewal of Ex. V, promissory notes for Rs. 20,000 at Re. 1-4-0 per cent. of December 12, 1924. It is said that the promissory note of which Ex. B was a renewal is lost.

The main contention in this appeal is that the Judge wrongly put the burden of proof on Chan Wan Hong Tong, and that the evidence on the record did not show that the transaction was a fraudulent or colourable one. The learned Judge found

that Ex. V could not have been executed on the date which it bears. The Judge did not believe the evidence as to the execution of Exs. B and C promissory notes, nor the evidence as to their being the consideration for the mortgage deed. The Judge gave reasons for holding that the mortgage deed itself was a sham transaction, and that therefore there was no consideration for the sale. In my opinion, the Judge came to the only possible conclusion on the evidence. I shall therefore review the evidence on those transactions as briefly as possible, but dwell a little on the evidence as to possession after the sale on which less has been said. (After reviewing the evidence His Lordship proceeded.) It has been contended in argument that the Judge constantly referred to Chan Wan Hong Tong as "the plaintiff" throughout the course of his judgment, and it is suggested that the Judge wrongly cast the burden of proof on Chan Wan Hong Tong.

As regards the genuineness of the transactions in question there is nothing to support this line of argument. Chan Wan Hong Tong was referred to as "the plaintiff" merely because he started both cases. The Judge did not say in so many words on what side the burden of proof lay, but he clearly indicated his opinion that the evidence did not merely show that it was not proved that the transactions were genuine. The Judge came to the further conclusion that the evidence was sufficient to show that the transactions were not genuine. The Judge did not have the advantage of hearing the evidence, but I entirely agree with the conclusions which he drew. They were not conjectures founded on mere suspicion; they were reasoned conclusions arising from the evidence in the case. The burden of proof was, of course, initially on the Chettyar firm to show that these transactions were not genuine. It is true that the sale deed had not been properly registered. But when Chan Wan Hong Tong relied on s. 53-A, T. P. Act, to cure that defect it was again for the Chettyar firm to show that the registered mortgage deed was not good consideration for the sale. It was for the Chettyar firm to show that the mortgage was only a colourable transaction by proving inadequacy or absence of consideration and other circumstances suggesting that the sale was not meant to be acted upon: see *V. E. A. R. M. Firm v. Maung Ba Kyin* (1), at p. 855, a decision of their Lordships

(1) 5 R 852, (885); 105 Ind. Cas. 788; 4 O W N 926; 53 M L J 388; A I R 1927 P C 237; 29 Bom. L R 1481; 32 C W N 28; 46 C L J 349; 27 L W 447 (P C).

of the Privy Council. If the defendants put forward a substantial case it was then for the plaintiff to rebut it by proof of the genuine character of the sale. I agree with what was said in *Appathurai Chettiar v. Vellayan Chettiar* (2), as to the meaning of the above ruling.

In this case the substantive evidence for the defendants showed that Maung Sein Done was heavily embarrassed at the time of the mortgage sued upon, and that he was being pressed for repayment by respondent No. 1 Chettyar, and it also showed that part of the plaintiff's evidence relied upon (Ex. V) was a fabrication. It showed that Ex. W could not have been the consideration for the mortgage deed. The rest of the evidence for the defence consisted of admissions elicited from the plaintiff and his witnesses in cross-examination. It is academic to argue the question of burden of proof at this stage when all the evidence is on record and the plaintiff's evidence itself has shown that the plaintiff's case was a false one.

Much argument has been adduced in an endeavour to say that no presumptions should be drawn from the gaps in the evidence for Chan Wan Hong Tong because the burden was not upon him, and that it was for the defence to show substantively that his case was false. On this I would like to quote some observations of their Lordships of the Privy Council in *Murugesam Pillai v. M. D. Gnana Sambandha Pandara Sanadhi* (3) at p. 408 viz. :

"A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing accordingly to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough; they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition. The present is a good instance of this bad practice. It is proved in the case by the first witness that 'the mutt has regular fair day-books; they are not now before the Court; ledgers are also maintained in the mutt.' These ledgers and day-books were in the possession of the defendants or those of them who were heads of the institution, and they are not put in evidence."

(2) 55 M 748; 137 Ind. Cas. 879; A I R 1932 Mad. 302; (1932) M W N 97; 62 M L J 236; 35 L W 276; Ind. Rul. (1932) Mad. 475.

(3) 40 M 402 (408); 39 Ind. Cas. 659; A I R 1917 P C 6; 21 M L J 288; 32 M L J 369; 15 A L J 281; 1 P L W 457; 5 L W 759; 21 C W N 761; 19 Bom. L R 456; 25 C L J 589; (1917) M W N 487; 44 I A 98 (P O).

This was followed in *Guruswami Nadar v. Gopalasami Odayar* (4) where the head-note reads :

"Held, that, assuming that the onus of proving the binding nature of the debt lay on the plaintiffs even in the case of a trade carried on as joint family business, it was shifted to the defendants on account of the presumption arising against them by their omission to produce their accounts called for by the plaintiffs, a presumption which arises against them whether the plaintiffs have any evidence or not."

Then in *Rameshwar Singh v. Bajit Lal Pathak* (5) at p. 99 their Lordships made the following remarks :

"In the change of attitude on the part of the defence and in its failure to produce documents presumably available and probably decisive one way or another if examined, the learned Judges saw a design on the part of the defendant to take advantage of the abstract doctrine of the burden of proof upon a plaintiff in ejectment.

Their Lordships, in agreement with the High Court, consider that the excuses made by the defendant for the non-production of those documents are unsatisfactory, and unreliable, and, like the learned Judges of the High Court, they consider that their non-production is due to the fear that, if produced, they would either establish the plaintiff's claim, or in view of the defendant's admission as to the existence somewhere within the village of three *jotes* of the plaintiff of the area assigned would lead to a successful claim, albeit in another suit, which would be more serious for the defendant than that made in this suit. Their Lordships would refer to the views of the Board on this subject expressed by Lord Shaw when delivering the judgment of the Board in *Murugesam Pillai v. M. D. Gnana Sambandha Pandara Sanadhi* (3) and would again endorse them. In their Lordships' judgment the learned Judges of the High Court were well warranted in finding further confirmation of the plaintiff's evidence in the defendant's reticence and inconsistency."

In the present case, Chan Wan Hong Tong failed to produce the accounts of his firm for 1924-32, to show any payments made by him on the promissory notes in question and any repayments towards them. The practice of Chinese firms of keeping and preserving books of account carefully is well known and has been recognized in a pronouncement in a recent case of their Lordships of the Privy Council on appeal from this Court. As their Lordships remarked in another case, *Robins v. National Trust Co., Ltd.* (6) at p. 520 :

"Onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate con-

(4) 42 M 629; 50 Ind. Cas. 775; A I R 1919 Mad. 444; 36 M L J 568; 9 L W 547; (1919) M W N 301.

(5) A I R 1929 P C 95, (99); 114 Ind. Cas. 592; 33 C W N 430; 29 L W 501; 49 C L J 308; 6 O W N 423; 31 Bom. L R 721; (1929) A L J 261 (P O).

(6) (1927) A C 515, (520); 96 L J P C 84; 137 L T 1; 71 S J 158; 43 T L R 243

clusion, the onus has nothing to do with it and need not be further considered."

I have no doubt that the learned Judge of the trial Court came to the proper conclusion when he found that the transactions between Chan Wan Hong Tong's firm and Sein Done were merely sham and collusive. This appeal will be dismissed with costs.

Mya Bu, J.—I concur.

D. *Appeal dismissed.*

PATNA HIGH COURT Special Bench

Miscellaneous Judicial Case No. 4 of 1940
December 18, 1940

HARRIES, C. J., DHAVLE AND

MANOHAR LALL, JJ.

Kumar BADRI NARAIN SINGH,
KEEPER OF HAZARA MEMORIAL
PRESS, GAYA—PETITIONER

versus

CHIEF SECRETARY TO GOVERNMENT
OF BIHAR—RESPONDENT

Press (Emergency Powers) Act (XXIII of 1931), s. 4 (1) (a) and (d)—Common sense interpretation must be given to document complained of — Poem entitled "Labourers, the mainstay of the world", urging labourers not to tolerate exploitation of their masters and inciting bloody revolution and destruction of present social order by force—Poem held fell under s. 4 (1), cl. (a) and not under cl. (d).

A common sense interpretation must be given to the document complained of namely, the impression it gives to a man of ordinary common sense. 172 Ind. Cas. 906 (3), relied on. [p. 276, col. 1.]

In order to show that certain words come under s. 4 (1) (a) of the Press (Emergency Powers) Act, it is unnecessary to show that the words tend to incite to, or to encourage the commission of a particular offence or offences. It is sufficient if they tend to incite to or to encourage the commission of cognizable offences of violence in general. [p. 275, col. 2.]

A poem in Hindi was entitled "Labourers—the mainstay of the world." It began emphasising that labourers are the mainstay of the present world and then proceeded to describe their unfortunate and pitiful lot. The author subsequently pointed out that though speechless today, when organized they would be as powerful as millions and this portion of the poem ended with these words: "Why are you helplessly tolerating the exploitation of your masters". The remaining lines were as follows:

"Labourers. Raise now the cry of Revolution.
The heavens will tremble, the Universe
Will shake and the flames of revolution
Will burst forth from land and water. You who
have been the object of exploitation,
Now dance the fearful dance of destruction on
this earth.

Truly, labourers. Only total destruction will create
a new world order and that will bring happiness
to the whole world":

Held, that the words "masters or exploiters" are too wide and vague to denote a definite or ascertainable class so as to come within cl. (d) of s. 4 (1) of the Act. 141 Ind. Cas. 780 (1), relied on. [p. 274, col. 2.]

Held, further that the poem contained words tending to incite to or to encourage bloody revolution, and the destruction of the present social order by bloodshed and force and clearly came within s. 4 (1) (a) of the Act. 151 Ind. Cas. 943 (2), distinguished. 172 Ind. Cas. 906 (3), explained. [p. 275, col. 2.]

Messrs. Sarjoo Prasad and Basanta Chandra Ghosh, for the Petitioner.

The Advocate-General, for the Crown.

Harries, C. J.—This is an application under s. 23, Press Act, (Act XXIII of 1931); by: Kumar Badri Narain Singh, the keeper of the Hazara Memorial Press, Gaya, to set aside an order of the Provincial Govt. demanding security of Rs. 1,000 from the applicant as keeper of the said Press. The Provincial Govt. has appeared by the Advocate-General who opposes the application. As required by s. 24, Press Act, this Special Bench has been constituted to hear the application. The applicant was served with a notice under sub-s. (3) of s. 3, Press Act, on December 15, 1939, calling upon him to deposit with the District Magistrate of Gaya on or before January 13, 1940, security to the amount of Rs. 1,000 in money or in Govt. securities. This notice alleges that the Hazara Memorial Press was used for the purpose of printing matter set out in the schedule which was of the nature described in cls. (a) and (d) of sub-s. (1), of s. (4), Press Act. The schedule sets out poems in Hindi published in the "Chingari" dated November 6, November 13, and November 20, 1939, and in the issue of December 4, 1939. It is now conceded that the petitioner was not responsible for the publication of the articles in the month of November 1939, but it is admitted that he was responsible for the publication of the poem in the issue of the "Chingari" of December 4, 1939. The case is, therefore, confined to the poem published in the "Chingari" on December 4, 1939. Section 3 (3), Press Act, 1931, is in these terms:

"Whenever it appears to the Provincial Govt. that any printing press kept in any place in the territories under its administration, in respect of which security under the provisions of this Act has not been required, or having been required has been refunded under sub-s. (2), is used for the purpose of printing or publishing any newspaper, book or other document containing any words, signs or visible representations of the nature described in s. 4, sub-s. (1), the Provincial Govt. may, by notice in writing to the keeper of the press stating or describing such words, signs or visible representations, order the keeper to deposit with the Magistrate within whose jurisdiction the press is situated security to such an amount not being less than five hundred or more than three thousand rupees as the Provincial Govt. may think fit to require, in money or the equivalent thereof in securities of the Central

Govt. as the person making the deposit may choose."

Sub-section (4) of this section requires that the notice referred to in s. 3 shall appoint a date, not being sooner than the tenth day after the date of the issue of the notice, on or before which the deposit has to be made. In the present case the petitioner was called upon to make the deposit on or before January 13, 1940. Section 4 (1) of the Act is as follows :

"Whenever it appears to the Provincial Govt. that any printing press in respect of which any security has been ordered to be deposited under s. 3 is used for the purpose of printing or publishing any newspaper, book or other document containing any words, signs or visible representations which—

(a) incite to or encourage, or tend to incite to or to encourage, the commission of any offence of murder or any cognizable offence involving violence, or

or which tend, directly or indirectly :

(d) to bring into hatred or contempt His Majesty or the Govt. established by law in British India or the administration of justice in British India or any class or section of His Majesty's subjects in British India, or to excite disaffection towards His Majesty or the said Govt...."

In the present case the notice alleges that the poem published in the issue of the "Chingari" dated December 4, 1939, contained words falling within cls. (a) and (d) of this section. Section 23 (1) of the Act is in these terms :

"The keeper of a printing press who has been ordered to deposit security under sub-s. (3) of s. 3; or the publisher of a newspaper who has been ordered to deposit security under sub-s. (3) of s. 7, or any person having an interest in any property in respect of which an order of forfeiture has been made under s. 4, s. 6, s. 8, s. 10 or s. 19, may, within two months from the date of such order, apply to the High Court for the local area in which such order was made, to set aside such order, and the High Court shall decide if the newspaper, book or other document in respect of which the order was made did or did not contain any words, signs or visible representations of the nature described in s. 4, sub-s. (1)."

Section 25 provides that if a Special Bench of the High Court constituted under s. 24 is not satisfied that the words contained in the newspaper, book or other document in respect of which the order under s. 4, sub-s. (1), was made, it shall set aside the order. From these sections, it is clear that what the Bench has to decide is whether the poem published in the issue of the "Chingari," dated December 4, 1939, contains words falling within cl. (a) or cl. (d) of s. 4 (1). The poem published on December 4, 1939 is entitled "Labourers—the mainstay of the world." It begins emphasising that labourers are the mainstay of the present

world and then proceeds to describe their unfortunate and pitiful lot. When the scorching summer midday sun burns they are found toiling in the open fields and *khalihans* to provide food for others. They work day and night, still their children are hungry and the labourer has even no clothes to cover the body of his young wife. On the other hand, the masters are enjoying the fruits of their labour. This portion of the poem ends with the words; "O! helpless and poor labourers." The tone of the poem then suddenly changes and the author points out that so far from being helpless the labourers are all powerful and are the life and soul of the universe. Though speechless to-day, when organized they will be as powerful as millions and this portion of the poem ends with these words: "Why are you helplessly tolerating the exploitation of your masters?" Up to this, the poem contains no matter which can possibly be suggested to fall within cls. (a) and (d) of s. 4 (1), Press Act. It is, however, contended that the remainder of the poem does contain such matter. The remaining lines are as follows :

"Labourers. Raise now the cry of Revolution.
The heavens will tremble, the Universe
Will shake and the flames of revolution
Will burst forth from land and water. You who
have been the object of exploitation,
Now dance the fearful dance of destruction on
this earth

Truly, labourers. Only total destruction will
create a new world order and that will bring
happiness to the whole world."

On behalf of the Provincial Govt. it has been contended that this portion of the poem does contain words which incite to or encourage, or tend to incite to or to encourage, the commission of murder or cognizable offence involving violence. It is further contended that the words tend, directly or indirectly, to bring into hatred or contempt a class or section of His Majesty's subjects in British India, namely the masters or exploiters. In my judgment, it cannot be said that these words tend to bring into hatred or contempt any class or section of His Majesty's subjects. The words "masters or exploiters" are too wide and vague to denote a definite or ascertainable class so as to come within cl. (d) of s. 4 (1) of the Act: see *Maniban Liladhar Kara v. Emperor* (1). The Advocate-General very properly conceded that he could not seriously contend that the poem complained of came within the mischief of s. 4 (1) (d) of the Act.

(1) 57 B 253; 141 Ind. Cas. 780; A I R 1933 Bom. 65; 34 Cr. L J 231; 34 Bom. L R 1642; Ind. Rul. (1933) Bom. 153; (1933) Cr. Cas. 182.

The question however remains whether the poem contains words falling within s. 4 (1) (a) of the Act.

The concluding portion of the poem begins with the words "Labourers. Raise now the cry of Revolution," and these words may in themselves well suggest violence. Mr. Sarjoo Prasad who appeared on behalf of the petitioner contended however that "revolution" does not necessarily involve either violence or bloodshed. A revolution may be a bloodless and a peaceful one, and he has contended that such is the revolution contemplated by the author of this poem. It is urged that all the words amount to is an exhortation to the labourers to bring about a change in the social order by legitimate, constitutional and peaceful means. It appears to me however that if that was the object of the author of this poem, then he had used language singularly inappropriate for his purpose. He urges the labourers to raise the cry of revolution, and the consequence of that cry would be that the heavens would tremble, the universe would shake and the flames of revolution would burst forth from land and water. Mr. Sarjoo Prasad has strenuously urged that the Court must permit considerable poetic license in poems of this kind; but it is to be observed that the imagery employed by the poet in this part of the poem is not the imagery of peace or constitutional change but the imagery of terrible violence. The revolution is likened to an earthquake causing the heavens to tremble and the universe to shake and it is then likened to an eruption causing the flames of revolution to burst forth from land and water. The revolution contemplated by the poet is clearly revolution through violence. The poet then urges the labourers who have been the object of exploitation to dance the fearful dance of destruction on this earth and then concludes by pointing out that total destruction alone would create the new world order which will bring happiness to the labourers. If the revolution contemplated was a peaceful bloodless one, why call upon the labourers to dance the fearful dance of destruction and insist that total destruction alone must precede the new world order? This is obviously an exhortation to the labourers to destroy the existing social order and to destroy it by force and violence. Then and only then will a new world order be possible and happiness for the toiling masses achieved.

Mr. Sarjoo Prasad then contended that even if this portion of the poem contained

words tending to incite to or to encourage bloody revolution such would not be words within s. 4 (1) (a) of the Act. His contention was that words tending to incite to or encourage general violence were not sufficient to come within the mischief of s. 4 (1) (a). The words used must tend to incite to or to encourage the commission of some specific crime such as murder or a particular cognizable offence involving violence. In my judgment, words tending to, incite to or to encourage bloody revolution and the destruction of the present social order by bloodshed and force clearly come within s. 4 (1) (a) of the Act. Bloody revolution and forcible and violent destruction of the present social order involve all kinds of cognizable offences involving violence and would in all probability involve murder. In my view it is unnecessary to show that the words tend to incite to, or to encourage the commission of a particular offence or offences. It is sufficient if they tend to incite to or to encourage the commission of cognizable offences of violence in general. To accept Mr. Sarjoo Prasad's contention would be to hold that the greater does not include the less. Great stress was laid by Counsel for the applicant on the case in *Des Raj v. Emperor* (2), in which a Bench of that Court held that a revolution did not necessarily imply violence and commission of cognizable offences involving violence. In that case *Des Raj* was responsible for the publication of a poster the headline of which contained the words "Long, Long live Revolution." The poster in question was a mere announcement that it was intended to publish and circulate a series of pamphlets under the headings "Thoughts of Young men, their Ideas and Aspirations" containing the views of young men on all topics of the day, the movements in the country and the forces working behind them. It was contended that the use of the words "Long long live Revolution" brought the poster within the mischief of s. 4 (1) (a), Press Act, 1931. The Bench, however, held that there was nothing in the poster to bring it within the provisions of that section. At p. 266* Agha Haider, J., observed :

"It is true that the heading itself contains the word 'revolution,' but revolution, even in political matters need not necessarily be accompanied by bloodshed. A revolution may be absolutely bloodless and peaceful and there is no reason why we should assume that in the present case the revolution intended by the maker of the leaflet was a sanguinary or a violent revolution."

(2) A I R 1934 Lah. 264; 151 Ind. Cas. 943; (1934) Cr. Cas. 502 (2); 7 R L 227; 35 Cr. L J 1447 (2).

*Page of A I R 1934 Lah.—[Ed.]

At p. 268* Tek Chand, J., observed :

"The headline of the poster however contains the words 'Long Long Live Revolution' and the learned Sessions Judge has held that this heading 'can be regarded as tending to incite to, or encourage, the commission of a cognizable offence involving violence.' It is however a matter of common notoriety that this slogan, whatever its original significance might have been, has now come to be used indiscriminately by all those who aim at bringing about a marked change in the Govt. of the country, by any means whatever, violent or non-violent, constitutional or otherwise. The mere use of these words, without more cannot therefore lead to the conclusion that it was intended to produce literature advocating violence. Moreover in this case such an assumption is clearly negatived by the contents of the poster itself which says that the pamphlets, which it is proposed to publish and circulate, will contain the views of young men on 'all topics of the day and the movements in the country and the forces behind them'."

In my judgment this Lahore case is clearly distinguishable from the case which I have to consider. There was nothing in the poster beyond the heading which tended to incite to, or encourage any form of revolution, and there was nothing to suggest that the "revolution" there referred to was anything more than a peaceful bloodless one. In fact, the contents of the poster strongly suggested that the publisher had in mind only peaceful bloodless change. In the present case however the "revolution" referred to is clearly a violent and terrible one, and those who are urged to bring it about are urged to dance the fearful dance of destruction and cause total destruction of the existing order. The readers are not urged to bring about a change but destroy the existing order so that a new order may arise from the ashes of the old world. Reliance was also placed by Counsel for the petitioner on the case in *Kamal Sirkar (Ajit Ghose) v. Emperor* (3), but in my view that case can be of no assistance to the petitioner. The point at issue in that case was whether a certain poster fell within mischief of cls. (d) and (f) of s. 4 (1), Press Act, 1931. Biswas, J., held that in dealing with such a poster containing a caricature or cartoon, the common sense interpretation of such a document, namely the impression it gives to a man of ordinary common sense must be taken. The learned Judge pointed out that "it is worse than useless to try to extract a meaning out of it by a laboured commentary." I respectfully agree with the statement of the learned Judge that a common sense interpretation must be given to the document complained of. The question

to be answered always is, what impression will the document or words give to a man of ordinary common sense? That question in my view, admits only of one answer in the present case. A man of ordinary common sense reading the poem complained of in this case would be bound to conclude that bloody and fearful revolution was the only panacea for the ills of the exploited labourers. He would be bound to regard the poem as an exhortation to the labourers to arise and to destroy the existing order by force and by the commission of violent crime. That being so, the Provincial Govt. were entitled to call upon the applicant as keeper of the Hazara Memorial Press, Gaya, to furnish security under s. 3 (3), Press Act, and that being so, this application must fail. I would therefore dismiss the application.

Dhavlé, J.—I agree. How little the last stanza with the flames of revolution that are to burst forth from land and water, and the terrible dance (*karal tandab*) that is to be danced upon the glory of this world (*is jaga bhaibhab par*) is meant to inculcate peaceful operations is clear from the summing up in the concluding lines in which it is emphatically asserted that total destruction alone will introduce a new order which will be full of happiness; and it is noticeable that *sarbanas*, the expression for "total destruction," is so simple that nobody who knows the language will have the smallest difficulty in understanding it.

Manohar Lall, J.—I agree with the exhaustive analysis made by my Lord, the Chief Justice, of the poem in the 'Chingari' and would dismiss this application.

s. *Application dismissed.*

ALLAHABAD HIGH COURT Full Bench

Second Appeal No. 2069 of 1937
September 27, 1940

IQBAL AHMAD, BAJPAI AND VERMA, JJ.

HOTI LAL—PLAINTIFF—APPELLANT
versus

CHATURA PRASAD AND OTHERS—

DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 73—Word "passed", significance of—Words "passed against same judgment-debtor", construction of—Decree by X against Y—Decree by A on Y's death against Y's son Z personally and against Y's assets in hands of his sons, on pro-note executed by Y and Z—S. 73 held applied—Object of s. 73—S. 73 enacts mere rule of procedure—It does not clothe decree-holder with right which he does not possess—Interpretation of Statutes—Phraseology capable of two interpretations—One consistent with object of enactment to be preferred.

(3) I L R (1938) 1 Cal. 455; 172 Ind. Cas. 906; A I R 1937 Cal. 691; 41 C W N 1217; 39 Cr. L J 190; 10 R C 466.

*Page of A. I. R. 1934 Lah.—[Ed.]

The Legislature, added the word "passed" in the new s. 73 in order to make it clear that the words "against the same judgment-debtor" had reference to the decrees themselves, and not to the various applications for execution contemplated by the section. [p. 284, col. 1.]

Per *Iqbal Ahmed and Verma, JJ., Bajpai, J. dissenting*.—The expression "passed against the same judgment-debtor" in s. 73 must be liberally construed. The object of s. 73 being to provide for rateable distribution of assets upon which two or more decree-holders have equal claims, the words "passed against the same judgment-debtor" must, be interpreted as referring more to the property which a judgment-debtor represents "than to the person against whom execution has been sought. [p. 284, col. 2.]

Where therefore, a decree for certain amount has been obtained by X against Y on a pro-note executed by Y and on the death of Y one A obtains a money decree against Y's son Z personally and against the assets of Y in the hands of Z and C the sons of Y on the basis of a promissory note executed by Y and Z, the decrees obtained by X and A are against the same judgment-debtor and s. 73 applies. 184 Ind. Cas. 589 (10), **Overruled**.

[Case-law discussed.]

Per *Bajpai, J.*—The personality, the character and the capacity of the judgment-debtor should not be ignored and undue preference should not be given to the property from which the assets are realized. The decree-holders must have obtained their decrees against the same persons and it may become a matter of no importance that by reason of the death of the judgment-debtor in one decree the property that can be seized in execution in both the decrees happens to be the same. If the two decrees are not against the same person s. 73 would not be applicable. [p. 290, col. 1.]

The object underlying the enactment of s. 73, Civil P. C., was to prevent multiplicity of execution proceedings while at the same time ensuring equitable distribution of assets between various decree-holders who had the right to have their decrees satisfied out of these assets. *Bithal Das v. Nand Kishore* (1), relied on. [p. 278, col. 2.]

Section 73 enacts a mere rule of procedure and not a rule of substantive law. It merely enacts a rule by which decree-holders, in specified cases, can resort to a cheap and speedy procedure for the realization of their decrees. It does not, however, clothe a decree-holder with a right which he does not possess. It does not enlarge the rights given to a decree-holder by his decree, nor does it cut down the rights to which a decree-holder may be entitled by the decree in his favour. Section 73 cannot therefore be invoked to entitle a decree-holder to satisfy his decree from assets which he could not touch if s. 73 was not on the statute book. Conversely the provisions of s. 73 cannot be utilized to deprive a decree-holder from satisfying his decree from assets which he would have been otherwise entitled to follow in execution. [p. 282, col. 1.]

When the phraseology of an enactment is clear and unambiguous and capable of one and only one interpretation, it is not open to the Courts to give a go-by to that interpretation simply with a view to carry out what is supposed to be the intention of the Legislature. But if the phraseology used is capable of two interpretations, that interpretation which is consistent with the object of the enactment is to be preferred to the interpretation that would nullify that object. Observations of Walsh, J. in 84 Ind. Cas. 749, relied on. [p. 278, col. 2.]

S. A. from the decision of the Civil Judge, Aligarh, dated July 29, 1937.

Mr. *Panna Lal*, for the Appellant.

Messrs. *P. L. Banerji* and *S. B. L. Gour*, for the Respondents.

Iqbal Ahmad, J.—The question for consideration in the present appeal is as to what is the true interpretation of the words "decrees for the payment of money passed against the same judgment-debtor" in s. 73 (1), Civil P. C., and on the answer to that question depends the fate of this appeal. The facts that have given rise to the question are undisputed and are as follows: Hoti Lal plaintiff-appellant obtained a simple money decree (No. 59 of 1930) against one Bishambhar Sahai on the basis of a promissory note executed by Bishambhar Sahai. Bishambhar Sahai died after the passing of the decree and, then, his sons Navin Chandra and Abinash Chandra were brought upon the record as his legal representatives, and certain properties of Bishambhar Sahai were attached in execution of the decree. Makhan Lal, the ancestor of the contesting defendant-respondents, also held a promissory note executed by Bishambhar Sahai and Navin Chandra and, after the death of Bishambhar Sahai, he put that promissory note into suit impleading Navin Chandra and Abinash Chandra as defendants. Makhan Lal's suit was decreed and a decree (No. 620 of 1931) was passed in his favour against Navin Chandra personally and against the assets of Bishambhar Sahai in the hands of Navin Chandra and Abinash Chandra. Makhan Lal put his decree in execution and got some of the properties already attached by Hoti Lal sold. One of the items of the attached properties was sold and purchased by one Reoti Prasad for Rs. 1,325 and another item of the attached properties was sold and purchased by Makhan Lal himself for Rs. 1,415. It appears that Makhan Lal took the sum of Rs. 1,325 from Court on October 26, 1932, and filed a receipt for Rs. 1,415 in respect of the property purchased by him on March 29, 1932.

Hoti Lal applied for rateable distribution of the two amounts, but the execution Court disallowed his application on August 25, 1934. Hoti Lal then brought the suit giving rise to the present appeal in accordance with the provisions of s. 73 (2), Civil P. C. Both the Courts below dismissed the suit holding that, though the other requisites of s. 73 (1) were satisfied, Hoti Lal was not entitled to a decree for rateable distribution as the two decrees, viz., decrees Nos. 59 of 1930 and 620 of 1931, were not "passed against the same judgment-debtor" within the meaning of s. 73, Civil P. C. By the present appeal the decisions of the Courts

below are assailed and it is maintained that, in the circumstances of the present case, Hoti Lal was entitled to a rateable share out of the amounts fetched at the auction sale. The relevant portion of s. 73 (1), Civil P. C., reads as follows :

"Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of the decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons."

Section 73 (1) of the present Code corresponds to s. 295 of the Code of 1882 and the relevant portion of s. 295 was as follows :

"Wherever assets are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court (by which such assets are held) for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of (the) realization, shall be divided rateably among all such persons".

It would be noted that the word "passed" that has been introduced in the present Code between the words "for the payment of money" and the words "against the same judgment-debtor" did not find a place in the former Code, and it has to be considered as to what is the effect of the addition of the word "passed" in s. 73 of the present Code. There is sharp conflict of judicial opinion about the interpretation of the words "the same judgment-debtor" and, broadly speaking, one view is that a strict literal construction ought to be put on these words, whereas the other view is that these words ought to be liberally construed keeping in view the object with which the section was enacted. While it may be conceded that much can be said in favour of either view, I, for reasons to be presently stated, prefer the latter view. By ss. 270 and 271 of the Code of 1859, which corresponded to the present s. 73, the decree-holder who first attached the property had the right to have his decree satisfied in full out of the sale proceeds to the exclusion of the other decree-holders and the surplus that remained was to be rateably distributed

"amongst any other persons who prior to the order for such distribution may have taken out execution of decree against the same defendant and not obtained satisfaction thereof."

This statutory priority given to the first attaching creditor led to scrambles among attaching decree-holders and, with a view to put an end to the same, these sections were changed by the Codes of 1877 and 1882 so as to place all decree-holders on an equal footing regardless of any priority in attachment or of the application for rateable distribution. These legislative changes de-

monstrate that the object underlying the enactment of s. 73 was to prevent multiplicity of execution proceedings while at the same time ensuring equitable distribution of assets between various decree-holders who had the right to have their decrees satisfied out of these assets. The objects of s. 73 were thus summarized by Strachey, C. J., in *Bithal Das v. Nand Kishore* (1) at p. 110 :

"Now the object of the section is two-fold. The first object is to prevent unnecessary multiplicity of execution proceedings, to obviate in a case where there are many decree-holders, each competent to execute his decree by attachment and sale of a particular property, the necessity of each and every one separately attaching and separately selling that property. The other object is to secure an equitable administration of the property by placing all the decree-holders in the position I have described upon the same footing and making the property rateably divisible among them, instead of allowing one to exclude all the others merely because he happened to be the first who had attached and sold the property."

While it is a recognized canon of construction that the words used in a statute should be given their natural and ordinary meaning, it is also well settled that

"unless it is very clear that violence would be done to the language of the Act by adopting any other construction, any great inconvenience which might result from that suggested may certainly afford fair ground for supposing that it could not be what was contemplated by the Legislature, and will warrant the Court in looking for some other interpretation."

vide Broom's Legal Maxims, Edn. 8, pp. 150 and 151. In the construction of statutes one must therefore primarily adhere to the strict literal interpretation of the words used but if such adherence is destructive of the object of the enactment and leads to anomalies and absurdities, it is fair to assume that the Legislature did not intend to use the words in that sense, and in such a case a liberal interpretation that is consistent with the object of the enactment is to be preferred, provided no violence is done to the words used by the Legislature. In other words, when the phraseology of an enactment is clear and unambiguous and capable of one and only one interpretation, it is not open to the Courts to give a go-by to that interpretation simply with a view to carry out what is supposed to be the intention of the Legislature. But if the phraseology used is capable of two interpretations, that interpretation which is consistent with the object of the enactment is to be preferred to the interpretation that would nullify that object. As was observed by Walsh, J. in the Full Bench decision in *Mubarak Husain v. Ahmad* (2) :

"Where a section, or an Act, is capable of two render-

(1) 23 A 106.

(2) A I R 1924 All. 328; 84 Ind. Cas. 749; 46 A 489; 22 A L J 321.

ings or is said to mean less, or more than it says, it is a maxim of interpretation that one must look at the scope and object of the enactment. For this purpose it is helpful to recall the history."

In short though a Court cannot, while interpreting a statute, assume the functions of the Legislature to legislate, it is nevertheless its duty to put a common sense interpretation on statutory enactments in preference to a literal interpretation that is destructive of the object of the enactment. In the light of the principles formulated above, I proceed with the discussion of the question under consideration. To begin with it would be convenient to notice the cases in which a strict literal construction, or what has been characterized as the "*eo nomine* construction," has been put on the expression "the same judgment-debtor." In *Hart v. Tara Prasanna* (3) it was argued that decrees against a defendant personally, and against the same defendant in a representative capacity, were not decrees "against the same judgment-debtor" within the meaning of s. 295 of the Code of 1882, and the learned Judge, while pointing out that the question did not arise for decision in the case, observed that, if they had to decide the point, they would have held that the decrees were "against the same judgment-debtor".

The facts in *Govind Abaji v. Mohoniraj Vinayak* (4) were identical with the facts of the present case. In that case *M* obtained a money decree against *B*. *B* died after the passing of the decree and *B*'s son *K* was brought on the record as *B*'s legal representative and the property of *B* was then attached and sold in execution. In the meantime one *G* had obtained a decree against "*B*, deceased, by his son *K* and against the estate of *B* deceased"; and *G* applied under s. 295 to share rateably in the proceeds of the sale in execution of the other decree. The application of *G* was refused on the ground that the two decrees were not "against the same judgment-debtor." Jenkins, C. J. observed that

"it is useless to speculate as to any other test than that which the section itself provides, and that test is stated in the plainest terms. So far as the present case goes, it is enough to say that the money decrees must be against the same judgment-debtor. Here, however, one decree is against *B* and the other decree is against his son *K*."

It is true that the second decree is expressed to be against *B*, deceased, by his son *K*; but this incorrect mode of expression can make no difference..... It is so obvious that one hesitates to make the remark, but it is the fact that a dead man cannot be a party to a suit. It cannot too, in this case, make any difference that the decree is expressed further to be 'against the deceased's estate': that does not make *B* a judgment-

debtor in respect of a decree in a suit commenced after his death."

Chandavarkar, J. also, after pointing out that as one decree was against *B* and the other was against *B*'s legal representative, held that

"it cannot be said, therefore, looking to the names of the parties, that the two decrees are against the same judgment-debtor."

He further observed that :

"It is true that the estate that is liable in the case of both the decrees is the estate of the deceased *B*, but s. 295 does not make the nature of the liability under the decrees contemplated by it one of the essential conditions for the application of the section."

In short, he decided that a decree against *B* while he is alive and a decree against *K* after *B*'s death as *B*'s legal representative, are not against one and the same judgment-debtor. The decision in *Govind Abaji v. Mohoniraj Vinayak* (4), was followed in *Sirinivasa Aiyangar v. Kanthimathi Ammal* (5). In the Madras case *A* obtained a decree against one *M* and after *M*'s death *B* obtained a decree against the legal representatives of *M* and his estate in their hands. *B* applied under s. 295, Civil P. C., to share rateably in the proceeds of property sold in execution of *A*'s decree. *B*'s application was rejected on the ground that the two decrees were not "against the same judgment-debtor" and it was observed that the fact that the two decrees are to be realized out of the property of *M*, "is not decisive of the question against whom the decrees are made." The decision proceeded on the ground that whereas one decree was against *M* the other decree was against *M*'s legal representatives, and, as such, there was not identity of judgment-debtors in the two decrees. It would be noted that the facts of this case were also on all fours with the facts of the case before us. The decision in *Govind Abaji v. Mohoniraj Vinayak* (4) was further followed by Rankin, C. J. in *Jahar Lal v. Lalita Sundari* (6), and it was held that the undoubted requirement of s. 73, a requirement which must be satisfied before a person is entitled to a rateable distribution, is that the two decrees must have been passed against the same judgment-debtor. The last mentioned decision was followed in *Hemlata Dasi v. Bengal Coal Co. Ltd.* (7), and it was held that "for purposes of rateable distribution the executing Court must take the decrees as they are," and that if in the decrees the judgment-debtors are not identical rateable

(5) 33 M 465; 5 Ind. Cas. 917; 7 M L T 157.

(6) A I R 1930 Cal. 454; 130 Ind. Cas. 227; 34 C W N 291; Ind. Rul. (1931) Cal. 355.

(7) A I R 1935 Cal. 738; 159 Ind. Cas. 575; 40 C W N 26; 8 R C 329.

(3) 11 C 718.

(4) 25 B 494; 3 Bom. L R 407.

distribution cannot be allowed. To the same effect is the decision in *Hemendra Nath v. East Bengal Commercial Bank* (8). In that case one decree was against "A, B, C and D" in their capacity as the legal representatives of their father and the other decree was against A, B, C and D personally and it was held by Nasim Ali and Henderson, JJ. that the decrees were against the same judgment-debtors and rateable distribution should be ordered. The argument, that if one decree is against a man as legal representative of a deceased person and the other decree is against him in his personal capacity, the two decrees are not "against the same judgment-debtor" within the meaning of s. 73, was repelled by the learned Judges and they observed that the introduction of the word "passed" in s. 73 puts it beyond doubt that the decree should have been passed "against the same judgment-debtor" and held that this test was satisfied in the case before them.

The matter was again considered by the Bombay High Court in *Chunilal Rai Chand v. Broach Urban Co-operative Bank Ltd.* (9), and the earlier decision of the same Court in *Govind Abaji v. Mohoniraj Vinayak* (4), was followed, and a recent Full Bench decision of the Madras High Court, to be referred to hereafter, was dissented from. The learned Judges held that where one decree is against a certain person and another decree is against his legal representative on such person's death, the two decrees cannot be said to be "against the same judgment-debtor," notwithstanding the fact that both the decrees are ultimately founded on a liability resting upon the deceased. In this case also the facts were identical with the facts of the case before us, and the identity of the names of the judgment-debtors was held to be the decisive factor in the decision of the question as to whether the decrees were or were not "against the same judgment-debtor" within the meaning of s. 73, Civil P. C. Lastly there is the decision in *Lal Singh Nayal v. Jiwanand* (10), by a learned Judge of this Court. It was held in this case that a money decree obtained against the father of a joint family and a decree obtained after his death against his sons upon a promissory note executed by them in respect of a debt due from their father are not decrees passed against the same judgment-debtor. The facts of this case were also very similar to the facts

of the case before us, and the learned Judge, who decided the case, was of the opinion that, as the names of the judgment-debtors as they appeared in the two decrees were not identical, the decrees were not "passed against the same judgment-debtor" and, as such, s. 73 had no application to the case.

It will be observed that in all the cases referred to above, it was held that, in order to decide whether the decrees were "against the same judgment-debtor," one has to look only to the names of the judgment-debtors, as they appear in the decree. In other words, identity of names was held to be the decisive test, irrespective of the capacity in which decrees were passed against a particular individual and, irrespective of the property which could be proceeded against in execution of one decree or the other. A diametrically opposite view was, however, taken by a Full Bench of the Madras High Court in *Rama Krishna Chettiar v. Kasi Vishwanathan Chettiar* (11). In that case V obtained a simple money decree against P and after P's death, his two sons were brought on the record as his legal representatives, and the family properties were sold in execution, and the sale proceeds were in the custody of the executing Court. In the meantime, after P's death, R had obtained a decree against P's sons as against P's estate in respect of debts contracted by P and had applied for execution of the decree. After the execution sale, R applied for rateable distribution and his application was ultimately allowed by the High Court. Pandrang Row, J., who delivered the main judgment in the case, after noticing some of the cases referred to above observed as follows:

"It would therefore seem that the *eo nomine* construction cannot be the right one, and that the expression 'the same judgment-debtor' is not so simple and clear in its meaning as to dispense with any reference to the general intention of the section in which it is found. About that intention there can be no doubt; and a construction which defeats that intention no less than the ends of justice should be avoided if the provisions of law are to be interpreted in a reasonable manner. The weight of authority appears to be in favour of the more liberal construction of the expression, the same judgment-debtor, and I would therefore accept that construction and hold that the petitioners in these petitions are entitled to rateable distribution."

Cornish, J., who delivered a separate but concurring judgment made the observation:

"There is, in my judgment, nothing illogical in describing as 'the same judgment-debtor' the legal representative against whom a decree has been passed in respect of a claim against the deceased and the deceased person against whom a decree was passed in his lifetime

(11) 59 M 93; 159 Ind. Cas. 501; A I R 1936 Mad. 40; 69 M L J 711; (1935) M W N 960; 42 L W 835; 8 R M 506 (F B).

(8) 63 C 923; 162 Ind. Cas. 702; A I R 1936 Cal. 210; 40 C W N 570; 8 R C 648.

(9) I L R (1937) Bom. 795; 172 Ind. Cas. 92; A I R 1937 Bom. 461; 39 Bom. L R 815; 10 R B 249.

(10) A I R 1939 All. 545; 184 Ind. Cas. 589; 12 R A 253.

but which is sought to be executed against his legal representative."

Beasley, C. J. agreed with the conclusions arrived at by the two learned Judges. It would be observed that the facts of this case were identical with the facts of the case before us. This Full Bench decision was followed in *Swaminatha Aiyar v. Saivu Rowathan* (12) and *Palaniappa Chettiar v. Palani Goundan* (13). In the three cases just mentioned, a liberal construction, as opposed to a literal one, was put on the expression "the same judgment-debtor," and rateable distribution was allowed mainly because the decrees were executable "against the same properties," even though the names of the judgment-debtors as they appeared in the decrees were not identical. In other words, the identity of the properties which could be proceeded against in execution of the decrees, and not the identity of the names of the judgment-debtors, was held to be the criterion for the application of s. 73 (1) of the Code. In these cases the Courts did not stop short of at a mere ascertainment of the names of the defendants as they appeared in the decrees, but proceeded further with the enquiry as to the capacity in which the decrees were passed against those defendants. This enquiry was solely with the object of determining as to whether the decrees could or could not be realized by attachment and sale of identical properties. If they could, the decrees were held to be "against the same judgment-debtor." If they could not, s. 73 was held to be inapplicable.

There are numerous judicial decisions in which the capacity in which a defendant was sued, or the capacity in which execution was levied against him, was held to be an infallible guide for the determination of the applicability or otherwise of s. 73. In *Bhola Nath v. Maqbul-un-nissa* (14), a Muhammadan widow obtained against the other heir of her deceased husband a decree for her dower payable out of the estate of the deceased, and in execution thereof attached certain property of the deceased in the hands of the heir. A creditor of the heir, having obtained a money decree against the heir for his personal debt, subsequently attached the same property in execution of that decree, and the question arose whether the creditor of the heir was entitled to the benefit of the provisions of s. 295 of the Code of 1882. This question was

answered in the negative. It was held that as the decree obtained by the widow was against the heir as representative of her deceased husband, while the decree obtained by the creditor was against the heir in his personal capacity, the two decrees were not "in fact" obtained against "the same judgment-debtor". The fact that the property attached by the widow was an asset of the deceased husband, and, as such was primarily liable to satisfy the claims against the deceased in preference to a claim against the heir personally was emphasized to support the conclusion noted above.

To the same effect is the decision of the Lower Burma Chief Court in *Toola Ram v. Abdul Ghafoor*, 24 Ind. Cas. 476 (15). It was held in that case that s. 73 of the Code cannot be invoked unless the judgment-debtor occupies the same character in each decree. The same is an authority for the proposition that where there is a decree against a judgment-debtor personally and another against him as heir, he is not the same judgment-debtor in the two decrees within the meaning of s. 73. In *Balmer Lawrie & Co. v. Jadunath Banerji* (16), the contest was between two decree-holders one of whom had obtained a money decree personally against M and the other had obtained a money decree against a firm of which M was a partner. It was held that s. 73 was not applicable as the decree against the firm was not capable of execution against M "individually". Again, in *Nilmoni Dey v. Hira Lal Das* (17) the capacity in which the decrees were obtained against the defendants and the estate that could be proceeded against in execution of those decrees was held to be the test for the decision of the question under consideration. In that case a testator appointed A, B and C as executors to his will. X, a creditor, instituted a suit against A and B only for recovery of his dues from the estate of the deceased testator and obtained a decree. A, one of the executants, who was himself a creditor of the estate, also obtained a decree against B and C for recovery of his dues. A put his decree in execution and certain assets came to be held by the Court. X applied for rateable distribution and his application was allowed, notwithstanding the fact that one decree was against A and B and the other decree was against B and C. It was held that, as each decree was *prima*

(12) A I R 1936 Mad. 123; 160 Ind. Cas. 559; 8 R M 665; (1936) M W N 343; 43 L W 624.

(13) A I R 1936 Mad. 948; 165 Ind. Cas. 664; 71 M L J 541; 44 L W 615; (1936) M W N 1142; 9 R M 286.

(14) 26 A 28; A W N 1903, 184.

(15) 24 Ind. Cas. 476; A I R 1914 L B 191.

(16) 42 C 1; 27 Ind. Cas. 644; A I R 1915 Cal. 658; 19 C W N 1202.

(17) 27 C L J 100; 43 Ind. Cas. 452; A I R 1918 Cal. 281.

facie capable of execution against the estate of the deceased testator :

"the two decrees may without unduly straining the language of s. 73, be regarded as passed against the same judgment-debtor, namely, they are both decrees against the estate of the testator, in one case represented by A and B, in the other case by B and C."

The learned Judges further observed in that case that they were "not disposed to put a narrow construction upon the terms of s. 73, so as to defeat the ends of justice."

Similar view prevailed in *Munshi Lal v. Amir Mirza Beg* (18). In that case the fact that one decree was against an heir in his representative capacity and the other decree was against that heir in his personal capacity was held sufficient to preclude the application of s. 73, as the two decrees could not be said to be against "the same judgment-debtor". Now, apart from the question as to whether a literal or liberal interpretation is to be put on the expression "passed against the same judgment-debtor," it cannot be disputed that s. 73 enacts a mere rule of procedure and not a rule of substantive law. It merely enacts a rule by which decree-holders, in specified cases, can resort to a cheap and speedy procedure for the realization of their decrees. It does not, however, clothe a decree-holder with a right which he does not possess. It does not enlarge the rights given to a decree-holder by his decree, nor does it cut down the rights to which a decree-holder may be entitled by the decree in his favour. It follows that s. 73 cannot be invoked to entitle a decree-holder to satisfy his decree from assets which he could not touch if s. 73 was not on the statute book. Conversely the provisions of s. 73 cannot be utilized to deprive a decree-holder from satisfying his decree from assets which he would have been otherwise entitled to follow in execution.

If the strict literal interpretation that was accepted in the cases noticed in the earlier portion of this judgment is to be adopted, the inevitable result, in most cases, would be to entitle decree-holders to realize their decrees from properties against which, but for s. 73, they could not have proceeded in execution, or to disentitle them to realize their decrees from properties from which, but for s. 73, they could have satisfied their decrees. That this is so, may be illustrated by a few examples. Take the following case: A obtains a money decree against X, (a Muslim) for X's personal debts. B also obtains a money decree against X in his capacity as legal representative of his (X's) father as

against the assets of the father in respect of a loan advanced to the father. A executes his decree by attaching and selling the personal properties of X and not the properties inherited by him from his father. According to the *eo nomine* construction of s. 73, B would be entitled to claim rateable distribution as X was the judgment-debtor in both the decrees. Such a result could not, however, have been in the contemplation of the Legislature, for the simple reason that B's decree against X could be realized only from the assets of the father in X's hands and not from properties that X had not inherited from his father. Or take the converse case. B puts his decree in execution by selling the property of the father in X's hands and the amount fetched at the auction sale is just sufficient to satisfy B's decree. According to the *eo nomine* construction, A would be entitled to claim rateable distribution with the necessary result that B's decree will remain unsatisfied in part. It is manifest that, apart from the provisions of s. 73, A, in the given case, would not have been entitled to realize his decree from the properties of the father when the value of those properties did not exceed the liabilities of the father.

Again take another case. A files a money suit against X. B also filed a money suit against X. A obtains a decree against X in his lifetime. X, however, dies before the decision of B's suit, and Y, the son of X, is brought on the record as the legal representative of X, B's suit is then decreed against Y, the decree being realizable from the assets of X in Y's hands. Thereafter, A executes his decree by attaching X's properties in Y's hands. According to the strict literal interpretation of s. 73, B would not be entitled to claim rateable distribution as the names of the judgment-debtors as they appeared in the two decrees were not identical. It is needless to observe that nothing would have been farther from the intention of the Legislature than to enact a rule of procedure that was calculated to lead to such startling results. Both A and B were the creditors of X and had therefore the right to realize their debts from X's properties, and the mere accident of X dying before the decision of B's suit could not nullify the right of B to realize the debts due to him from X's properties.

Take a third case; A, a Hindu, is indebted to B and C. A dies leaving a son X. B sues X for the recovery of the debt due to him and obtains a decree against the assets of A in X's hands. Then X also dies leaving a son Y. C brings a suit against Y and obtains a decree against the assets of A in Y's hands.

B thereafter puts his decree in execution by attaching and selling all the properties left by *A* and the amount realized at the auction sale is just enough to satisfy *B*'s decree. According to the *eo nomine* construction, *C* will not be entitled to claim rateable distribution, and thus the entire assets of *A* will be realized by *B* and his decree will be satisfied in full, whereas *C* will be deprived of the fruits of his decree in its entirety. It is manifest that, but for s. 73, *C* would have been entitled to share with *B* the assets of *A*, and I find it impossible to hold that the Legislature could have intended to adversely affect this manifest right of *C* by enacting s. 73.

When, in the course of arguments, I put these illustrations to Mr. P. L. Banerji, the learned Counsel for the respondents, he conceded that departure from strict literal interpretation of the words "passed against the same judgment-debtor" may be permissible in certain cases to avoid these anomalies. But in this connection he advocated the following propositions: (1) In the case of identity of names of the judgment-debts in the decree, it is open to interpret the decrees in order to find out whether they are in fact not against the same judgment-debtor, but (2) when the names of the judgment-debtors are not identical, it is not open to interpret the decrees to find out whether in fact the decrees were against the same person. In short, it is not controverted that, though the same defendant may, by name, figure as a judgment-debtor in two decrees, it is open to the Court to enquire into the capacities in which that defendant was sued with a view to find out whether the decrees are not in fact "against the same judgment-debtor." In other words, in such cases, it is not the mere form but the substance of the decrees that is decisive of the question whether they are or are not against the same judgment-debtor. That being so, it passed my comprehension as to why, in cases where the names of the judgment-debtors are not identical, the Court is precluded from looking into the real nature of the decrees with a view to ascertain whether, in fact and in substance, those decrees are against the same judgment-debtor.

To put the matter in another way. It is admitted on all hands that in the case of the identity of names of the judgment-debtors it is open to the Courts to interpret the decrees with a view to discover whether they are not against the same judgment-debtor. In such a case it is admitted that departure from a strict literal interpretation of the words used is permissible. Why then, in the converse

case, *viz.*, in a case in which there is not the identity of names of defendants in the decrees, an examination of the substance of the decrees with a view to ascertain their real character should be barred is not explained. I am alive to the fact that the validity of a proposition does not necessarily lead to the conclusion that the converse of that proposition must also be valid. It is, for instance, correct to say that gold glitters. But it is equally manifest that it is incorrect to say that all that glitters is gold. In the question under discussion, however, it is not the validity of two propositions, one converse to the other; that is under consideration. On the other hand the sole question for decision is whether the words "against the same judgment-debtor" are or are not to be literally construed. If they are to be so constructed in one set of cases they must be similarly construed in another, even though diametrically opposite, set of cases.

It cannot be denied that a strict literal construction of the expression "the same judgment-debtor" has not been adopted in at least two classes of cases. In a series of cases it has been held that it is not necessary that all the judgment-debtors in each of the several decrees should be identically the same, and that it is sufficient if there is one judgment-debtor common to all the decrees. Thus, where a decree is against *A* and another decree is against *A* and *B*, it has been held that the decrees are against the same judgment-debtor within the meaning of s. 73. The cases on the point are noted in Chitaley's Civil P. C., Vol. I, p. 647. Similarly, in another class of cases, it has been held that even though the person against whom the decrees were passed is the same in name, s. 73 will not apply unless that person occupied the same character in all the decrees. If resort can be had in this class of cases to a liberal construction consistent with the object of s. 73, there is no justification to give a go-by to such an interpretation and to construe the words literally in those cases in which there is not the identity of names of the judgment-debtors in the decrees. Again it was argued on behalf of the respondents that the Legislature introduced the word "passed" in s. 73 of the present Code with a view to bar the consideration of the consequences that might happen in execution proceedings. The argument is that, in view of the addition of the word "passed," the only relevant consideration in the determination of the question under consideration is to see whether the decrees were against the same judgment-debtor and not whether the same judgment-debtor could be reached in execution. There are two answers.

to this contention. In the first place, in my judgment, the addition of the word "passed" was not with the object contended for by the Counsel for the respondents. In *Abadi Begam v. Shah Ara Begam* (19), it was laid down that the test of the application of s. 295 is not whether the decrees have been passed against the same judgment-debtor, but whether the applicants for a rateable share have applied for execution against the same judgment-debtor. In accordance with this decision rateable distribution of assets could be claimed under s. 295 of the former Code if there was identity of judgment-debtors in the course of execution proceedings, even though one decree was against the judgment-debtor in his personal capacity and the other was against him in a representative capacity. This was, if I may say so with respect, another extreme view calculated to result in the anomalies of the description referred to in the illustrations given above. The Legislature, in my judgment, added the word "passed" in the new section in order to make it clear that the words "against the same judgment-debtor" had reference to the decrees themselves, and not to the various applications for execution contemplated by the section.

In the second place, as already stated, it is conceded that notwithstanding the addition of the word "passed" one cannot stop short at mere identity of names of judgment-debtors, but has to ascertain the capacity in which the decrees were passed against those judgment-debtors. The use of the word "passed" does not therefore make it obligatory to adopt a strict literal interpretation of the words used. Lastly reliance was placed on behalf of the respondents on the definition of "judgment-debtor" contained in the Code. By s. 2 (10) "judgment-debtor" is defined as meaning "any person against whom a decree . . . has been made." It is contended that in view of this definition the word "judgment-debtor" in s. 73 must be deemed to refer only to the person against whom the decree was actually made. Again there are two answers to this contention.

In view of the opening words of s. 2, the meaning given to the expression 'judgment-debtor' by the Code is to hold good only if there is nothing "repugnant in the subject or context." The subject dealt with by s. 73 is that of rateable distribution of assets among decree-holders. If the expression "judgment-debtor" in s. 73 is interpreted in the light of the definition of that expression, a repugnancy will be created in the subject dealt with (19) 8 O C 86.

by s. 73, as one would be up against the anomalies of the description indicated above. The word "judgment-debtor" in that section must, therefore, be construed in a more extended sense than that given to it by s. 2 (10) so as to avoid repugnancy in the subject. It must be so construed as not to result either in the enlargement or in the nullification of the rights given to various decree-holders by the decrees held by them. In other words, it ought to be so interpreted as to entitle on the one hand, all decree-holders who have the right to satisfy their decrees from particular assets to share in rateable distribution thereof and, on the other, to exclude from the benefit of s. 73 such decree-holders as have not the right to realize their decrees from those assets. This is possible only if a liberal and not a literal interpretation is put on that expression.

The second answer to the contention noted above is furnished by the definition of the expression "legal representative." Section 2 (11) defines "legal representative" as meaning "a person who in law represents the estate of a deceased person" If the expression "judgment-debtor" is interpreted in the light of its definition the relevant portion of s. 73 will read as follows: ". . . decrees for the payment of money passed against the same person against whom a decree has been made," As a "legal representative" represents the estate of a deceased person, it will not be doing any violence to the language of s. 73, if the above rendering of s. 73, the legal representative of the person against whom the decree was made is substituted for that person. For the reasons that I have given I have come to the conclusion that the expression "passed against the same judgment-debtor" must be liberally construed and, accordingly, I, with all respect, dissent from the decisions in which the *eo nomine* construction was adopted. The object of s. 73 being to provide for rateable distribution of assets upon which two or more decree-holders have equal claims, the words "passed against the same judgment-debtor" must, as observed in *Abadi Begam v. Shah Ara Begam* (19) be interpreted as referring more to the property which a judgment-debtor represents "than to the person against whom execution has been sought."

In the present case Hoti Lal undoubtedly had the right to seek satisfaction of his decree from the assets of Bishambhar Sahai in the hands of his sons. Similarly, Makhan Lal had also the right to realize his decree from the same assets of Bishambhar Sahai. Both Hoti Lal and Makhan Lal were, therefore,

entitled to proceed in execution against identical properties, viz., the properties of Bishambhar Sahai. In the view that I have taken, s. 73 must govern the present case, even though Hoti Lal's decree was against Bishambhar Sahai and Makhan Lal's decree was against his sons. The sons though not nominally judgment-debtors in Hoti Lal's decree must, in view of the definition of "legal representative" in the Code, be deemed to be judgment-debtors in that decree. I have, therefore, come to the conclusion that the decisions of the Courts below are erroneous and that this appeal must be allowed. One of the issues, viz., issue No. 8, raised in the trial Court was in the following terms: "To what amount, if any, is the plaintiff entitled?" No finding was recorded on this issue either by the trial Court or by the lower Appellate Court. Further the lower Appellate Court did not record any finding on the question of limitation raised by the contesting defendant. The dispute between the parties cannot be decided without an adjudication on the points just mentioned. Accordingly, I would allow this appeal, set aside the decree of the lower Appellate Court and send the case back to that Court with directions to decide the point of limitation and issue No. 8 and then pass such decree in favour of the plaintiff-appellant as he may be entitled to. I would further direct that the costs here and hitherto should be costs in the cause and should abide the result.

Bajpai, J.—The facts of this case before the Full Bench are stated at length in the referring order, but they might be re-stated briefly. Seth Hoti Lal, the appellant before us, was the plaintiff in the Court below. He obtained a decree for a certain sum of money against Bishambhar Sahai upon the basis of a promissory note executed by Bishambhar Sahai. This is decree No. 59 of 1930. Makhan Lal obtained a decree for money against Navin Chandra personally and against the assets of Bishambhar Sahai in the hands of Navin Chandra and Abinash Chandra, sons of Bishambhar Sahai. The promissory note upon the basis of which this decree was obtained, was executed by Bishambhar Sahai and Navin Chandra. This is decree No. 620 of 1931. After the death of Bishambhar Sahai his two sons, Navin Chandra and Abinash Chandra, were brought on the record as his legal representatives at the execution stage and then certain properties were attached in execution of decree No. 59 of 1930. In the decree of Makhan Lal also certain properties were attached and then in execution of Makhan Lal's decree one pro-

perty was sold and purchased by one Reoti Prasad for Rs. 1,325 and another property was sold and purchased by Makhan Lal, the decree-holder, for Rs. 1,415. Some assets thus came to be held by the Court and as Hoti Lal and Makhan Lal had made applications to the Court for the execution of their decrees for the payment of money, Hoti Lal applied for rateable distribution of the assets that were held by the Court.

Hoti Lal's application was disallowed by the Court on August 25, 1934, and the entire assets were declared to be available to Makhan Lal alone, and we are informed that Makhan Lal withdrew the entire money from Court. The present suit was then filed by Hoti Lal on October 19, 1935, in accordance with the provisions of s. 73 sub-s. 2, Civil P. C. The Courts below have dismissed the plaintiff's suit on the ground that the two decrees mentioned above, that is, decree No. 59 of 1930 and decree No. 620 of 1931, were not passed against the same judgment-debtor and therefore although many of the requirements of s. 73 were satisfied one such requirement had not been satisfied. All the other points taken in defence were repelled by the trial Court, and in appeal before the lower Appellate Court the only point that was taken by the plaintiff was the point, whether the trial Court was right in dismissing the plaintiff's suit on the ground that the two decrees were not passed against the same judgment-debtor. The lower Appellate Court also agreed with the trial Court on the said point and if the appeal of the plaintiff-appellant has to be allowed it would be necessary to remand the case to the lower Appellate Court for the decision of the other points taken in defence as learned Counsel for the defendants-respondents has pressed before us that he does not propose to give up the other pleas taken in defence by him. Coming to the main question involved in this appeal, it is necessary to state the provision of law which falls for discussion. Section 73, Civil P. C. of 1908 corresponds with s. 295, Civil P. C. of 1882. The material portion of s. 295 ran as follows :

"Whenever assets are realized by sale or otherwise in execution of a decree and more persons than one have prior to the realization, applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of the realization shall be divided rateably among all such persons."

Section 73 of the Code of 1908 runs as follows :

"Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees.

for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons."

The phraseology of the section has been changed. I am of the opinion that the change has some significance, although some learned Judges have held the view that the alteration contained in the words underlined above (here in italics) has no importance. It was possible to hold under the old enactment that the crucial point was whether applications for execution of decrees for money were against the same judgment-debtor and not that the decrees were passed against the same judgment-debtor. In *Abadi Begum v. Shah Ara Begam* (19) Chamier, A. J. C. was of the view that s. 295, Civil P. C., was applicable when applications for execution were made against the same judgment-debtor, whereas there could be no doubt that on the present language of s. 73, Civil P. C. the decrees must be decrees passed against the same judgment-debtor. To my mind the alteration in the phraseology has emphasised the fact that the execution stage has not to be looked into but attention has to be concentrated on the time when the decrees were passed.

The authorities, as was pointed out in the order of reference are not reconcilable, and I shall at first proceed to discuss the question without any reference to the authorities. The word 'judgment-debtor' has been defined in s. 2 (10), Civil P. C., as "any person against whom a decree has been passed or an order capable of execution has been made." For purposes of s. 73, judgment-debtor therefore means any person against whom a decree has been passed, and we are not concerned with any order capable of execution. Bearing that definition in view and bearing also in mind what I have said before that the wordings of the present s. 73 emphasize the stage when the decrees are passed and have no relation to the execution stage, it would be fairly obvious that the two decrees, namely decree No. 59 of 1930 and decree No. 620 of 1931, have not been passed against the same judgment-debtor. Decree No. 59 of 1930 has been passed against Bishambhar Sahai, decree No. 620 of 1931 has been passed against Navin Chandra personally and against the assets of Bishambhar Sahai in the hands of Navin Chandra and Abinash Chandra. It is true that at the execution stage decree No. 59 of 1930 became a decree against the assets of Bishambhar Sahai in the hands of Navin Chandra and

Abinash Chandra, but that to my mind is of no importance.

Looking at decree No. 620 of 1931, it cannot be said that Bishambhar Sahai is the judgment-debtor for, it is not possible to hold that Bishambhar Sahai was on the record in this suit as he was dead when the decree was passed. It is possible to say that when a person is sued in a representative capacity, he represents some other persons also; for instance, a Hindu father may be sued in a representative capacity and then it may be held that his sons in existence were also sued through him and although the sons may not be on the record as judgment-debtors by name they may also be considered as judgment-debtors but no principle of representation or legal fiction can be invoked in aid to resuscitate a dead man and I cannot hold that Bishambhar Sahai was a judgment-debtor in decree No. 620 of 1931. Looking at decree No. 59 of 1930 it is not possible to say that the assets of Bishambhar Sahai in the hands of Navin Chandra and Abinash Chandra is the judgment-debtor there or that Navin Chandra and Abinash Chandra to the extent of the assets in their hands are judgment-debtors in decree No. 59 of 1930.

I am prepared to concede that all the judgment-debtors in each of the several decrees need not identically be the same and it is sufficient if there is one judgment-debtor common to all the decrees and thus where Y gets a decree against A and B and X gets a decree against B and C the two decree-holders are against the same judgment-debtor B and rateable distribution can be claimed with respect to the assets of B held by the Court, but this concession is not by reason of any strain on the language of s. 73. Nor do I in any way strain the language when I agree with what has been held in some cases that a decree against A personally and a decree against A as the trustee of X are not decrees against the same judgment-debtor. In the illustration that I have given above I have paid due regard to the fact that a judgment-debtor has been defined as a person and s. 73 requires an identity of judgment-debtors or persons. In one case the identity so far as one of the judgment-debtors is concerned is the same and the section does not say that the identity of the group of judgment-debtors should be the same, in the other case where the decrees are by name against the same judgment-debtor their responsibility, their capacity (paying no regard whatsoever to the property that can be seized in execution) is not really the same. Further when I apply

principle of representation as in the case of a Hindu father I am not in any way straining the language of s. 73. I now propose to discuss the authorities cited before us. The case in *Bithal Das v. Nand Kishore* (1) is of importance only to this extent that in it Streehey, C. J., attempts to state the objects of s. 295. He says:

"The first object is to prevent unnecessary multiplicity of execution proceedings, to obviate, in a case where there are many decree-holders, each competent to execute his decree by attachment and sale of a particular property, the necessity of each and every one separately attaching and separately selling that property. The other object is to secure an equitable administration of the property by placing all the decree-holders in the position I have described upon the same footing and making the property rateably divisible among them, instead of allowing one to exclude all the others merely because he happened to be the first who had attached and sold the property."

I have no doubt whatsoever that these were the objects of s. 295, Civil P. C. of 1882 and are also the objects of s. 73, Civil P. C. of 1908 but these objects when we are considering a particular case must be attainable on a fair interpretation of the language employed in s. 73 and not by means of altering or enlarging it. When the words are capable of only one meaning a Court of Law is not at liberty to speculate on the object of the Legislature and to construe the words according to its own ideas of what ought to have been enacted. Nothing would be more dangerous than to make the object of the Legislature a ground for construing an enactment which in itself is unambiguous. "I cannot doubt" says Lord Campbell in *Coa v. Lawrence* (20).

"What the intention of the Legislature was but that intention has not been carried into effect by the language used.....It is far better that we should abide by the words of a statute then seek to reform it according to the supposed intention....."

The language of a statute should not be strained to make it applicable to a case to which it does not on its terms apply by invoking considerations of the supposed intention of the Legislature. The objects of s. 73, were truly stated in *Bithal Das v. Nand Kishore* (1), but it is of great importance to note that before we reach the stage of attachment and sale of a particular property and make it rateably divisible among several decree-holders the essential condition is that the decree-holders must have obtained their decrees against the same persons and it may become a matter of no importance that by reason of the death of the judgment-debtor in one decree the property that can be seized in execution in both the decrees happens to be the same. If the two decrees (20) (1853) 22 L J Q B 140; 1 El. & Bl. 516; 17 Jur. 1115; 1 W R 146.

were not against the same person s. 73, Civil P. C., would not be applicable. In *Bhola Nath v. Maq-bul-unnessa* (14), the learned Judges refused to apply the provisions of s. 295, Civil P. C., in the case of two decrees obtained not against the same judgment-debtor occupying the same capacity. Stanley, C. J., observed:

"The decree obtained by the respondent is a decree against Yakub Husain as representative of her deceased husband whilst the decree obtained by the appellant is against Yakub Husain in his personal capacity."

In *Lal Singh Nayal v. Jiwanand* (10), Collister, J., held that a decree obtained against the father of a joint family and a decree obtained after his death against his sons upon a promissory note executed by them in respect of a debt of their father are not decrees passed against the same judgment-debtor and holder of decree against the son is not entitled to get rateable distribution under s. 73 in the sale proceeds of the family estate in execution of the decree against the father and the Court cannot invoke any inherent powers outside the provisions of that section. The facts of this case are very similar to the facts of the case before us, and I am in general agreement with the views expressed by the learned Judge. The decisions of the Allahabad High Court, therefore, to my mind, support the view taken by the Courts below. Coming to the Calcutta cases, the first one that has been cited before us is the case in *Hart v. Tara* (3), where the learned Judges at p. 728* make certain observations which might seem to enlarge the scope of s. 295, Civil P. C. The observations are;

"The decree in the plaintiff's suit on his mortgage was against Harish Chunder Ghose and Brajendrabala Dasi 'personally' and the decree in the defendant's suit directed Harish Chunder Ghose personally and Brajendrabala Dasi out of the estate of Panchanan Ghosh to pay the amount decreed and it is argued that decrees against a defendant personally and against the same defendant in a representative capacity are not decrees against the same judgment-debtor and that, therefore, the plaintiff is not entitled to ask for a rateable distribution of assets between himself and the defendant. As we are of opinion that the suit must be dismissed as premature, it is not necessary to decide this point but if it was necessary we should decide it in favour of the plaintiff."

Their Lordships were considering the cases of the judgment-debtor Brajendrabala Dasi personally and 'Brajendrabala Dasi out of the estate of Panchanan Ghose' and they seemed to be inclined to the view that the two judgment debtors were the same. Later cases have doubted the correctness of what might be considered to be the inclination of

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the learned Judges, but this case does not in any way help the appellant inasmuch as the names of the two judgment-debtors in the two decrees were the same namely Brajendrabala Dasi and, if anything, these observations attached very great importance to the name of the judgment-debtor and not to his capacity. In *Balmer Lawrie & Co. v. Jadunath Banerji* (16), Mookerji and Beachcroft, JJ. held that :

"It is essential for the application of s. 73, Civil P. C., that the decrees should have been passed against the same judgment-debtor. This has been made clear beyond any possibility of dispute by the introduction of the word 'passed' which did not find a place in s. 295 of the Code of 1882."

Section 73 of the Code of 1908 was held to be inapplicable in the case where one of the decrees was passed against Dasarathi Mukerji personally and the other decree was passed against a firm of which Dasarathi Mukerji was a partner. In *Jahar Lal v. Lalita Sundari Dasi* (6), Rankin, C. J., was of the opinion that the undoubted requirement of s. 73, a requirement which must be satisfied before a person is entitled to a rateable distribution, is that the two decrees must have been passed against the same judgment-debtor, and where A obtained a money decree against N in respect of money which he had lent to N's husband in his lifetime and where after the death of N, L was substituted as her legal representative and later when R got a rent decree against L in respect of certain lands and R's decree was enforced first by sale, it was held that A could not apply for rateable distribution because the principal requirement of s. 73 was not satisfied. The cases in *Govind Abaji v. Mohaniraj Vinayak* (4) and *Srinivasa Aiyangar v. Kanthimathi Ammal* (5) were quoted with approval and followed. In *Hemlata Dasi v. Bengal Coal Co. Ltd.* (7) a decree was obtained by one person against R and the other decree was against the sons of R. Nasim Ali and Henderson, JJ., held that s. 73 was not applicable. Nasim, Ali, J. said that :

"Section 73, Civil P. C., permits rateable distribution only when the decrees are against the same judgment-debtor. Section 146 cannot enlarge the scope of s. 73 as it is expressly made subject to the other provisions of the Code. By reason of s. 146 the words 'passed against the same judgment-debtor' in s. 73 cannot be read as 'passed against the same judgment-debtor or the legal representatives of the same judgment-debtor.' An executing Court cannot go behind the decree and by invoking s. 146 it cannot change a decree passed against Rasraj into a decree against his legal representative."

Section 146, Civil P. C., undoubtedly prescribes that where any proceeding may be taken or application made by or against any

person then the proceeding may be taken or the application may be made by or against any person claiming under him but it is prefaced by the words "save as otherwise provided by this Code or by any law for the time being in force," and the condition in s. 73 of the Code itself that the decrees must be passed against the same judgment-debtor is a provision which stands in the way of the application of s. 146, Civil P. C. Section 146, Civil P. C., may be invoked in aid by the representatives of decree-holders or judgment-debtors when any proceeding is to be taken or any application is to be made but when we are considering s. 73 we have got to be satisfied that the condition precedent which is not a matter of procedure has been complied with. Applying this reasoning it is clear that the decree against Bishambhar Sahai in the case before us cannot be changed into a decree against Navin Chandra and Abinash Chandra to the extent of the assets of Bishambhar Sahai. In *Hemendra Nath v. East Bengal Commercial Bank* (8), Nasim Ali and Henderson, JJ., held :

"Where in one decree the judgment-debtors are described as on the death of X his sons and heirs A, B, C and D and in the other decree they are merely described as A, B, C and D, all the decrees are against the same judgment-debtors and rateable distribution should be ordered."

Their Lordships quoted with approval the cases in *Gobind Abaji v. Mohoniraj Vinayak* (4), *Srinivasa Aiyangar v. Kanthimathi Ammal* (5) and *Balmer Lawrie & Co. v. Jadunath Banerji* (16) and after discussing these cases came to the conclusion that both the decrees were against the same judgment-debtor and there can be no doubt that the decrees were passed against the same judgment-debtor. In one suit X had died during the pendency of suit and his sons and heirs A, B, C and D were brought on the record during the pendency of the suit and the decree was passed against A, B, C and D. The other decree was of course passed against A, B, C and D. The Calcutta view, therefore, is also in favour of the respondents. I omitted, however, to mention the case in *Nilmoni Dey v. Hira Lal Das* (17) where it appears that Mookerji and Beachcroft, JJ., held that when two decrees were obtained against the estate of a deceased testator each obtained against two out of three executors and where one of these two executors was common to the two suits the decree-holders were entitled to rateable distribution of the assets of the deceased testator under s. 73, Civil P. C. They were of the opinion that a narrow construction should not be put upon the terms of s. 73 so as to defeat the ends of justice. It is of some

importance to note that the executors were not personally liable under the two decrees in any manner and it might have been permissible under those circumstances to look to the estate of the deceased testator whose executors they were and thus arrive at the conclusion that the decrees were against the same judgment-debtor, but there can also be no doubt that one of the executors was common in both the decrees. With the exception of this case, which might be said to support the appellant to a certain extent all the other cases help the respondents.

I now come to the Bombay case. In *Govind Abaji v. Mohoniraj Vinayak* (4) the facts were that one Mohoniraj obtained a money decree against one Bhau Babaji who died shortly afterwards. His son Kashi Nath, as his legal representatives, was then placed on the record and the property of the deceased judgment-debtor Bhau Babaji was attached and sold in execution. Meantime the applicant Govind Abaji had obtained a decree against Bhau Babaji deceased by his son Kashi Nath and against the estate of Bhau Babaji deceased, and he applied under s. 295, Civil P. C., to share rateably in the proceeds of the sale held in execution of the other decree. Jenkins, C. J. and Chandavarkar, J. by separate judgments held that the application should be refused. Jenkins, C. J. pointed out that the fact that one of the decrees was expressed to be against Bhau Babaji Jangam deceased by his son Kashi Nath made no difference and this was due to the erroneous practice which prevailed in the Mofussil Courts according to which a dead man was expressed to be a party to the suit by his heirs. He said:

"It is useless to speculate as to any other test than that which the section itself provides and that test is stated in the plainest terms. So far as the present case goes it is enough to say that the money decrees must be against the same judgment-debtor. Here, however, one decree is against Bhau Babaji Jangam and the other is against his son Kashi Nath.....The interpretation of judgment-debtor in s. 2 and the phraseology of s. 234, Civil P. C., leave no doubt on the point."

Chandavarkar, J. laid emphasis on the definition of the term judgment-debtor and pointed out that a decree against A while he is alive and a decree against B after A's death as A's legal representative are not against one and the same judgment-debtor. Section 234 provides for the execution of a decree where that execution is sought after the judgment-debtor's death. It is the deceased who is, according to the terms of that section, the judgment-debtor, and where on the other hand a person is sued from the beginning as the legal representative of a de-

ceased person the person so sued is the defendant and is therefore the judgment-debtor. He laid stress on the fact that :

"Section 295 does not make the nature of the liability under the decrees contemplated by it one of the essential conditions for the application of the section."

There is then the case in *Chunilal Rai Chand v. Broach Urban Co-operative Bank Ltd.* (9). The facts of this case were that the petitioner Chunilal obtained a money decree against one Jorbbhai and later another person obtained a decree against the widows of Jorbbhai to recover money owed by Jorbbhai, and in execution of this latter decree Jorbbhai's property was sold by the Court, and before the assets were realized the petitioner applied to the Court for rateable distribution. It was held that the petitioner could not be allowed rateable distribution under the provisions of s. 73, Civil P. C. For the petitioner the Full Bench case of the Madras High Court in *Rama Krishna Chettiar v. Kasi Vishwanathan Chettiar* (11) was cited, but their Lordships were of the view that the Madras interpretation was not justified by the words of the section. These are the only two cases that were cited before us from Bombay and both of them support the respondents.

I now come to the Madras cases and there the decisions are not uniform. The facts in *Ram Nathan v. Subramania* (21), were that there was a decree of judgment-creditor No. 2 against the father, and another decree of judgment-creditor No. 1 against the father and son, and it was admitted that the property from which the assets were realized by sale was the ancestral property of the family of which the father and the son were undivided members. It was held that the decrees were against the same judgment-debtor for the purposes of s. 295. If the facts are as I have stated above the father is the common judgment-debtor in both the decrees and the decrees would therefore be against the same judgment-debtor under s. 295, Civil P. C. 1882 or s. 73, Civil P. C., 1908 and, rateable distribution could be allowed.

In *Srinivasa Aiyangar v. Kanthimathi Ammal* (5) the facts were that A obtained a decree against one Maruthamuthu Pillai and subsequently B obtained a decree against the legal representatives of Maruthamuthu Pillai and his estate in their hands. B applied under s. 295, Civil P. C., to share rateably in the proceeds of property sold in execution of A's decree and it was held that B was not entitled to do so. It is true that the earlier case in *Ram Nathan v. Subramania* (21) 26 M 179.

(21) was not cited before their Lordships, but as I have explained above that case does not, to my mind, help the appellant. In *Rama Krishna Chettiar v. Kasi Vishwanathan Chettiar* (11) a Full Bench of the Madras High Court held a view which supports the appellant. Pandrang Row, J., who delivered the principal judgment, was of the opinion that a strict literal construction of the expression "the same judgment-debtor" in s. 73, Civil P. C., in the sense that the decrees must be against the same persons *eo nomine*, should not be adopted, and the decrees that were capable of execution against the same estate may without unduly straining the language of s. 73, Civil P. C., be regarded as passed against the same persons.

This case was followed in *Swaminatha Aiyar v. Saivu Rowthan* (12) and *Palaniappa Chettiar v. Palani Goundan* (13) by a learned Single Judge but he obviously had to follow the decision of the Full Bench. Pandrang Row, J., was of the opinion that in certain cases a literal construction of s. 73 has not been adopted because it has been held that although the person against whom the decrees were passed is the same in name s. 73 did not apply unless that person occupied the same character in all the decrees and it has also been held in other cases that all the judgment-debtors in each of the several decrees need not be identically the same and that it is sufficient if there is one judgment-debtor common to all the decrees; but, as I have pointed out in an earlier portion of my judgment, the decisions in these two classes of cases have not been obtained by straining the language in any manner and afford no justification therefore, for holding the view that the plain meaning of the section ought to be ignored and the personality, the character and the capacity of the judgment-debtor is to be ignored and undue preference is to be given to the property from which the assets are realized. The Full Bench case of the Madras High Court was, however, considered by the learned Judges of the Bombay High Court in *Chunilal Rai Chand v. Broach Urban Co-operative Bank Ltd.* (9), and not followed. It was also not followed by Collister, J. of this Court in *Lal Singh Nayal v. Jivnand* (10), I hold the view that if the law, as laid down in s. 73, Civil P. C., is to be interpreted, and if we pay due regard to the restricted language used therein, the decision arrived at by the Court below is the correct decision and the weight of authority, as I have pointed out, is entirely in favour of

the respondent. I would, therefore, dismiss this appeal.

Verma, J.—The principal question involved in this case is one relating to the proper construction of s. 73, Civil P. C. The case has been referred to a Bench of three Judges as the Division Bench before whom it originally came up for hearing found that there was a wide divergence of judicial opinion with regard to the proper interpretation of the language employed by the Legislature in that section and in the corresponding section of the Code of 1882, *viz.*, s. 295. The essential facts are these. One Bishambhar Sahai, a Hindu governed by the Mitakshara, executed a pronote in favour of the plaintiff-appellant and borrowed a certain sum of money. The appellant instituted suit No. 59 of 1930 against Bishambhar Sahai in respect of that transaction and a decree was passed in his favour for the recovery of Rs. 10,561. Before the decree could be executed, Bishambhar Sahai died. The appellant then took out execution of the decree against the sons of Bishambhar Sahai, namely Navin Chandra and Abinash Chandra, in accordance with the provisions of s. 50 read with s. 53 of the Code, and prayed for the attachment and sale of certain family property which was in the possession of the sons, and the attachment was made on May 7, 1931.

Shortly afterwards a suit being suit No. 620 of 1931 was filed by one Makhan Lal against Navin Chandra and Abinash Chandra for the recovery of a certain sum of money on the basis of a pro-note executed by Bishambhar Sahai deceased and his elder son Navin Chandra. This suit was decreed as against Navin Chandra personally and as against both Navin Chandra and Abinash Chandra to the extent of the family property in their hands. Makhan Lal applied for execution of his decree to the same Court in which the execution of the appellant's decree was pending and had the same properties attached as had been attached on the application of the appellant. The attachments in execution of Makhan Lal's decree were made on December 2, 3, 1931. Sales were held in execution of Makhan Lal's decree on March 18, 1932, when one Babu Lal purchased a portion of the property for Rs. 1,325 and on March 29, 1932, when Makhan Lal himself purchased the remaining property in lieu of Rs. 1,415. Babu Lal having deposited in Court the sum of Rs. 1,325 in accordance with the provisions of the Code, Makhan Lal applied that the same be paid over to him and obtained payment on October 26, 1932.

So far as the purchase made by Makhan Lal himself was concerned, the purchase money, namely, the sum of Rs. 1,415, was set off against the amount due to him on the decree and satisfaction of the decree was entered up to that extent. This also took place in 1932. Makhan Lal thus received a total sum of Rs. 2,740 in execution of his decree. On October 6, 1933, the appellant applied for rateable distribution under the provisions of s. 73, of the Code. The execution Court disallowed his application in August 1934. The appellant thereupon, in October 1935, instituted, under sub-s. (2) of s. 73, the suit which has given rise to this appeal. His claim was that he was entitled to a sum of Rs. 2,061 and Rs. 493-8-0 as interest, from October 6, 1933, to the date of the institution of the suit and at 1 per cent. per mensem, total Rs. 2,554-8-0 as his rateable share out of the amount realised by Makhan Lal. As Makhan Lal had died before the institution of the suit, the appellant impleaded his sons and grandsons as defendants Nos. 1 to 13, and claimed that he was entitled to a decree for the realisation of the sum of Rs. 2,554-8-0 from the estate of Makhan Lal deceased which, he alleged, was in the possession of defendants Nos. 1 to 10. He averred that, as far as he knew, defendants Nos. 11 to 13 were not in possession of any portion of the estate of Makhan Lal, and that they were, therefore, impleaded as defendants *pro forma*. He also impleaded Nayin Chandra and Abinash Chandra, the sons of Bishambhar Sahai, as defendants Nos. 14 and 15, *pro forma*.

The suit was contested by defendants Nos. 1, 5, 8 and 10 who raised questions of jurisdiction, limitation, estoppel and acquiescence. They further pleaded that the plaintiff was not entitled to rateable distribution for certain reasons, one of which was that the decrees of the plaintiff and of Makhan Lal had not been 'passed against the same judgment-debtor'. It was also alleged that, in any event, the plaintiff was not entitled to the amount claimed and that he should in no case be allowed any interest. The pleadings gave rise to a number of issues. The learned Munsif who tried the suit decided the issues of jurisdiction, limitation, estoppel and acquiescence in favour of the plaintiff. He further held that if the plaintiff was entitled to rateable distribution, he was entitled to the amount he would have got on the date on which the assets realised in execution of Makhan Lal's decree should have been distributed and that subsequent events could not be taken into account. He also held that two

of the three grounds on which the defendants based their plea that the plaintiff was not entitled to rateable distribution were untenable. He held, however, that the decrees of the plaintiff and of Makhan Lal were not passed against the same judgment-debtor and that, therefore, the plaintiff had no right to claim a share by rateable distribution in the assets realised by execution of Makhan Lal's decree.

Having arrived at that conclusion, the learned Munsif did not decide the question whether the plaintiff was entitled to any interest. In the result, the suit was dismissed. The plaintiff appealed and the lower Appellate Court agreed with the trial Court in holding that the two decrees in question had not been passed against the same judgment-debtor within the meaning of s. 73 of the Code. The appeal was accordingly dismissed without any expression of opinion on the part of the lower Appellate Court on the other questions that had been raised. The plaintiff has filed this second appeal and the only question that arises for consideration is whether the decision that the plaintiff was not entitled to claim rateable distribution, for the reason that the two decrees had not been 'passed against the same judgment-debtor' within the meaning of s. 73 is correct.

The answer to the question thus raised depends on the construction to be placed on s. 73. Questions relating to the proper construction of that section, as well as of the corresponding section of the Code of 1882, have occupied the attention of several High Courts in India in a number of cases, many of which have been cited at the Bar. As my brother Iqbal Ahmad and Bajpai are going to deal exhaustively with these cases, I do not propose to discuss them in detail. On the specific questions that arise before us there is a sharp conflict of opinions between the High Courts of Bombay and Madras. The Bombay view is to be found in *Govind Abaji v. Mohoniraj Vinayak* (4) and *Chunilal Rai Chand v. Broach Urban Co-operative Bank Ltd.* (9), and the Madras view in the Full Bench case in *Rama Krishna Chettiar v. Kasi Vishwanathan Chettiar* (11). Broadly speaking, the view of the Bombay High Court is that the words of the section should be taken literally and that the moment you find that the suits, in which the two decrees were obtained, were not filed against the same individual or individuals as defendant or defendants, you must hold that the decrees were not against 'the same judgment-debtor.'

The facts in *Govind Abaji v. Mohoniraj Vinayak* (4), were identical with those of the

case before us, the only difference being that in that case the assets had been realized in execution of the decree of the person whose position corresponded with that of the appellant before us, and the applicant for rateable distribution was the person whose position corresponded with that of Makhan Lal in this case. That difference can have no effect on the decision of the question of law. Jenkins, C. J. considered it "enough to say that the money must be against the same judgment-debtor" and that in the case before him one decree was against the father and the other was against the son. The circumstances that the debts of both the creditors had been incurred by the father, that one of the creditors had to bring his suit against the son because the father had died before the institution of the suit, leaving property which was in the possession of the son, and that the decree against the son was that the amount be realized from the assets of the father in the hands of the son, were not considered to be of any importance. Chandavarkar, J. delivered a longer judgment, agreeing with the conclusion arrived at by the learned Chief Justice. He referred to certain provisions of the Code and held that the test laid down by the learned Chief Justice was the true test. The real basis of the decision is to be found in the following sentences which occur in the judgment of Chandavarkar, J. :

"The decree obtained by the present applicant is against Bhau Babaji Jangam, deceased, by his son and heir Kashinath. Can it be said to be a decree against Bhau Babaji? It is a decree against Bhau's legal representative, whereas the decree obtained by the opponent Mohoniraj was against Bhau himself. It cannot be said, therefore, *looking to the names of the parties*, that the two decrees are against the same judgment-debtor. It is true that the estate that is liable in the case of both the decrees is the estate of the deceased Bhau, but s. 295 does not make the nature of the liability under the decrees contemplated by it one of the essential conditions for the application of the section."

(The italics are mine.) After considering certain sections of the Code, the learned Judge makes these observations in the concluding paraphrase of his judgment :

"Applying these considerations to this case before us, it is obvious that the decree obtained by the present applicant was against Bhau's son and heir, Kashinath who must be regarded as his 'judgment-debtor' whereas the decree obtained by the opponent was against Bhau as his judgment-debtor. The opponent by bringing Kashinath as the legal representative of Bhau on the record in his execution proceedings and obtaining an order for execution as against Kashinath as such representative, has no doubt made him his 'judgment-debtor', according to the definition of that term in the Code. But though that order obtained by the opponent and the decree obtained by the present applicant are against the same 'judgment-debtor', (i. e., Kashinath), yet the decree of the former is against Bhau whereas the decree of the latter is against Kashinath,

and it is the decrees and not the orders passed in execution which form the test for a rateable distribution under s. 295 of the Code."

It seems to me that Pandrang Row, J., is perfectly correct, if I may say so with respect, in describing this, in his judgment in the Full Bench case in *Rama Krishna Chettiar v. Kasi Vishwanathan Chettiar* (11) as the *eo nomine* construction of the section. In *Chunilal Rai Chand v. Broach Urban Co-operative Bank Ltd.* (9) the facts are absolutely identical with those of the case before us. The learned Judges who decided that case preferred the view expressed by their own Court in *Govind Abaji v. Mohoniraj Vinayak* (4) to the view of the Full Bench of the Madras Court in *Rama Krishna Chettiar v. Kasi Vishwanathan Chettiar* (11) Barlee, J. observes :

"In the present case the petitioner obtained a decree against one Jorbbhai and after his death defendant No. 4, the Broach Urban Co-operative Bank, obtained a decree against the widows of Jorbbhai to recover money due to the Bank by Jorbbhai. Therefore, the two decrees were not passed against the same judgment-debtor and the position is exactly the same as that in *Govind Abaji v. Mohoniraj Vinayak* (4)."

The learned Judge then quotes two passages from the judgment of Pandrang Row, J. in the Madras Full Bench case, one in which it is said that in neither of the two cases *Govind Abaji v. Mohoniraj Vinayak* (4) and *Srinivasa Aiyanger v. Kanthimathi Ammal* (5) was any reference made to the objects of s. 73 of the Code, and the other in which a reference is made to *Nilmoni Dey v. Hira Lal Das* (17) and it is observed that in that case the fact that both the decrees were capable of execution against the same estate was held to be a sufficient reason for concluding that the decrees may without unduly straining the language of s. 73 of the Code be regarded as passed against the same judgment-debtor, and says : "This view had been considered but discarded in our Court." Having thus disposed of the judgment of Pandrang Row, J., and rejected his view, not on the ground that there was any inherent unsoundness in it, but on the ground that it had been considered and discarded by the High Court of Bombay, Barlee, J., proceeds to consider the judgment of Cornish, J., in the Madras Full Bench case. He quotes a passage from the judgment of Cornish, J., where it is stated that the liability of the legal representative under the decree, whether he has been brought on record before decree or whether execution is made after the judgment-debtor's death, is limited to the extent of the deceased's assets which have come into his hands and which have not been duly distributed by him, and that the

notion underlying these principles is that the legal representative takes the place of the deceased and is under the obligation which lay upon the deceased of paying lawful claims against the deceased out of the deceased's assets. Barlee, J., observes that this is no doubt correct, but hardly relevant, and proceeds:

"It explains why the Legislature should have provided for a case of this sort. But the fact remains that s. 295, Civil P. C., did not provide for a case of this nature. It provided for one case only where there are two or more decrees passed against the same judgment-debtor; and though after that decision, which was delivered in 1901, the Civil P. C., of 1882, was repealed and re-enacted and Sir Lawrence Jenkins himself was a member of the Special Committee on the Bill, the Legislature neglected to take the opportunity of changing the words of the section."

But that is the whole question. Did the Legislature, when it enacted s. 295 of the Code of 1882, deliberately intend to exclude from its operation a case in which, owing to the person who had incurred the debt dying before the institution of the suit, the creditor has to file it against the legal representative, or in which, owing to the judgment-debtor dying after the passing of the decree but before the decree being executed, the creditor decree-holder was to take proceedings in execution against the legal representative? I should also like to observe; with great respect to the learned Judges who decided the case in *Chunilal Rai Chand v. Broach Urban Co-operative Bank Ltd.* (9) that the fact that Sir Lawrence Jenkins, who had delivered a short judgment in the year 1901 expressing a certain opinion with regard to the interpretation of s. 295 of the Code of 1882, was a member of the Special Committee on the Bill which ultimately emerged as Act V of 1908, is not a relevant consideration in construing s. 73 of the Code of 1908. Barlee, J. concludes his judgment in these words:

"In my opinion the Madras interpretation is not justified by the words of the section, and since the Legislature has not agreed to amend it, we must accept it as it is unamended, and must follow the case in *Govind Abaji v. Mohoniraj Vinayak* (4)."

Thus, the basis of Barlee, J.'s decision is that the High Court of Bombay had taken a certain view as to the interpretation of s. 295 of the Code of 1882, that in spite of the expression of that view the section had not been amended when the Code of 1908 was enacted in place of the Code of 1882, and that therefore the view expressed by the Bombay Court in *Govind Abaji v. Mohoniraj Vinayak* (4) was binding on that Court. The question thus remains whether the view expressed in *Govind Abaji v. Mohoniraj Vinayak* (4) on the interpretation of s. 295 of the Code of 1882

was correct. The fact that the language of the section was not altered when the Code of 1908 was enacted does not necessarily lead to the conclusion that that view is correct. There is no justification for the assumptions underlying such a conclusion. Tyabji, J., who was the other member of the Bench which decided the case in *Chunilal Rai Chand v. Broach Urban Co-operative Bank Ltd.* (9), discards the reasoning of the Full Bench of the Madras High Court on the ground that, in his opinion, it amounted to an unjustifiable expansion of s. 73 and that "the Courts have no jurisdiction to expand in this manner a Legislative provision such as s. 73." He accepts the view expressed in the earlier Bombay case, *Govind Abaji v. Mohoniraj Vinayak* (4), as correct.

The question, which we have to consider, thus, resolves itself into this. Should we accept the Bombay view, namely that a strict literal construction should be placed on the expression "the same judgment-debtor" in the sense that the decrees must be against the same person *eo nomine*, or should that construction be rejected as too narrow? Now, it is beyond question that the view that a strict literal construction should be placed on the section has not been accepted in a number of cases arising out of a variety of circumstances. The very expression "the same judgment-debtor" was the subject of interpretation in the Full Bench decision of the Calcutta High Court in *Gonesh Das Bagria v. Shiva Lakshman* (22). The question that arose in that case was whether two decrees, one of which was against X, Y and Z, and the other was against X and Y only, could be said to be against "the same judgment-debtor" within the meaning of the section. The answer given by a Full Bench of five Judges was in the affirmative. The case had been referred to a Full Bench by a Division Bench consisting of Maclean, C. J., and Banerjee, J. and the learned Chief Justice in his referring order mentioned the case in *Deboki Nunden Sen v. Hart* (23) as a case in which a contrary view had been taken and observed:

"If the language of the section be absolutely clear, the circumstance that such a construction as was put upon it in that case may lead to injustice or to anomaly or to hardship, could not prevent us from putting such construction upon it. But looking at the whole of s. 295, and especially to that portion of it which deals with the distribution of the assets, where it speaks of 'the judgment-debtor' not using the expression 'the same judgment-debtor' and to the equitable distribution which is aimed at by the section, I am disposed to think that the construction put upon it by the case in *Deboki Nunden Sen v. Hart* (23) is too narrow."

The learned Chief Justice is referring to (22) 30 C 583; 7 C W N 414 (F B), (23) 12 C 294.

para. 4 under cl. (c) of the proviso to the section. Banerjee, J. in his referring order states:

"That it is not necessary that the decrees should be against identically the same judgment-debtors as is clear from the cases in *Shumbhoo Nath Poddar v. Luckynath Dey* (24) and in *Sarat Chandra v. Doyal Chand* (25), and I do not think that the language of s. 295 requires that the judgment-debtors in the two decrees should be identically the same."

Banerjee, J. was not a member of the Full Bench, but the learned Chief Justice was and the principal judgment of the Full Bench was delivered by him. In that judgment he observes as follows :

"I was a member of the Court which referred the case, and for the reasons which I gave in my judgment, which it is unnecessary to repeat, and also for those which are very clearly stated by my colleague, Banerjee, J., I consider that the question ought to be answered, as we then answered it, in the affirmative."

Prinsep, Sale, Stevens, and Geidt, JJ. concurred in this view. The facts of the case were no doubt slightly different from those of the case before us, but the principle accepted by six learned Judges was that a strictly literal construction should not be placed upon the section, and that in construing it, its main object, namely an equitable distribution, should not be lost sight of. It will be convenient at this stage to quote a passage from the judgment of Sir Arthur Strachey in *Bithal Das v. Nand Kishore* (1) in which the learned Chief Justice explains the object of the section :

".....the object of the section is twofold. The first object is to prevent unnecessary multiplicity of execution proceedings, to obviate, in a case where there are many decree-holders each competent to execute his decree by attachment and sale of a particular property, the necessity of each and every one separately attaching and separately selling that property. The other object is to secure an equitable administration of the property by placing all the decree-holders in the position I have described upon the same footing, and making the property rateably divisible among them instead of allowing one to exclude all the others merely because he happened to be the first who had attached and sold the property."

I am not losing sight of the fact that the question which arose for decision in that case and the facts out of which it arose were different. But the remarks of the learned Chief Justice as to the objects with which the section has been enacted are perfectly general and if I may say so with respect are in my opinion perfectly correct. Another case in which the strict literal construction of the expression 'the same judgment-debtor' was not adopted is that in *Bhola Nath v. Maqbul-Unnissa* (14). It is converse case to the one before us. The plaintiff-respondent in that

case had, on the death of her husband Said-ud-din, obtained a decree for her dower against Said-ud-din's son and heir, Yaqub Hussain, and had, in execution of that decree, attached certain property which had belonged to Said-ud-din, and which had been inherited by and was in the possession of Yaqub Hussain. The defendant-appellant had obtained a money decree against Yaqub Hussain in respect of a debt incurred by Yaqub Hussain, and had in execution of that decree attached the same property. The plaintiff was granted a decree by the High Court for a declaration that she had priority in respect of the amount of her decree over the decree obtained by the defendant and that the defendant could only bring the property in suit to sale in execution of his decree subject to the plaintiff's rights under the decree obtained by her. The competition thus was between two decree-holders holding decrees against the same individual, but one of them was entitled to proceed, and to proceed only against the property of the deceased which had descended to the individual against whom the decree had been obtained, and the other of them was entitled to proceed against the person and the property of the individual against whom he had obtained the decree. It was held that the decree-holder who was entitled to have her decree satisfied out of the assets of the deceased in the hands of the judgment-debtor was entitled to priority over the other decree holder. At p. 34* of the report the learned Chief Justice makes these observations :

"I am not disposed to think that s. 295, Civil P. C., which directs in certain events rateable distribution of assets realized by sale in execution of a decree, if it were applicable, opposes any obstacle to the granting of the relief which the plaintiff seeks. The decree obtained by the respondent is a decree against Yaqub Hussain as a representative of her deceased husband, whilst the decree obtained by the appellant is against Yaqub Hussain in his personal capacity. The two decrees have not, in fact, been obtained against 'the same judgment-debtor.'"

Thus, although the two decrees were *eo nomine* against the same individual, they were held to be not against 'the same judgment-debtor' for the reason that the judgment-debtor held different capacities in the cases in which the decrees had been obtained. It has been conceded before us that this is settled and sound law. Another instructive case is that in *Nilmoni Dey v. Hiralal Das* (17). In that case the learned Judges observe as follows :

"What has happened in substance is that there are now two decrees against the estate, each obtained against two out of three executors. One of these two executors is common to the two suits. Each decree is *prima facie* capable of execution against the estate

(24) 9 C 920.

(25) 3 C W N 368.

of the deceased testator. In these circumstances, we are of opinion that the two decrees may, without unduly straining the language of s. 73 be regarded as passed against the same judgment-debtor, namely, they are both decrees against the estate of Bhuvan Chunder Bhar, in one case represented by A and B, in the other case by B and C. We may add that we are not disposed to put a narrow construction upon the terms, of s. 73, so as to defeat the ends of justice."

(The italics are mine). The object of the section being as stated above, and it having been held in a number of cases arising out of a variety of facts that a strict literal construction should not be placed upon the expression 'the same judgment-debtor; it seems to me that the reasoning of the learned Judges of the Madras High Court who decided the case in *Rama Krishna Chettiar v. Kasi Vishwanathan* (11), must be accepted. The only other case to which I propose to refer is that in *Lal Singh Nayal v. Jiwanand* (10), in which on similar facts my brother Collister preferred the Bombay view to that expressed in the Full Bench decision of Madras. For the reasons indicated above I am unable to agree with my learned brother. In my opinion, the decision of the lower Appellate Court on the only point which it has decided should be reversed. I would, therefore allow the appeal, set aside the decree of the lower Appellate Court and remand the case to that Court for decision of the points which remain to be decided.

By the Court.—The appeal is allowed, the decree of the lower Appellate Court is set aside and the case is remanded to that Court for decision of the remaining issues arising in the case. No additional evidence will be allowed. After deciding the remaining issues that were pressed in the trial Court and were decided by that Court, the lower Appellate Court will, if it finds that the plaintiff is entitled to a decree, pass a decree in the plaintiff's favour for such amount as he may be entitled to. Costs here and hitherto will be costs in the cause and will abide the result. The court-fee paid by the appellant in this appeal will be refunded to him.

s.

Appeal allowed.

PATNA HIGH COURT

Criminal Revision No. 258 of 1941

May 6, 1941

MANOHAR LALL, J.

LAKHMAN KURMI—PETITIONER

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 109
(a) (b)—S. 109 (a) applicability of—Held on facts

that s. 109 (a) did not apply—Criminal trial—Evidence—Admissibility—Evidence of Sub-Inspector not on personal knowledge, but based on inquiries made in course of duty—Admissibility.

The cl. (a) of s. 109, Criminal P. C., should be applied with proper discretion. It cannot be applied to a person who was merely found talking at night time with bad characters in a place open to the public or to one who merely shows a disinclination for the society of the Police and endeavours to avoid them by running away on their approach. There must be some definite attempt at concealment by taking precautions with that object in view, whether it be by disguise or otherwise, indicating a desire to hide the fact that the person is present within the local limits of the Magistrate's jurisdiction. 97 Ind. Cas. 648 (1) and 155 Ind. Cas. 729 (2), relied on.

Held, having regard to the entire circumstances that it was a matter of common experience that a person in the position of the petitioner would ordinarily try to run away when challenged at night from the Police or the *choukidars*, and that there was no sufficient evidence which would justify the inference that the petitioner had been found to be taking precautions to hide his presence, far less that he was taking such precautions in order to commit an offence.

Evidence of a Police Sub-Inspector not on his personal knowledge but as a result of some enquiries which he has made in the course of his official duties is wholly inadmissible. Similarly the evidence that the petitioner was on the active picketing list of the *thana* and that "this list is maintained for the criminals who are suspected to be most active" is wholly inadmissible. The Courts have to decide matters judicially and not upon a suspicion which led the Police authorities, however correctly, to place a person upon the suspicion list.

Or. R. from an order of the Sessions Judge of Saran, dated January 20, 1941.

Syed Safdar Imam, for the Petitioner.

The Assistant Govt. Advocate, for the Opposite Party.

Order.—This is an application in revision on behalf of Lakhman Kurmi who has been ordered under s. 109 read with s. 118 of the Criminal P. C., to execute a bond of Rs. 100 with two sureties of the like amount to be of good behaviour for a period of one year or in default to undergo rigorous imprisonment for one year by an order passed by the First Class Deputy Magistrate of Gopalganj dated June 29, 1940, an appeal against which order was dismissed by the learned Sessions Judge of Saran on January 20, 1941.

The facts found are these. On the night of March 9, 1940, at about 2 A. M. the petitioner along with two others, untraced, were seen standing on the District Board Road about 10 *bighas* east of village Isyapur by three *choukidars* who were on their rounds. On being challenged they all ran away. The petitioner hid himself in a big sugar-cane field immediately to the east of that road. The *choukidars* surrounded the field and at dawn they took the help of one Feku Missir

who was seen approaching with some labourers to cut sugar-cane crops from the neighbouring field. The party then entered the sugar-cane field where they found the petitioner sitting almost in the middle of the sugar-cane field under a bar tree with his face covered; a bundle of *sarso*, about four seers in weight, was kept by his side. The petitioner was questioned and gave his name as Sobran Kanu and resident of village Daibhata. But one of the *choukidars* was able to identify him to be Lakhman Kurmi. This roused the suspicion of the party who searched the person of the petitioner and they found a big knife, a torch in working order and a bunch of keys. The petitioner was then taken to the *thana* and a Station Diary Entry was lodged. Upon these facts the petitioner has been ordered to execute a bond in the terms already stated.

The petitioner's defence was that he was in ill health, was suffering from enlarged spleen, and on that date started from his house at village Ekdarwa at about 7 or 8 A.M. in order to go to another village for treatment and that he took a bundle of *sarso* so that he may sell it and meet the costs of treatment. But on the way, he says, he got an attack of fever and lay down on a culvert on the District Board road where he was arrested owing to enmity. He denied that he was arrested inside the sugar-cane field.

I have read the evidence and I am satisfied that the petitioner on being challenged hid himself in the sugar-cane field, but I am also satisfied that the petitioner was in ill health as was testified to by the Assistant Surgeon of Gopalgunj, defence witness No. 4. The doctor stated in his evidence that the petitioner was suffering from enlarged spleen, probably *kalazar*, and that he was suffering from this disease from February last, that is to say, from before the date of his arrest. I must say that I am not satisfied from the evidence that the petitioner was covering his face when he was discovered under the bar tree. In the Sanha entry dated March 10, 1941, while every other detail is given the story that the petitioner was sitting with his face covered is not to be found. Further, it must be observed that the knife was recovered from the person of the petitioner. The evidence of P. W. No. 3 is clear that the torch and the knife of the petitioner were found in the *kurta* of the petitioner. The knife, therefore, although it is stated in the judgment of the Courts below to be a big knife, could not have been very big as it could easily be kept in the pocket of his shirt.

Upon these facts can it be held that the

petitioner was taking precautions to conceal his presence within the local limits of a Magistrate's jurisdiction and that there is reason to believe that he was taking such precautions with a view to committing any offence as provided by s. 109 (a) of the Criminal P. C.?

It was pointed out by the learned Chief Justice, Foster, J., concurring, in the case of *Rambirich Ahir v. The King-Emperor* (1), that s. 109 (a) cannot be applied to a person who was merely found talking at night time with bad characters in a place open to the public or to one who merely shows a disinclination for the society of the Police and endeavours to avoid them by running away on their approach. It was also pointed out that in order to apply s. 109 (a) there must be some definite attempt at concealment by taking precautions with that object in view, whether it be by disguise or otherwise indicating a desire to hide the fact that the person is present within the local limits of the Magistrate's jurisdiction and that the clause should be applied with proper discretion.

Mohammad Noor, J., in a later case in the *King-Emperor v. Bishi Sahara* (2), took a similar view.

The only suspicious circumstance against the petitioner is that he gave a wrong name and address; but the Sub-Inspector of Police himself, who was witness No. 6 for the prosecution, stated in his evidence that the petitioner gave his address both as Daibhata and Ekdarwa and that enquiry from the Police Officers showed that the petitioner was originally a resident of Daibhata and that he had left it 12 years ago. Having regard to the entire circumstances and specially when it is a matter of common experience that a person in the position of the petitioner would ordinarily try to run away when challenged at night from the Police or the *choukidars*, I am not satisfied that there is sufficient evidence which would justify the inference that the petitioner has been found to be taking precautions to hide his presence, far less that he was taking such precautions in order to commit an offence. The precaution which the petitioner has been found to have taken was not with a view to committing any offence but with a view to his avoiding being caught by the *choukidars*.

But the petitioner has also been found to be of no ostensible means of subsistence, and, therefore, it was argued that s. 109 (b) of the

(1) 8 P L T 95; 97 Ind. Cas. 648; (1926) Pat. 290; 27 Cr. L J 1128; A I R 1926 Pat. 569; 6 Pat. 177.

(2) 15 P L T 836; 155 Ind. Cas. 729; A I R 1935 Pat. 69; (1935) Cr. Cas. 139; 36 Cr. L J 846; 7 R P 611.

Criminal P. C., justified the passing of the order complained against.

Now, strange as it may seem, the only evidence on this point is the evidence of Babu Chandrika Prasad Sinhā, Sub-Inspector of Police, who received a slip, Ex. 1, for verification and as a result of his enquiry and on consulting the record he reported that Lakhman Kurmi was at present residing at Ekdarwa, that he was untraced since long from Ekdarwa and that "he has no land and no ostensible means of subsistence". It is obvious that the Sub-Inspector is deposing not on his personal knowledge but as a result of some enquiries which he has made in the course of his official duties. Such evidence was wholly inadmissible. I should also like to point out that the evidence that the petitioner was on the active picketing list of the *thana* and that "this list is maintained for the criminals who are suspected to be most active" is wholly inadmissible and it is unfortunate that the learned Magistrate allowed this evidence to be brought on the record. The Courts have to decide matters judicially and not upon a suspicion which led the Police authorities, however correctly to place a person upon the suspicion list.

Against the hearsay evidence given by this witness the petitioner has been able to produce some witnesses to support him that he has some land and works as a labourer. D. W. No. 1 stated in cross-examination that the petitioner worked as a labourer for him. No suggestion is made that this statement was untrue. Similarly D. W. No. 2 stated in cross-examination that the petitioner sometime worked in the witness's field. For these reasons I am unable to hold that "there is not an iota of evidence on the record to show that the accused had any honest means of livelihood". It may be remarked that the learned trial Court gave no reason for taking that view. All that he says towards the end of his judgment at p. 13 is: "He has no means of subsistence". The learned Sessions Judge discussed the evidence of the defence witnesses in these terms: "I should add in conclusion that though the three defence witnesses are interested in the accused and though D. W. No. 1 spoke of Money Orders having been regularly remitted by the accused to his wife when he was employed in Calcutta, until sometime before the occurrence, there is not an iota of evidence on the record to show that the accused had any honest means of livelihood in village Ekdarwa. The learned Sessions Judge has not considered the statement made by these witnesses in cross-examination which I have

referred to above that the petitioner works as a labourer in the fields of these witness. Having regard to the position of the petitioner it is difficult to see how he would be able to produce witnesses who are not interested in him. It is only those who are interested in him who will be able to show, if believed, that the petitioner is or is not a man who lives by honest means.

For these reasons I set aside the order of the learned Magistrate under s. 109, read with s. 118 of the Criminal P. C. The petitioner was ordered to be released on bail to the satisfaction of the District Magistrate. If he is on bail the bail bond will be discharged, if he is not on bail he must be set at liberty at once.

D.

Order set aside.

LAHORE HIGH COURT

Second Appeal No. 314 of 1940

October 21, 1940

DIN MOHAMMAD, J.

SHAM LAL AND ANOTHER—PLAINTIFFS

—APPELLANTS

versus

CHHAJU RAM—DECREE-HOLDER AND

ANOTHER—JUDGMENT-DEBTOR—DEFENDANTS—

RESPONDENTS

Transfer of Property Act (IV of 1882), s. 92—Applicability to Punjab—Principle of subrogation as embodied in amended s. 92, applies to Punjab.

If a principle is to be imported from a statute and acted upon in a province where the statute does not apply it is not fair to pick and choose for that would always lead to arbitrary results. The principle of subrogation as it stands is now embodied in s. 92, T. P. Act, and must be applied in the Punjab on the lines indicated there. Consequently where the mortgagor executes a third mortgage of his property without disclosing the second mortgage and pays off the original mortgagee from out of the consideration received from the third mortgagee, the third mortgagee does not become subrogated to the rights of the original mortgagee. No question of keeping the original mortgage alive can arise inasmuch as the third mortgagee had no knowledge of the intermediary mortgage.

[Case-law referred to.]

S. A. from the decree of the Senior Sub-Judge, Hissar, dated November 15, 1939.

Mr. F. C. Mittal, for the Appellants.

Mr. C. L. Aggarwal, for Respondent No. 1.

Judgment.—The facts bearing on the question of law involved in this case are these. Some time before 1924, one Nasir Beg mortgaged a house to Banwari Lal for Rs. 600. In 1924, he mortgaged the equity of redemption of the same house along with another house to Chhaju Ram. In 1927, he mortgaged with possession for Rs. 1,000 to Sham Lal and his

brother the house which had already been mortgaged to Banwari Lal. It was stated in the mortgage deed that the house was free from encumbrance and that the entire consideration would be received by the mortgagor before the Sub-Registrar in order to pay off Banwari Lal. This document was executed on April 22 and on 23, Nasir Beg appeared before the Sub-Registrar, admitted the execution of the deed and received in currency notes Rs. 1,000 out of which he paid Rs. 925 to Banwari Lal and retained Rs. 75 for himself. In 1938, Chhaju Ram brought a suit against Nasir Beg and obtained a decree against him without impleading Sham Lal. In execution of his decree, the entire house was ordered to be sold. Sham Lal's objections having been dismissed by the executing Court, he instituted the suit out of which the present appeal has arisen for the usual relief. The Honorary Subordinate Judge who tried the suit dismissed it and the Senior Subordinate Judge on appeal affirmed that decision.

Counsel for the appellants contends that Sham Lal by paying off Banwari Lal was subrogated to the rights of Banwari Lal and inasmuch as Banwari Lal was a prior mortgagee, Sham Lal was entitled to precedence on that account. In support of his contention, Counsel relies on *Shyam Lal v. Bashiruddin* (1), *Dinobundo Shaw v. Jogmoya Dasi* (2), *Tangya Falla v. Trimbak Daga* (3) and *Karam Chand v. Ram Singh* (4). In *Shyam Lal v. Bashiruddin* (1), it was held that where a mortgage debt, for the payment of which a sale had been ordered, was satisfied by a third party, who obtained a security for the advance made by him, such security was not extinguished by s. 89, T. P. Act, and the encumbrance in respect of which the sale was ordered enured for the benefit of the party making the payment. In *Dinobundo Shaw v. Jogmoya Dasi* (2), the question that arose for decision was whether a purchase of property by the appellant at a Sherri's sale was subject to or free from a prior lien claimed by the respondent. Their Lordships of the Privy Council following a previous judgment of their own held that the mortgagor in paying off his own debts did so, for the benefit of the mortgagee and in performance of the agreement with him and that the intention of the parties was to give to mortgagee a first

charge on the property represented to be unencumbered and the appellant was aware of it. In *Tangya Falla v. Trimbak Daga* (3), it was remarked that the plaintiff being a stranger, in paying off a subsisting mortgage was entitled to be subrogated to the position of the mortgagee. It may be observed that all these judgments are prior to 1929, the significance of which will appear later on. In *Karam Chand v. Ram Singh* (4) reliance was mainly placed on two judgments of their Lordships of the Privy Council reported in *Gokal Dass v. Purammal* (5), and *Malireddi Ayyareddi v. Gopala Kishnayya* (6), and it was held that the principle enunciated in *Malireddi Ayyareddi v. Gopala Kishnayya* (6), applied to the case of a vendee from the mortgagor of a property which was sold to him as being subject only to one mortgage (which was paid off out of the purchase money) while in reality there was another subsequent mortgage.

Counsel for the respondent on the other hand urges that whatever the state of law may have been before 1929, it has undergone a substantial change on its amendment in that year. Prior to 1929, there were three different ss. 74, 75 and 101 in the T. P. Act, which dealt with the subject of subrogation in one way or another. By s. 74, any second or other subsequent mortgagee was authorised to tender the mortgage money due on the next prior mortgage and that prior mortgagee was bound to accept such tender and to give a receipt for such amount and on obtaining such receipt the subsequent mortgagee acquired all the rights and powers of the mortgagee to whom he had made such tender. By s. 75, every second or other subsequent mortgagee had, so far as regards redemption, foreclosure and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees as his mortgagor had against such prior mortgagee or mortgagees, and the same rights against the subsequently mortgagees (if any) as he had against his mortgagor. By s. 101, where the owner of a charge or other incumbrance on immovable property became absolutely entitled to that property, the charge or incumbrance was extinguished, unless he declared by express words or necessary implication, that it should continue to subsist or such continuance would be for his benefit. In 1929, two new sections, that is, s. 91 dealing

(1) 28 A 778; 3 A L J 630; A W N 1906, 230.

(2) 29 C 154; 29 I A 9s 6 C W N 209; 4 Bom. L R 238; 12 M L J 73; 8 Sar. 217 (P O).

(3) 40 B 646; 35 Ind. Cas. 794; A I R 1916 Bom. 302; 18 Bom. L R 700.

(4) I L R (1938) Lah. 155; 174 Ind. Cas. 226; A I R 1937 Lah. 665; 39 P L R 899; 10 R L 530.

(5) 10 C 1035; 11 I A 126; 4 Sar. 543; 8 Ind. Jur. 396 (P O).

(6) 47 M 190; 79 Ind. Cas. 592; A I R 1924 P C 36; 51 I A 140; 22 A L J 45; 46 M L J 164; 19 L W 215; 26 Bom. L R 204; 34 M L T 1; 2 Pat. L R 99; 10 O & A L R 269; (1924) M W N 290; 39 C L J 204; 28 C W N 1025; L R 5 A (P O) 49; 1 O W N 27 (P O).

with redemption and s. 92 dealing with subrogation were enacted and s. 92 replaced the old section dealing with subrogation. Under s. 91 besides the mortgagor three classes of persons were held entitled to redeem, namely: (a) any person (other than the mortgagee of the interest sought to be redeemed) who had any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same; (b) any surety for the payment of the mortgage debt or any part thereof; or (c) any creditor of the mortgagor who had in a suit for the administration of his estate obtained a decree for sale of the mortgaged property. Under s. 92, any of the persons referred to in s. 91 (other than the mortgagor) and any co-mortgagor was empowered on redeeming property subject to the mortgage to exercise the same rights in respect of redemption, foreclosure or sale of such property as the mortgagee whose mortgage he redeemed may have had against the mortgagor or any other mortgagee. It was further provided that a person who had advanced to mortgagor money with which the mortgage had been redeemed would be subrogated to the rights of the mortgagee whose mortgage had been redeemed if the mortgagor had by a registered instrument agreed that such persons shall be so subrogated. It may be remarked that the word "subrogation" was for the first time introduced in this section.

Counsel for the respondents argues that inasmuch as the law in respect of subrogation was given a new shape by s. 92, the principles now applicable should be derived from this section and from no other source and as in the present case it was the mortgagor who himself had paid off Banwari Lal, the appellants Sham Lal and his brother could not be subrogated to the rights of Banwari Lal, firstly, because the mortgagor is expressly excluded in para. 1 of s. 92 and, secondly, because the condition laid down in para. 3 has not been fulfilled. He further contends that inasmuch as the appellants were not even aware of the existence of any intermediary mortgage, there could be no occasion for them to express an intention to keep the first lien alive for their benefit. In support of his contention, he refers to *Mohammad Shafiq Ullah Khan v. Mohammad Sami Ullah Khan* (7), and *Tulsi Ram v. Radha Kishan* (8). In *Mohammad Shafiq Ullah Khan v. Mohammad Sami Ullah Khan* (7), it was remarked by a Division Bench composed of Sulaiman

and Pullan, JJ., that s. 74, implied a tender by the subsequent mortgagee on his own account and not as an agent of the mortgagor. They further remarked that in all other cases it should be ascertained whether the parties intended that the previous mortgage debt would be kept alive for the benefit of the subsequent mortgagee as against the mortgagors and in the absence of direct evidence of intention to keep the prior mortgage debt alive, it was impossible to hold that the previous mortgage debt was not extinguished by the payment. This judgment though delivered prior to the amendment introduced in 1929, hold good with greater force even after the amendment as the amendment embodies in a way the principles enunciated therein. In *Tulsi Ram v. Radha Kishan* (8), a Division Bench composed of Sir Shadi Lal, C. J. and Abdul Qadir, J., remarked as follows:

"If a person purchases property subject to two prior mortgages and the bulk of the price is retained by him for their discharge, his payment of the first mortgage would not entitle him to set up that mortgage as a shield against the claim of the second mortgagee, inasmuch as payment by him was really a payment of the mortgagor."

These judgments so far as they go lend some support to the contention raised on behalf of the respondent. The question really is to what extent is the principle of subrogation applicable in the Punjab. On the one hand, it is contended that inasmuch as the T. P. Act, is not in terms in force in this Province, mere general principles should be applied denuded of all technicalities. On the other hand, it is equally forcibly contended that even if general principles of subrogation are to be made applicable in this province, the law as stated in the amended s. 92 should hold good. I am disposed to agree with the latter view mainly on the ground that if a principle is to be imported from a statute and acted upon in a province where the statute does not apply it is not fair to pick and choose for that would always lead to arbitrary results. The principle of subrogation as it stands is now embodied in s. 92 and must be applied on the lines indicated there. Applying this principle to the present case, it is obvious that the payment was made by the mortgagor himself and not by the mortgagees and it is equally clear that they could have no intention of keeping the original encumbrance alive as they did not possess any knowledge of any intermediary mortgage and consequently no occasion for expressing such intention arose. I accordingly dismiss this appeal but as the case is not free from difficulty I leave the parties to bear their own costs before me. I further grant the necessary certificate under cl. 10 of the Letters.

(7) A I R 1929 All. 943; 123 Ind. Cas. 101; 52 A 139; (1930) A L J 57; Ind. Rul. (1930) All. 357.

(8) A I R 1933 Lah. 810; 146 Ind. Cas. 679; 6 R L 264.

Patent if the appellants are disposed to prefer an appeal against this order.

D. Appeal dismissed.

PATNA HIGH COURT

Letters Patent Appeals Nos. 11, 20 and 21 of 1940

April 22, 1941

HARRIES, C. J. AND FAZL ALI, J.
CHINTI KAHARIN AND OTHERS—
DEFENDANTS—APPELLANTS

versus

KRIPASHANKAR WARRAH AND OTHERS
—PLAINTIFFS—RESPONDENTS

Landlord and tenant—"belagan", whether means rent free holding—Record of rights—Holding shown as rent free—Court can accept evidence in rebuttal—Suit one for arrears of rent—Enquiry to ascertain what the rent was necessary—Plaintiff asking Court to settle rent and give decree—Form of suit held not bad—Adverse possession—It must be to the knowledge of landlord—Monthly tenancy—Rent, if can be mentioned as so much per year.

Without deciding what "belagan" means generally in the District of Jharia all that the Court (in Letters Patent Appeal) held was that it could not take a different view from the Courts below having regard to the materials on the record, i. e., the word "belagan" as used in this district did not necessarily mean rent-free but that it meant a holding which is not paying rent, and such may be a rent-free holding, or it may be a holding for which rent may later be assessed.

Even if the record of rights had stated that certain lands were rent-free, it would still be open to a Court of fact to accept the evidence as rebutting the entry in the record of rights.

Where the suit is really one for arrears of rent and an inquiry has to be conducted to ascertain what that rent is, it is maintainable, as a suit asking the Court to settle the rate of rent and for a decree for arrears of rent on such basis.

Even assuming the tenant can acquire an adverse title against his landlord by an assertion of title by not paying rent he can only do so if his assertion was brought to the notice of his landlord.

A tenancy may well be a monthly tenancy though the rent may be mentioned as so much per year.

L. P. A. from a decision of Mr. Justice Agarwala, dated May 7, 1940.

Mr. S. C. Mazumdar, for the Appellants.

Messrs. P. R. Das and N. N. Roy, for the Respondents.

Harries, C. J.—These are three appeals from a decision of Agarwala, J. upholding a decree of the lower Appellate Court passed in favour of the plaintiff-respondent.

The plaintiff-respondent is the successor-in-title of certain land to the Raja of Jharia. It was alleged that the Raja had thirty or thirty-five years ago settled certain homestead lands with the defendant-appellants or their predecessors-in-title, and the terms of

settlement included an undertaking by the tenant to pay rent at the rates prevailing in the district from time to time. No rent had been paid, and the present suits were brought in which the plaintiff asked the Court to settle the rate of rent and for a decree for arrears of rent on such basis.

The defendants, on the contrary, alleged that these were rent-free lands and that no rent was payable in respect of them. In the alternative, they alleged a title in the lands by adverse possession. They further pleaded that the suit as framed was not maintainable.

The learned Munsif dismissed the suits, but on appeal the learned Subordinate Judge reversed his decision and decreed the suits holding that the rent applicable was a rent of Rs. 6 per *katha* per year for certain types of land and Rs. 2 per *katha* for other types of land. In second appeal to this Court Agarwala, J. upheld the decision of the lower Court and dismissed the appeals.

It has been contended by Mr. Mazumdar on behalf of the appellants in Letters Patent Appeal No. 11 of 1940 that the decision of the learned single Judge as to the nature of the settlement made with the defendants or their ancestors cannot be sustained. The land is recorded in the Record of Rights as "belagan", and it is urged that this means that the holdings were rent-free holdings. All the Courts below have come to the conclusion that the word "belagan" as used in this district does not necessarily mean rent-free. It means a holding which is not paying rent, and such may be a rent-free holding, or it may be a holding for which rent may later be assessed. The Courts below have relied upon the Settlement Report of Mr. Gokhale, and in that Report the word used for a rent-free holding is "nishkar." The expression used for a holding not paying rent but which is assessable to rent is "belagan-qabil-lagan." Mr. Gokhale gives the meaning of "belagan" standing alone as not paying rent. All the Courts have held that *belagan* in this particular District when standing alone means nothing more than not paying rent. In the view of the Courts, when such an expression appears in the Record of Rights there is no presumption that the land is either rent-free or assessable to rent. It may well be that Mr. Gokhale took this to be the meaning of *belagan* after considering a decision of the Calcutta High Court, *Keshwar Bhagat v. Sheo Prasad Lal* (1). I do not wish in this case to decide what "belagan" means generally in this province.

(1) 18 C L J 166; 21 Ind. Cas. 415; 18 C W N 913.

All that I can say in this Letters Patent appeal is that the Court cannot take a different view from the Courts below having regard to the materials on the record.

In any event the lower Appellate Court accepted the evidence adduced on behalf of the plaintiff as to the origin and terms of the tenancy. An old servant of the Raja was called who stated the precise terms upon which these lands were let. Even if the Record of Rights had stated that these lands were rent-free, it would still be open to a Court of fact to accept the evidence as rebutting the entry in the Record of Rights. The learned Subordinate Judge unhesitatingly accepted the evidence as to the nature of the tenancy, and that being so, it is immaterial what the entry in the Record of Rights really means. If it meant a rent-free holding, the entry was rebutted by the evidence which the Court accepted. In my view it is impossible to assail this judgment on the ground that the record of rights establishes that the settlement was of a rent-free holding.

It was then argued that this suit as framed was not maintainable. It was suggested that it was a suit to settle a fair and equitable rent for a holding; but as pointed out by the Courts below the suit was really one for arrears of rent and an inquiry had to be conducted to ascertain what that rent was. It appears to me that such is the real nature of the suit and it is maintainable in its present form.

It was then argued that if the original settlement was not a rent-free settlement the defendants had asserted their title to hold the land rent-free for more than twelve years before this suit was brought. Whether they asserted such a right depends upon the meaning to be given to the word "*belagan*"; but in any event the lower Appellate Court has held that neither the plaintiff nor his predecessor-in-title had any knowledge of any such assertion of title. Even assuming the tenant can acquire an adverse title against his landlord by such an assertion he could only do so if his assertion was brought to the notice of his landlord. This assertion, if, indeed, it was an assertion of hostile title, was never brought to the notice of the landlord, and that being so, the defendants have not acquired a title by adverse possession.

It was also suggested that the tenancy which was created was one for a year or more, and as the formalities required by the T. P. Act had not been complied with and the document had not been registered the lease was void. Having entered under a

void lease, it was urged that time began to run at once against the landlord and that a title was acquired after possession for the statutory period. The lower Appellate Court, however, came to the conclusion that this was really a monthly tenancy and relied upon s. 106, T. P. Act. It is impossible to say that the lower Appellate Court and the learned single Judge were wrong in coming to the conclusion that this tenancy was nothing more than a monthly tenancy. It was urged that as the rate of rent had been found to be Rs. 6 per *katha* per year the Courts had actually found that it was an annual tenancy. A tenancy may well be a monthly tenancy though the rent may be mentioned as so much per year. There is ample authority for this proposition without referring to the cases in detail.

It was also suggested that if there was a tenancy and a promise to pay rent at the prevailing rate that meant the rate actually prevailing at the date of the tenancy. The witness who gave evidence as to the tenancy was cross-examined about the precise terms of the agreement, and he made it clear that the agreement was not to pay the rent then prevailing but to pay a fluctuating rent. The Courts have held that such was the agreement, and that is a finding of fact which cannot be disturbed in second appeal or in this Letters Patent appeal.

It was further urged that the tenancy, if there was one, was a tenancy at will and that as the original tenant had died his successor began to acquire title by adverse possession from the moment the original tenant had died. The Courts, however, have held that this was a monthly tenancy, and that as long as the tenancy existed no question of limitation can arise.

It appears to me that we are precluded in this case from interfering with the decision of the Court below by reason of the findings of fact. They practically conclude the matter, and that being so, Letters Patent Appeal No. 11 of 1940 fails and must be dismissed with costs.

No one has appeared in Letters Patent Appeals Nos. 20 and 21 of 1940, but as the points are the same these appeals also fail and must be dismissed with costs, but there will be no hearing fee for these two appeals.

Fazi Ali, J.—I agree.

D.

Appeals dismissed.

BOMBAY HIGH COURT

Criminal Appeal No. 242 of 1940

October 1, 1940

BROOMFIELD AND WASSOODREW, JJ.

EMPEROR—PROSECUTOR

versus

KUNVERJI KAVASJI KAVARANA

—ACCUSED

Bombay Abkari Act (V of 1878), s. 45 (c)—License prohibiting accused from selling liquor outside his shop—Accused taking out liquor from cask in shop, bottling it and delivering to servants in shop for transmission to customers at their houses—Sale held, completed within licensed area—Accused held could not be convicted under s. 45 (c)—Sale of Goods Act (III of 1930), ss. 21, 23—"Specific goods", meaning of—Contract to sell some liquor out of big cask containing large quantity, required quantity not being separated or bottled is not contract of sale of specific goods within meaning of s. 21—If falls under s. 23.

The accused who was a licensed vendor of country liquor was prohibited by a clause in his license from selling liquor outside the shop mentioned in the license. He took out quantity of liquor out of a big cask, bottled it and delivered it to his servants in the shop premises and the servants delivered the bottles to the customers in their houses and recovered the price there :

Held, that the servant of the accused in the circumstances could very well be treated as a bailee for the purpose of transmission to the buyer, within the meaning of s. 23 (2), Sale of Goods Act, and delivery to such servant, which admittedly took place in the licensed place, would be effective delivery to the buyer himself. As the sale therefore was completed within the licensed area the fact that the price was paid at the houses of the customers was immaterial for the completion of sale does not depend upon payment of the price of the goods sold. The accused could not therefore be convicted under s. 45 (c), Bom. Abkari Act.

A contract to sell some liquor out of a big cask containing much large quantity, the required quantity not being separated or bottled, would not be a contract of sale of specific goods within the meaning of s. 21, Sale of Goods Act. The expression 'specific goods' necessarily means goods capable of being ascertained with certainty—*certum est quod certum reddi potest*. A sale of some specified quantity of liquor out of a storehouse or cask would not be capable of ascertainment until it was removed or separated. The words 'specific goods' would according to their natural interpretation mean goods whose delivery can be demanded in specie. A contract of sale of a small quantity of liquor stored in bulk could more properly be regarded as a contract for sale of unascertained goods. The ownership will not pass till the quantity ordered by the purchaser is ascertained and appropriated. The bottling of the liquor would be an act of ascertainment and appropriation.

Cr. A. against an order of acquittal passed by the Sessions Judge, Surat.

Mr. R. A. Jahagirdar, Government Pleader, for the Government of Bombay.

Messrs. H. R. Pardiwala and Pochaji Jamshedji, for the Accused.

Wassoodew, J.—This is an appeal by the Govt. of Bombay against the order of acquittal passed by the Sessions Judge of Surat in an appeal by the accused. The

latter, who is a licensed vendor of country liquor, was convicted and sentenced to pay a fine of Rs. 200 under s. 45 (c), Bom. Abkari Act, (Bom. V of 1878) by the First Class City Magistrate of Surat for contravening a term of his license. It was alleged by the prosecution that the accused sold a quantity of country liquor outside the building or shop mentioned in the license to three different persons, according to the orders placed by each of them, between April 1, and June 11, 1938, in contravention of cl. (2) of the license. That clause provides as follows:

"Under this license the licence-holder will be entitled to keep or sell country liquor in the building or premises mentioned hereunder.....that is to say, in the building or premises known as.....and situate on..... Road and numbered as.....And he will not be entitled to keep or sell the same at any place except the aforesaid place. This building or premises is henceforth regarded as the place of license."

The prosecution led evidence of the servants of the accused to show that they were asked to tout for customers and canvass orders, and that they went round the place, obtained orders and carried them to the shop, delivered the liquor to the customers at their respective places of residence and recovered there the price of the liquor sold. One of the servants examined by name Soma (Ex. 3) stated as follows :

"I would go and inform the accused about the orders given to me and then the accused would himself give the liquor, and if he was not present, his servant would fill up the bottles. Then I would give the liquor to the customers' houses and would recover the money and give it over to the accused."

The prosecution maintained that that evidence if believed would inevitably lead to the inference that the sale took place outside the licensed place and therefore in violation of cl. (2) of the license. The learned Magistrate accepted the evidence of the accused's servants as true and convicted the accused. The learned Sessions Judge in appeal took a contrary view of the facts and acquitted the accused holding that the statement of the servants that the price of liquor was not paid at the shop could not be acted upon without independent and reliable corroboration, as the servants were no better than accomplices, and the memoranda of the supposed orders received by the accused could not be regarded as sufficient corroboration. It is unnecessary in the view we take of the legal position, which was not properly appreciated in the Courts below, to examine that evidence of the prosecution. The question is whether upon the allegation in the complaint the sale could be said to have been completed outside the place of licence. The learned Govt. Pleader has argued that the sale, was

completed upon delivery of liquor at the buyers' houses and not before, and upon notice given to them that the liquor was bottled from the casks and put into a deliverable state. He says that this case would be governed by the provisions of s. 21, Sale of Goods Act (III of 1930). That section provides that :

"Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state the property does not pass until such thing is done and the buyer has notice thereof."

The argument of the learned Govt. Pleader assumes that a contract of sale of a quantity of liquor out of a large cask or cistern is a contract of sale of specific goods. I find the greatest difficulty in holding that a contract to sell some liquor out of a big cask containing much larger quantity, the required quantity not being separated or bottled, would be a contract of sale of specific goods within the meaning of s. 21. The expression 'specific goods' necessarily means goods capable of being ascertained with certainty—*certum est quod certum reddi potest*. A sale of sum specified quantity of liquor out of store house or cask would not be capable of ascertainment until it was removed or separated. The words 'specific goods' would according to their natural interpretation mean goods whose delivery can be demanded in specie. Consequently, in my opinion, s. 21 would be inapplicable. The appropriate section applicable to the facts alleged in this case would be s. 23, Sale of Goods Act. Sub-s. (1) of that section provides as follows :

"Where there is a contract for the sale of unascertained.....goods by description and goods of that description and in a deliverable state or unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made."

In my opinion a contract of sale of a small quantity of liquor stored in bulk could more properly be regarded as a contract for sale of unascertained goods. The ownership will not pass till the quantity ordered by the purchaser is ascertained and appropriated. The bottling of the liquor, would be an act of ascertainment and appropriation. That is what the evidence suggests. It is argued that it could not be said that the goods are ascertained until the appropriation by one party is assented to by the other that there is no evidence that the purchaser had assented to the appropriation, and that such assent could not be implied till the liquor was delivered to the purchaser into his house

or place named. The section itself provides that the assent may be express or implied, and may be given either before or after the appropriation is made. The question whether the assent was implied must necessarily depend upon the circumstances of each case. In this particular case it appears that the customer had assented that the goods should be delivered to the shop's servants for delivery to him, That is what Soma has suggested. If the prosecution intended to prove that the contract was different it was open to them, and in fact necessary to call the best evidence on the point, namely that of the customer, who could say what the terms of the contract were. That has not been done in this case. In view of the provisions of sub-s. (2) of s. 23 of the Act it is immaterial whether the delivery of the goods took place at the house of the purchaser. Sub-section (2) of s. 23 provides that :

"Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

The servant of the seller in the circumstances could very well be treated as a bailee for the purpose of transmission to the buyer; and delivery to such servant, which admittedly took place in the licensed place, would be effective delivery to the buyer himself. Nor would it be material for the purpose of the charge to ascertain whether the price of the liquor was paid in the shop, for, the completion of sale does not depend upon payment of the price of the goods sold. It seems, according to the statement of Soma, that upon delivery of the liquor to the customers at their houses money was paid to him and he delivered the same to the accused in his shop and that in some cases money was recovered later on. It has been pointed out to us that under cl. (10) of the license, sale on credit of country liquor is prohibited. That is so provided in that clause. But assuming that there has been a transgression of that term of the license, the accused has not been charged with breach of it. All that he is charged with is that he has offended against cl. (2) of the license which relates to the sale outside the premises. In the view we take the sales in question were completed within the premises and therefore, the accused could not be convicted of the offence with which he is charged. We therefore dismiss the appeal.

Broomfield, J.—I agree.

s.

Appeal dismissed.

LAHORE HIGH COURT

Appeal No. 1622 of 1939

October 24, 1940

BHIDE, J.

SHIMBHU NATH AND OTHERS—DEFENDANTS
—APPELLANTS

versus

Mst. BRAHAMWATI—PLAINTIFF

AND OTHERS—DEFENDANTS—RESPONDENTS

Hindu Law — Partition — Specification of shares without actual division by metes and bounds, if severs joint status—Descendants mentioned in partition deed as "one party"—Whether shows that they continued to be joint—Civil Procedure Code (Act V of 1908), O. II, r. 4—Suit on mortgage against brothers—One of brothers admitting mortgage and dying—Plaintiffs' application to bring widow as legal representative—Other defendants alleging that they formed joint Hindu family and have succeeded by survivorship—Plaintiff not pressing application—Suit decreed—Widow, if can file suit that she not being represented, was not bound by the decree and that she was still the owner of the house.

Specification of shares even without actual partition by metes and bounds is sufficient to establish severance of joint family. *Balkishen v. Ram Narain* (1), relied on.

The mere fact that the descendants of a person were described in the partition deed as 'one party' cannot be held to be sufficient to establish that the descendants must have continued to form a joint family.

Plaintiff instituted a suit upon a mortgage executed in his favour by three brothers, admitted the mortgage in his written statement but subsequently died during the pendency of the suit. The plaintiff applied at first for his widow being brought on the record as his legal representative but subsequently did not press the point as the two brothers stated that they were members of a joint Hindu family and had therefore succeeded to the interest of their deceased brother in the house by survivorship. The suit was eventually decreed. Thereafter, the widow instituted a suit for a declaration that she was the owner of the house in dispute and it was not liable to be sold in execution of the decree obtained by the plaintiff on the basis of the mortgage. The suit was based on the allegation that a partition had been effected between the members of the joint family prior to the execution of the mortgage and that she was therefore the legal representative of her deceased husband and that inasmuch as the plaintiff had failed to implead her as the legal representative in the previous suit, the decree obtained in that suit was not binding on her.

Held, that the deceased brother had already admitted the mortgage and his widow as his legal representative would have been bound by the admission. Her defence, if any, would have been the same as that of the co-mortgagors, who were impleaded and fought out the case. In the circumstances, the estate was effectively represented in the previous suit and the decision in the previous suit was binding on the widow. 100 Ind. Cas. 185 (5), not approved. 141 Ind. Cas. 580 (2) and 129 Ind. Cas. 469 (3), relied on. 139 Ind. Cas. 465 (6) and 75 Ind. Cas. 114 (7), distinguished.

A. from a decree of the District Judge, Delhi, dated July 17, 1939.

Messrs. M. C. Mahajan and Jindra Lal, for the Appellants.

Messrs. J. N. Aggarwal and J. L. Kapur, for the Respondent (Plaintiff).

Judgment.—The pedigree-table showing the relationship of the parties concerned in this case has been given in the judgment of the trial Court. One Bhondu Mal instituted a suit against Umrao Singh, Kanshi Nath and Banshi Nath on the basis of the mortgage of a house effected by them on November 16, 1927. Banshi Nath admitted the mortgage in his written statement but subsequently died during the pendency of the suit. The plaintiff applied at first for Mst. Braham Wati, his widow, being brought on the record as his legal representative but subsequently did not press the point as Umrao Singh and Kanshi Nath stated that they were members of a joint Hindu family and had, therefore, succeeded to the interest of Banshi Nath in the house by survivorship. The suit was eventually decreed. Thereafter, Mst. Braham Wati instituted the suit which has given rise to this appeal for a declaration that she was the owner of the house in dispute and it was not liable to be sold in execution of the decree obtained by Bhondu Mal on the basis of the mortgage. The suit was based on the allegation that a partition had been effected between the members of the joint family in 1921, that Mst. Braham Wati was, therefore, the legal representative of Banshi Nath and that inasmuch as Bhondu Mal had failed to implead Mst. Braham Wati as the legal representative of Banshi Nath in the previous suit, the decree obtained in that suit was not binding on her. The learned Judge of the trial Court came to the conclusion that, although a partition had been effected in the year 1921, Banshi Nath, Umrao Singh and Kanshi Nath continued to form a joint Hindu family and, therefore, Umrao Singh and Kanshi Nath had succeeded to the interest of Banshi Nath in the joint family property by survivorship. He, therefore, held that it was not necessary to implead Mst. Braham Wati in the previous suit as legal representative of her husband. The plaintiff's suit was accordingly dismissed. On appeal, the learned District Judge held that the partition deed of 1921 established that all the members of the joint family had separated although part of the joint property had not been partitioned by metes and bounds. He held, therefore, that Mst. Braham Wati was the proper legal representative of her husband Banshi Nath and that the failure on the part of Bhondu Mal to implead Mst. Braham Wati in the previous suit rendered the decree in that suit inoperative against her. The appeal was accordingly accepted and the plaintiff was granted the declaration and injunction.

prayed for. From this decision the present appeal has been preferred by the defendants.

The first point raised by the learned Counsel for the appellants was that the learned District Judge had not correctly interpreted the partition deed of 1921 and that it was not established that all the members of the joint family had separated. He drew attention specially to the fact that the partition deed refers to two 'parties'—one party being the descendants of Mehtab Rai and the other descendants of Bhagwan Das: *vide* pedigree-table given in the judgment of the trial Court referred to above. This point, however, does not appear to help the appellants because it was admitted that all the descendants of Mehtab Rai did not continue to form a joint family. It appears that Phul Chand and his sons separated at the time of the partition. Consequently, the mere fact that the descendants of Mehtab Rai were described in the partition deed as 'one party' cannot be held to be sufficient to establish that Umrao Singh, Kanshi Nath and Banshi Nath must have continued to form a joint family. It is true that their shares were not actually partitioned by metes and bounds but it is well established that specification of shares even without actual partition is sufficient to establish severance of joint family. The partition deed mentions separate shares of Umrao Singh, Kanshi Nath, Banshi Nath and other members of the joint family and in view of the principles laid down by their Lordships of the Privy Council in *Balkishen v. Ram Narain* (1). I am not prepared to dissent from the conclusion arrived at by the learned District Judge that all the members of the joint family must be deemed to have separated in status in the year 1921.

The next point taken up by the learned Counsel for the appellants was that even if a partition had taken place, the plaintiff had acted in good faith in not impleading *Mst. Braham Wati* as legal representative of her husband Banshi Nath as Umrao Singh and Kanshi Nath definitely represented in Court that they still continued to form a joint family and, therefore, *Mst. Braham Wati* had no interest in the property in suit. In support of this contention, the learned Counsel relied on *Karam Kaur v. Matwal Chand* (2), *Chaturbhuja Doss Kushaldoss & Sons v. Raja Manicka Mudali* (3) and *Jharu v. Pardhana*

(4). The learned Counsel for the respondent, on the other hand, disputed the correctness of the proposition laid down in *Karam Kaur v. Matwal Chand* (2) and relied on *Pukhraj Jeshraj v. Jamsetji Rustom* (5), *Manikya Nayanam v. Lakshminarasimha* (6), *Lasee Rai v. Udit Rai* (7) and *Md. Junaid v. Mst. Aulia Bibi* (8), in support of his contention that it was necessary for Bhondu Mal to implead *Mst. Braham Wati* in the previous suit as a legal representative of Banshi Nath and that even if he had acted in good faith and there was no fraud or collusion, the previous decree cannot bind *Mst. Braham Wati*. Out of the authorities relied on by the learned Counsel for the respondents, *Pukhraj Jeshraj v. Jamsetji Rustom* (5), clearly seems to be in his favour. *Manikya Nayanam v. Lakshminarasimha* (6), seems to be distinguishable as the previous case therein in which the true legal representative was not joined had not been fought out on merits, but had been compromised. In *Lasee Rai v. Udit Rai* (7) and *Md. Junaid v. Mst. Aulia Bibi* (8), the special circumstances of a case wherein a wrong person has been impleaded as a legal representative in good faith, without any fraud or collusion and the estate has been represented effectively, do not appear to have been considered. This special case has been discussed at length in *Chaturbhuja Doss Kushaldoss & Sons v. Raja Manicka Mudali* (3) and the effect of the amendment of the provisions of the Civil P. C. in 1908, replacing the corresponding previous provision of s. 368 by O. XXII, r. 4, on which stress was laid in *Pukhraj Jeshraj v. Jamsetji Rustom* (5), has also been taken into consideration therein. The rule laid down in *Karam Kaur v. Matwal Chand* (2), is to the same effect.

In the present case there is no reason to doubt that Bhondu Mal acted in good faith in the previous suit in not insisting on impleading *Mst. Braham Wati* as the legal representative of Banshi Nath. He had, as a matter of fact, first applied for her being so impleaded in addition to the male members of the joint family, by way of precaution. But she failed to appear and as the male members of the family definitely asserted that the family was joint and that *Mst. Braham Wati* was not a necessary party he did not pursue the matter. Banshi Nath had already admitted

(1) 30 C 738; 5 Bom. L R 461; 30 I A 139; 7 C W N 578; 8 Sar. 489 (P O).

(2) 14 L 696; 141 Ind. Cas. 580; A I R 1933 Lah. 380; 34 P L R 511; Ind. Rul. (1933) Lah. 148.

(3) 54 M 212; 129 Ind. Cas. 469; A I R 1930 Mad. 930; 60 M L J 97; 32 L W 862; (1930) M W N 994; Ind. Rul. (1931) Mad. 277.

(4) A I R 1939 Lah. 277; 183 Ind. Cas. 487; 41 P L R 147; 12 R L 123.

(5) 50 B 802; 100 Ind. Cas. 185; A I R 1927 Bom. 63; 28 Bom. L R 1382.

(6) A I R 1933 Mad. 43; 139 Ind. Cas. 465; 63 M L J 319; Ind. Rul. (1932) Mad. 716; 37 L W 199.

(7) A I R 1924 All. 717; 75 Ind. Cas. 114.

(8) 42 A 497; 61 Ind. Cas. 947; A I R 1920 All. 323; 18 A L J 613.

the mortgage and *Mst. Braham Wati* as his legal representative would have been bound by the admission. Her defence, if any, would have been the same as that of the co-mortgagors, who were impleaded and fought out the case. In the circumstances, it seems to me that the estate was effectively represented in the previous suit and the case falls within the rule laid down in *Chaturbhujia Doss Kushaldoss & Sons v. Raja Manicka Mudali (3)* and *Karam Kaur v. Matwal Chand (2)*. Following these authorities I hold that the decision in the previous suit was binding on the present plaintiff. I accept the appeal and dismiss the suit with costs throughout.

D.

Appeal accepted.

RANGOON HIGH COURT

Letters Patent Appeal No. 13 of 1939

May 2, 1940

ROBERTS, C. J. AND BLAGDEN, J.

SEIN DASS—APPELLANT

versus

LAKHAJEE AND ANOTHER—

RESPONDENTS

Appeal—Parties—Held on facts that appeal was incompetent in the absence of a party which was a necessary party—Letters Patent—Case certified to be fit for appeal to Letters Patent, includes order for costs made or refused in that case—Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Leave to appeal to Letters Patent granted—Appellate Court, if can pass whatever decree which should have been passed by trial Court.

A person as an agent of another executed a promissory note in favour of C. C instituted a suit on the note claiming relief alternatively against the agent and the principal. The suit was decreed against the principal and dismissed against the agent. No appeal was filed against the dismissal and consequently it became barred. The principal, however, appealed against the decree against him and contended that the agent and not he, was liable on the promissory note. The agent, however, was not impleaded as necessary party to the appeal:

Held, (1) that when the right of appeal against the dismissal of the suit against the agent was barred, the agent was no longer an interested party. He was entitled to hold the decree in his favour: it was a substantive right of a very valuable kind of which he could not be lightly deprived;

(2) that the appeal by the principal was incompetent unless the agent was added by him as necessary party;

(3) that it was not necessary for C to have appealed against the agent's dismissal from the suit. It was incumbent on the principal, if he desired to appeal against the judgment in favour of the agent, to do so. 159 Ind. Cas. 931 (5), referred to.

(4) that the order of the Court would be that the decree of the trial Court against the principal would be restored.

To assume that when leave is granted the appeal and the terms of the certificate are to be regarded as a reference only, is an error and the Appellate Court has the right and duty to pass whatever decree should have

been passed by the Subordinate Court in all the circumstances of the case that is in all the circumstances which gave rise to the litigation originally and to all the disputes between all the relevant parties in the matter. [p. 307, col. 2.]

When a "case" is certified to be fit for appeal to the Letters Patent the word 'case' includes an order for costs made or refused in that case, which is obviously ancillary to the substantive order made in the case. [p. 309, col. 1.]

L. P. A. from the decree of the High Court, reported in 188 Ind. Cas. 120.

Mr. F. S. Doctor, for the Appellant.

Messrs. K. C. Sanyal and E. Hay, for Respondents Nos. 2 and 1, respectively.

Roberts, C. J.—This is a letters patent appeal arising out of a suit on a promissory note for Rs. 1,120 with interest at 2 per cent. per month, brought by the plaintiff-appellant against the two respondents as defendants. His plaint averred that the defendant, Lakhajee, executed a promissory note on October 1, 1932 as 'agent and for Ranglal' who was the proprietor of the Irrawaddy Rice Mill whilst Lakhajee was his manager. Alternatively, he claimed relief against Lakhajee. This relief would, of course, be in the nature of damages for breach of warranty of authority to act as Ranglal's agent if it were proved that Lakhajee was not acting as such; and the sum due as damages would be the amount due under the note. In the Sub-Divisional Court of Mogaung it was held that Ranglal was liable and though Lakhajee was not expressly dismissed from the suit he was dismissed by implication. The plaintiff therefore obtained a decree against Ranglal alone. The date of the judgment was April 30, 1938. Ranglal appealed to the District Court on June 2, and Sein Dass was served with notice of the appeal on June 25. The period of limitation running in Lakhajee's favour expired on June 29.

In his grounds of appeal to the District Court Ranglal set out the contention that the lower Court had "erroneously come to the conclusion that the appellant is responsible for a debt contracted by one Lakhajee" and had "erroneously decided that the appellant ratified the acts of Lakhajee." It is clear therefore that his sole ground of appeal was that not he but Lakhajee was liable to the plaintiff. He did not join Lakhajee as a respondent as he ought to have done if he had desired to prove Lakhajee responsible for the debt. In *Pearson & Son Ltd. v. Lord Mayor, etc. of Dublin (1)* at p. 357 Lord Halsbury remarked that if a case cited

(1) (1907) A C 351, (357); 77 L J P C 1.

to him as authority were supposed to decide that the principal and agent could be so divided in responsibility that like the school-boys' game of "I did not take it: I have not got it," the united principal and agent might commit fraud with impunity, it would be quite new to our jurisprudence. It must frequently happen that a person who has contracted with some one upon the footing that the latter is an agent is in doubt whether to proceed against the principal or against the self-styled agent, and that it is reasonable to make each of them defendants in the alternative. When he obtains judgment against one and the other is dismissed from the suit, the unsuccessful defendant cannot, by omitting to join the successful defendant as a respondent in the appeal and then showing that the latter was really liable, deprive the plaintiff of his right to establish his claim. Ranglal did not appeal against the dismissal of Lakhajee from the suit.

When the right of appeal against the dismissal of Lakhajee from the suit was time barred, Lakhajee was no longer an interested party. I respectfully agree with the finding of the learned Judge in second appeal on this point and I need hardly add to his exhaustive researches into the authorities. It is enough to say that Lakhajee was entitled to hold the decree in his favour; it was, in the words employed by Sir John Wallis in *Chockalingam Chetty v. Seethai Ache* (2) "a substantive right of a very valuable kind of which he should not lightly be deprived." What then was the position of Ranglal? Assume, he succeeded by showing that Lakhajee was really liable (and he did not attempt to succeed by any other means) there would be in existence two inconsistent decrees, one of the District Court and another of the Sub-Divisional Court, with respect to the subject-matter of the suit. Applying the principle in *Ma Thaw May v. Mohammad Eusoof* (3), Ranglal's appeal ought not to have been allowed to proceed in the absence of Lakhajee as a necessary party.

In the events that have happened, the lower Appellate Court set aside the decree against Ranglal and passed a decree against Lakhajee alone. The learned Judge in second appeal has, in my respectful opinion, rightly concluded that no decree should have

been passed against Lakhajee as he was improperly joined as a respondent; but he has also agreed with the lower Appellate Court that Ranglal was not liable on the promissory note and has dismissed the cross-objection of Sein Dass against Ranglal's appeal in respect of the costs in the District Court. The result of all this is that each of the respondents has escaped liability on the promissory note on which admittedly one of them was liable, and each of them is awarded costs against the person who plainly ought to be paid. The learned Judge incorporated into one judgment his decision on Lakhajee's appeal, Special Civil Second Appeal, No. 18 of 1939* and Ranglal's appeal against the order depriving him of his costs, Civil Second Appeal No. 19 of 1939 and the cross-objection filed in the later. He then certified that the case was a fit one for a further appeal under cl. 13 of the Letters Patent, because it raised the question whether Lakhajee could have been properly joined by the District Court as a respondent. It is now contended that our jurisdiction is limited to a consideration of this point alone but in view of the wide provisions of O. XLI, r. 33, I am of opinion, that we are not so fettered, but may make such further or other decree or order as the case may require.

We have had cited to us the case in *Devi Charan Lal v. Mehdi Hussain* (4). In that case the learned Chief Justice of the Patna High Court (Chamier, C. J.) pointed out that though ordinarily a point is not to be taken in a letters patent appeal which had not been taken before the single Judge, there may be a case in which a point must be allowed to be taken in order to remedy what appears to be a serious failure of justice. It is perfectly clear that no learned Judge would ever grant a certificate of appeal against his judgment in such circumstances that the Court could only answer one specific question; to do that the Judge proceeds by referring a particular question; to assume that when leave is granted the appeal and the terms of the certificate are to be regarded as a reference only is, in my opinion, an error and the Appellate Court has the right and duty to pass whatever decree should have been passed by the Subordinate Court in all the circumstances of the case and that means, in all the circumstances which gave

(2) 6 R 29; 107 Ind. Cas. 237; A I R 1927 P C 252; 55 I A 7; 4 O W N 1231; 27 L W 1; 54 M L J 88; (1928) M W N 20; 47 C L J 136; 32 C W N 281; 1 L T 40 Rang. 18; 30 Bom. L R 220; 26 A L J 371 (P C).

(3) 9 R 624; 135 Ind. Cas. 645; A I R 1932 Rang. 16; Ind. Rul. (1932) Rang. 53.

(4) 20 C W N 1303; 35 Ind. Cas. 888; A I R 1916 Pat. 317; 1 P L J 485; 1 P L W 209.

* Since reported in 188 Ind. Cas. 120 *Lakhajee v. Sein Dass*—[Ed.]

rise to the litigation originally and to all the disputes between all the relevant parties in the matter. The nature of the decree which should have been passed in the plaintiff-appellant's suit against the two respondent-defendants is one which it is proper to determine in the circumstances and the conclusion at which we have arrived is that the appeal of Ranglal was incompetent unless Lakhajee was added by him as a necessary party. The whole of this question was reviewed by the learned Judge in second appeal and it cannot be said now that this Court is powerless to see that the appellant recovers the money which is due to him and in respect of which he brought a suit against each of the defendants in the alternative.

The failure on the part of Ranglal to join Lakhajee as a respondent has resulted in the latter's exonerated from liability to the plaintiff's claim and the alleged principal cannot offer a shield to one who has styled himself as his agent and then escape liability himself by proving that such self-styled agent was never his agent at all and was really all the time liable personally in damages for breach of warranty of authority, or, alternatively, upon the note. It has been contended that Sein Dass ought to have appealed against Lakhajee's dismissal from the suit. But Sein Dass had only asked for a decree against one or other of the defendants and having secured it against one had no need and indeed no right to pursue his claim against the other. It was incumbent on that other, if he desired to appeal against the judgment in Lakhajee's favour to do so : *U Po Sein v. E. M. Bodi* (5). The order of the Court will be that the decree of the Sub-Divisional Court against Ranglal will be restored with costs here, Advocates fee in this Court thirty gold mohurs and in all the Courts below to be paid to the appellant. We have been obliged to increase the Advocate's fee since his time as well as ours has been occupied in Court for many more hours than the comparatively simple character of the appeal demanded. The cross-objection of the appellant is allowed with costs in the Court below. The decree of the learned Judge in second appeal with regard to Lakhajee is affirmed; Sein Dass to pay his costs here and in all the Courts below, Advocate's fee in this Court fifteen gold mohurs and Sein Dass to recover from Ranglal the amount of the costs which the former shall be obliged to pay to Lakhajee.

Blagden, J.—I agree and desire only to add this. Mr. Sanyal contended, amongst (5) 13 R 189; 159 Ind. Cas. 931; 8 R Rang. 289.

other things, that even if his client was—as he denied—bound at his peril to make Lakhajee a party to his appeal to the District Court, if he wished there to contend that Lakhajee and not he was liable, the plaintiff was really to blame for Lakhajee's absence. Mr. Sanyal submitted that the plaintiff could have either (a) appealed against the order of the Sub-Divisional Court in effect dismissing Lakhajee from the suit, or (b) lodged his application to the District Court for Lakhajee to be added before that order had become unappealable, or (c) presented, if necessary, a petition under s. 5, Lim. Act. I do not agree that the first course was even open to him for the reasons given by my Lord. As to the second course (which in fact he, not unreasonably, did take within a not unreasonable time, though it was actually then too late) and the third course, it may well be that in fact here he could have taken one or other of them. But why should he have to act with feverish haste in order to preserve to himself the benefit of his original prudence in suing both defendants? Why should the time limited to him for taking the suggested steps be fixed not by any statute or rules of Court but by the whim of the unsuccessful defendant? It is quite possible, if Mr. Sanyal is right, to imagine a case in which a combination of delay by the unsuccessful defendant, error by the trial Court and (say) illness of the successful plaintiff might put the Courts in the position of having to make two inconsistent decrees and deprive the plaintiff wholly of his rights.

It being admitted that A or B is liable to C; the lower Court having decreed that A is liable and B is not, and the latter part of the decree having become unappealable, the net result, if the Appellate Court thought that B was liable, would be that C would have to pay costs to both of two persons one of whom was admittedly in this debt. This cannot be right. One and a sufficient answer to the cases cited to us on election by taking judgment against one of the persons liable in the alternative is, in my opinion, that in every one of those cases the judgment was effectual and subsisting. They do not decide that a judgment can at the option of an unsuccessful defendant be set aside on appeal in so far as it adversely affects the unsuccessful defendant and preserved in so far as it benefits a person who is admittedly liable, if he is not, and it would be absurd if such were the law. I have no doubt it is not, and therefore Lakhajee was in law a necessary party to Ranglal's appeal to the District Court, which should, in Lakhajee's

absence; have been dismissed. With regard to the point that no appeal has been lodged against the decree in Civil Second Appeal No. 19 of 1939 but only against the decree in Special Civil Second Appeal No. 18 of 1939, I do not think this has any substance. This appeal is an appeal in a 'case' certified to be fit for appeal, and the word 'case' is a very wide word. A case, in my opinion, includes an order for costs made or refused in that case which is obviously ancillary to the substantive order made in the case. Neither the precise form of the certificate nor any failure by the appellant to file a document which he should have filed under O. XLI, r. 1 (and I do not decide that there was any such failure) could, I think, deprive this Court of its statutory power under O. XLI, r. 33 to pass or make such further or other decree as the case may require and I have no doubt that the present case before us does require the order which we are making.

D. Order accordingly.

SIND JUDICIAL COMMISSIONER'S COURT

Reference No. 94 of 1937

November 20, 1939

DAVIS, J. C. AND WESTON, J.

COMMISSIONER OF INCOME-TAX—

PETITIONER

versus

CHHOTALAL MOHANLAL AND OTHERS—

RESPONDENTS

Income Tax Act (XI of 1922), ss. 3, 9—Association of individuals resembling Hindu undivided family falls under s. 3—Whether assessee forms association within meaning of s. 3 depends upon facts—Assessee held formed association within meaning of s. 3 and were owners of property under s. 9 and consequently could be assessed under s. 9 (1).

The words "association of individuals" appearing in s. 3, Income Tax Act, if construed on the *ejusdem generis* principle are to be construed with reference not merely to the word 'firm' immediately preceding them, but with reference to the other associations of individuals, namely, a Hindu undivided family and company which appear in the section. An association of individuals resembling a Hindu undivided family is an association of individuals contemplated by s. 3. The question whether the assessee formed an association of individuals within the meaning of s. 3 is a question which must depend upon the particular facts and circumstances of each case.

Held, on facts that the seven assessee formed an association within the meaning of s. 3 and that the association of individuals, formed by the seven assessee were the owners of the property within the meaning of s. 9 and that there could be no doubt that as owners they could be assessed under s. 9, part 1. 173 Ind. Cas. 482 (1), 177 Ind. Cas. 447 (2) and *In re B. N. Elias* (3), relied on. *Obiter* in 172 Ind. Cas. 807 (4) and 169 Ind. Cas. 969 (5), not approved.

Ref. by the Commissioner of the Income-tax, Bombay Presidency, Sind and Baluchistan.

Mr. Partabai D. Punwani, The Advocate-General, for the Commissioner of Income-tax.

Mr. Suganlal, for the Respondents.

Weston, J.—Three questions have been referred to us under s. 66 (2), Income Tax Act, by the learned Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan and these are as follows: (1) Whether in the circumstances of the case, the assessee constituted an association of individuals within the meaning of s. 3, Income Tax Act? (2) Whether the said association can be said to be the owner of the properties within the meaning of s. 9, Income Tax Act, and was rightly assessed as such? (3) Whether the assessee were in any event rightly assessed as owners of the said property under s. 9 (1)? The facts which it is necessary to state briefly are that the seven assessee are a father, four sons, two of whom are minors, and the wives of two of the sons. In the year 1928 the father separated from his sons by a partition deed, which partition was modified later by another deed executed in the year 1930. In the year 1933 the property which, was still jointly held by the members of this Hindu family, was sold and a plot of land was purchased in the names of the seven assessee. A building was constructed thereon and this building was managed jointly for the purpose of earning an income which, the assessee allege, they divided among themselves, but for the division of which the Income-tax Officer found no evidence in the accounts produced. The seven assessee made a return of income declaring their income as Rs. 6,058 from the property mentioned. The Income-tax Officer accepted this figure of income but assessed the assessee thereon as an association of individual under s. 3, Income Tax Act. The assessee appealed to the Assistant Commissioner who upheld the order of the Income-tax Officer and the assessee then petitioned to the Commissioner of income-tax to refer the case to this Court under s. 66 (2) and this is the reference which has been made.

We think there can be no doubt on the facts of the case that the Income-tax Officer and the Assistant Commissioner of income-tax were justified in holding that the assessee constituted an association of individuals within the meaning of s. 3, Income Tax Act. We are in agreement with the view taken by the Bombay High Court in *Commissioner of In-*

come-tax, *Bombay v. Laxmidas Devidas* (1), and also in *Commissioner of Income-tax v. Bombay v. Dwarkanath Harischandra* (2), where it has been held that the words "association of individuals" appearing in s. 3, if construed on the *ejusdem generis* principle are to be construed with reference not merely to the word 'firm' immediately preceding them, but with reference to the other associations of individuals, namely a Hindu undivided family and company which appear in the section. The same view has been taken by the Calcutta High Court in *In re B. N. Elias* (3), and although Panckridge, J. in *In the matter of Keshar Deo Chamaria* (4), has made a reference to the point expressing a contrary opinion, he has not referred to the earlier reported decision of the Calcutta High Court and it appears that the point was not material to the case which was then before him. The view expressed by Panckridge, J. has also been expressed by the Allahabad High Court in *Mufti Mahamad Khan v. Commissioner of Income-tax* (5), which was discussed by the learned Chief Justice in *Commissioner of Income-tax, Bombay v. Laxmidas Devidas* (1), and with his remarks we are in agreement. We think therefore that an association of individuals resembling a Hindu undivided family is an association of individuals contemplated by s. 3 and in the present case the association of the seven assesseees was clearly very akin to a Hindu undivided family, for they had formed a Hindu undivided family. Even after partition their property had remained undivided and in the year 1933 they had associated themselves, some of them being minors, in the purchase and management of the property upon which they have been assessed.

The question whether the assesseees formed an association of individuals within the meaning of s. 3 is a question which must depend upon the particular facts and circumstances of each case and we have no hesitation in holding in the present case that there was material from which the Income-tax, Officer and Assistant Commissioner of income-tax were justified in holding that the present seven assesseees did form an association within the meaning of s. 3 of the Act. The two other questions referred are subsidiary.

(1) I L R (1937) Bom. 830; 173 Ind. Cas. 482; A I R 1938 Bom. 41; 39 Bom. L R 910; 10 R B 335.

(2) 40 Bom. L R 455; 177 Ind. Cas. 447; A I R 1938 Bom. 353; 11 R B 81 (1).

(3) 63 C 538; 40 C W N 476.

(4) I L R (1937) 2 Cal. 358; 172 Ind. Cas. 807; A I R 1937 Cal. 583; 10 R C 430.

(5) A I R 1936 All. 817; 169 Ind. Cas. 969; I L R (1937) All. 108; 1936 A L J 1109; 1937 A L R 619; 10 R A 85.

diary to the first question and require little notice. On the facts the Income-tax Officer and the Assistant Commissioner of Income-tax also had material to hold that the association of individuals, formed by the seven assesseees were the owners of the property within the meaning of s. 9 and there can be no doubt that as owners they were rightly assessed under s. 9, Part 1. We therefore answer the questions referred to us accordingly and we direct that a copy of this judgment be sent to the Commissioner under s. 66 (5) of the Act. As to costs, we do not order the return of the Rs. 100 deposited under s. 66 (2) but we make no further order as to costs.

D.

Answer accordingly.

LAHORE HIGH COURT

Second Appeal No. 708 of 1940

October 21, 1940

BECKETT, J.

SUNDAR AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

Mst. TABO AND OTHERS—DEFENDANTS—

RESPONDENTS

Custom (Punjab)—Non-ancestral property—Gift by widow with consent of next reversioner—Remoter collaterals, if can challenge it—Question of justification—Punjab Courts Act (VI of 1918), s. 41 (3)—Lower Court holding that plaintiff as remote reversioner is not entitled to challenge alienation by widow—Plaintiff wishing to establish custom to contrary in second appeal—Certificate, necessity of.

When the alienation of non-ancestral property by a widow is by way of gift with the consent of the next reversioner only, and is not made for charitable or religious purposes, no question of justification arises, so that the consent cannot be treated as intended for evidence of justification. The consent of the next reversioner given in such circumstances should be regarded as intended to operate as a transfer by the reversioner following on a surrender by the widow. Consequently, the remoter collaterals of the widows' husband cannot contest the gift. 50 Ind. Cas. 498 (3) and *Vajranji v. Manokaronika* (6), relied on. 134 Ind. Cas. 197 (1) followed. *Nobokishore Sarma Roy v. Hari Nath* (4), approved.

Where it has been held by the lower Court that reversioners in the position of plaintiffs would ordinarily have no right to contest an alienation made by a widow with the assent of the next reversioner, the plaintiffs wishing to establish a local custom to the contrary in second appeal must produce a certificate under s. 41 (3), Punjab Courts Act.

S. A. from the decree of the District Judge, Hoshiarpur, dated February 22, 1940.

Mr. Iqbal Singh, for the Appellants.

Messrs. N. C. Pandit and Achhru Ram, for the Respondents.

Judgment.—The parties to this case are Jats, who are said to be governed by custom. *Mst. Tabo* made a gift of certain immovable property in which she held a widow's life-estate. The gift was made with the assent of Rama, the next reversioner. The more remote collaterals of *Mst. Tabo's* husband are now seeking to have it declared that the alienation is not binding upon them. The property is non-ancestral and the Courts below have held, following *Roshan v. Wadhawa* (1) that the plaintiffs have no right to contest such an alienation. The plaintiffs have come up in second appeal. At first sight the judgment in *Roshan v. Wadhawa* (1) seems to be exactly applicable to the facts of the present case, but *Sardar Sahib Iqbal Singh* for the appellants seeks to question both its applicability and its validity. With regard to its applicability he contends that the case is governed by the local custom of the Hoshiarpur district in respect of which he wishes to refer to the Manual in which the Customary Law of that district is collected. It is to be observed that there is no certificate permitting an appeal on the question of custom. It has been held by the lower Court that reversioners in the position of plaintiffs would ordinarily have no right to contest an alienation made by a widow with the assent of the next reversioner. If Counsel for the plaintiffs wishes to establish a local custom to the contrary it seems to me that a certificate is required.

With regard to the validity of the judgment, *Sardar Sahib Iqbal Singh* contends that it not only runs counter to other judicial pronouncements of higher authority and the law as laid down by the most distinguished commentators, but that it is also opposed to the principles set forth in the very decision of the Privy Council on which it purports to be based. It is true that there are a number of pronouncements, either in the commentaries or in recorded decisions, which lay down the law with regard to the rights of the more remote reversioners to a widow's estate in terms which are somewhat widely expressed; and if these are taken as equally applicable to ancestral and non-ancestral property alike, they would lend some support to the claim of more remote reversioners to contest an alienation in respect of which only the assent of the nearest reversioner has been obtained. Generally, however, these pronouncements have been made with reference to cases in which ancestral property was involved, and this is

shown by the reasoning on which they are based. So far as Customary Law is concerned, the Division Bench deciding *Roshan v. Wadhawa* (1) was fully aware of the fact that the judgment was not in accordance with the wording of para. 68 of *Rattigan's Digest*; but they adopted the opinion expressed in *Jaswant Kaur v. Wasawa Singh* (2) to the effect that this paragraph could be taken only as applying to ancestral property. I do not therefore think that it is necessary to refer to pronouncements of general importance unless they were made with specific reference to non-ancestral property, or the reasoning contained therein is equally applicable to such property.

The most important decision to be considered is that of the Privy Council in *Rangaswami Goundan v. Nachiappa Gounden* (3) on which *Roshan v. Wadhawa* (1) was based. That decision appears to lay down three things. In the first place, to explain the position of the reversioners in cases of this kind, it is not sufficient to refer merely to their consent. Persons with a mere expectation of succession cannot alter the devolution of property so as to affect the rights of persons other than themselves, so that a mere assent by some of them could not by itself affect the rights of the others. On the other hand, there are two possibilities to be considered, and the assent of one or more reversioners may validate an alienation by a widow if it falls into one of two categories. The first possibility is that the widow may terminate her own estate in favour of the next reversioner and the transaction may then have the effect of passing that reversioner's estate on to the persons in whose favour the alienation is being made. This may operate to validate a gift, but it must be shown that there has been a complete surrender of the widow's rights. The other possibility is that the alienation may be one for consideration on the ground of necessity, and the assent of the reversioners may be a token of their belief that the alienation is justified. In such a case, the assent should ordinarily be given by the reversioners as a body. In the case before them, their Lordships came to the conclusion that there had been only a partial alienation so that the transaction could not operate as a surrender of the widow's rights. On the other hand, as the alienation was found to

(2) A I R 1923 Lah. 353; 76 Ind. Cas. 592; 5 L 212; 5 Lah. L J 347.

(3) 42 M 523; 50 Ind. Cas. 498; A I R 1918 P C 196 46 I A 72; 36 M L J 493; 17 A L J 536; 29 C L J 539 21 Bom. L R 640; 23 C W N 777; (1919) M W N 62; 26 M L T 5; 10 L W 105 (P C).

(1) A I R 1931 Lah. 495; 134 Ind. Cas. 197; 13 L 180; 32 P L R 446; Ind. Rul. (1931) Lah. 901.

be gratuitous, no question of necessity arose. It was accordingly held that the transaction could be challenged by a reversioner who had not given his consent to the alienation.

If these principles are applied to the facts of the present case, it will be seen that Rama, who had only an expectation of succeeding after the widow's death, was not in a position to do anything which would alter the rights of the other reversioners if the widow should live longer than he lived. Nor was there any question of giving his consent by way of indication that he considered that the alienation would be justified on grounds of necessity. On the other hand, it was open to the widow to terminate her own estate, which would then vest in Rama, and for Rama to allow the estate to pass on to the donee. The other reversioners would be powerless to prevent the termination of the widow's estate in favour of Rama during his lifetime, and they would be equally powerless to prevent the estate which had vested in Rama from passing on to another person when the property concerned was non-ancestral. The following passage from the judgment of the Privy Council may now be quoted:

"The surrender once exercised in favour of the nearest reversioner or reversioners the estate became his or theirs, and it was an obvious extension of the doctrine to hold that, inasmuch as he or they were in title to convey to a third party, it came to the same thing if the conveyance was made by the widow with his or their consent."

This was decided to be possible in *Nobokishore Sarma Roy v. Hari Nath* (4) and the principle there enunciated appears to have been accepted by the Privy Council as applicable to those cases of gift in which there has been a total surrender of the widow's rights. This was the principle applied in *Roshan v. Wadhawa* (1). It is true that there is a long line of decisions to the effect that a transfer by way of gift in favour of a stranger on the part of the widow is not an alienation to which a presumption of legitimacy founded on the consent of the reversioners can be applicable. A list of the earlier cases will be found in the headnote to *Bindeshwari Singh v. Har Narain Singh* (5) and I do not think that it is necessary to refer to them in detail. In these cases, transactions of this kind have been regarded as alienations made directly by the widow in favour of a stranger, to which the consent is added by way of ratification to what would be an impeachable transfer unless necessity could be established. They

do not admit the principle that a gift may be in effect a surrender by the widow of her interest which passes that interest to the next reversioner, whereupon the more remote reversioners may cease to have any control over the estate. In this connexion, reference may be made to an earlier decision of the Privy Council, *Vajranji v. Manokaronika* (6). Although this was a case relating to a transfer for consideration, the question of surrender was discussed. After referring to the two theories, the surrender theory and the theory that the consent of reversioners is merely evidence of necessity, their Lordships proceeded to make the following observations:

"The High Court of Allahabad, indeed, does not recognize the validity of surrenders in favour, or alienations with the consent, of presumptive reversioners, so as to defeat the title of the actual reversioner at the time of the widow's death. But this restriction is at variance with the principle itself, and is not in accordance with the practice in other parts of India in which the Mitakshara Law prevails. Their Lordships have not been referred to any cases in the province of Oudh in which this restriction has been acted upon; and though they would be unwilling to extend the widow's power of alienation beyond its present limits, they cannot adopt the further limitation which the Allahabad High Court has sought to establish."

These remarks, taken with the later observations in *Rangaswami Goundan v. Nachappa Gounden* (3) clearly envisage the possibility that an alienation by way of gift on the part of a widow with the consent of the next reversioner only may take effect as a surrender of her interest followed by a transfer on the part of the reversioner, and that to exclude this possibility would be contrary to the views expressed by the Privy Council. When the alienation is by way of gift with the consent of the next reversioner only, and is not made for charitable or religious purposes, no question of justification arises, so that the consent cannot be treated as intended for evidence of justification. This proposition is unexceptionable; but it will not be sufficient in itself to dispose of the further question whether the consent of the next reversioner given in such circumstances should not be regarded as intended to operate as a transfer by the reversioner following on a surrender by the widow. In holding that it should be so regarded, it seems to me that *Roshan v. Wadhawa* (1) is in accordance with the law laid down by the Privy Council. For these reasons the appeal is dismissed with costs, but leave is given to file a Letters Patent Appeal.

Appeal dismissed.

(4) 10 C 1102 (F B).
(5) 4 Luck 622; 127 Ind. Cas. 20; A I R 1929 Oudh 185; 6 O W N 233; Ind. Rul. (1930) Oudh 436.

(6) 30 A 1; 35 I A 1; 9 Bom. L R 1348; 6 C L J 766; 12 C W N 74; 17 M L J 605; 5 A L J 1; 11 O C 78; 3 M L T 1 (P C).

RANGOON HIGH COURT

First Appeal No: 8 of 1939

August 23, 1940

MYA BU AND DUNKLEY, JJ.
MA AYE TIN—PLAINTIFF—**APPELLANT***versus***DAW THANT—DEFENDANT—****RESPONDENT**

Evidence Act (I of 1872), s. 92—Property purchased in jointly in name of two persons—Evidence by one showing that he paid the whole consideration and that other's name was entered to enable him to present the deed for registration, admissibility of—Burmese Buddhist Law—Payin property of husband—Wife's vested interest in—Whether affected by rule in Manukye Book X, s. 28—Scope of operation of Manukye Book X, s. 28.

Where a certain property is purchased in the joint names of two persons, evidence by one of them showing that he paid the whole consideration of the purchase and the other's name was mentioned in the deed as a joint purchaser merely in order that he should be able to present the documents for registration is clearly inadmissible under s. 92, Evi. Act. [p. 314, col. 1.]

All property acquired by either or both the spouses before or during marriage passes into common enjoyment and both spouses have a vested interest in all such property; that is, "passing into common enjoyment" is a consequence of marriage and not a test of the vesting of property. The interest of the wife in the payin property of her husband is one-third. She cannot be deprived of such vested interest in the property of her husband by the rule in Manukye Book X, s. 28 to which vested interest the law of inheritance can have no application. 137 Ind. Cas. 1 (3), relied on. [p. 315, cols. 1 & 2.]

The wording of s. 28 of Book X of the Manukye does not restrict its operation to the vested interest of the deceased in the undivided family property only but appears to extend its operation to the property of the deceased generally which is in the possession of the parent. The rule applies whether the parent is natural or adoptive as adoptive parents stand in the same position as the natural parents and have the same rights so long as the relationship constituted by adoption subsists. [p. 316, cols. 1 & 2.]

F. A. against the decree of the District Court, Henzada, dated January 9, 1939.

Mr. U E Maung, for the Appellant.

Dr. Ba Han, for the Respondent.

Mya Bu, J.—We first heard this appeal on June 20, 21 and 22, 1939, and at that hearing it was made clear to us that the only obstacle in the way of the appellant's complete success in the appeal was the decision in *Maung Ohn Khin v. U Nyo* (1), in which it was laid down that the provisions of the Manukye, Book X, s. 28, were still the law of Burma in regard to the division between the parents and daughter-in-law of the property of a son who has died childless. So far as the present case is concerned, the pertinent part

of that section of the Manukye read as follows (the section referring specifically to the case where the daughter has died and the son-in-law survives):

"Besides this he shall not recover any of his wife's property actually in the possession or keeping of her parents; they shall retain it."

As there was reason to doubt the correctness of the decision in *Maung Ohn Khin v. U Nyo* (1), we referred to a Full Bench for its opinion the following question:

"As between the parent and the surviving spouse of a child who dies leaving no issue but who lived with his or her parent and whose property is in the possession or keeping of the parent, who is entitled to inherit such property under the Burmese Buddhist Law?"

We have received the answer of the Full Bench* to this question, and it is that the parent is entitled to inherit such property. The conflict in this case is between the widow of one Maung Than Tun, namely Ma E Tin, who is the appellant and was the plaintiff in the District Court, and Maung Than Tun's adoptive mother, Daw Than, who is the respondent and was the defendant in the District Court. Most of the facts of the case have been set out in the order of reference, dated August 24, 1939, and it is unnecessary to repeat them. In fact, the only further questions of fact which remain for decision are (1) which of the properties mentioned in the Schedules attached to the plaint belonged to Maung Than Tun, it being admitted by the appellant that they were all acquired by him prior to his marriage with her and (2) which of the properties mentioned in the Schedules belonging to Maung Than Tun were in the possession of the respondent at the time of Maung Than Tun's death. The properties which the appellant claims to have constituted the estate of Maung Than Tun are set out in seven Schedules attached to the plaint. Those mentioned in Schs. A and B are the properties in regard to which Maung Than Tun relinquished all his right, title and interest in favour of the respondent by the release deed, dated February 11, 1927, which we have already held to be void. Those properties were therefore the absolute property of Maung Than Tun at the time of his death. However, the evidence makes it clear that Maung Than Tun himself considered this deed of release to be binding upon him up to the time of his death and, in fact, he never attempted to challenge it. He allowed the respondent to exercise all the rights of ownership over these properties and, consequently, they must be held to have been in her possession at the time of his death.

Schedule C contains a number of items of

*See 188 Ind. Cas. 683 (F B)—[Ed.]

(1) 10 R 124; 137 Ind. Cas. 431; A I R 1932 Rang. 98; Ind. Rul. (1932) Rang. 132.

jewellery, and the memorandum of appeal states unequivocally that the claim to these jewelleries is abandoned. Schedules D and E contain a number of items of immovable property which were purchased in the joint names of Maung Than Tun and the respondent. The presumption therefore arises that Maung Than Tun and the respondent were joint owners in equal shares of this property. This presumption has not been rebutted by the vague evidence called by the respondent to the effect that she paid the whole consideration for the purchase of each of these properties and that Maung Than Tun's name was mentioned in the deed as a joint purchaser merely in order that he should be able to present the documents for registration. Evidence of the latter category is clearly inadmissible under s. 92, Evi. Act, and even if the evidence to show that the respondent paid the whole of the purchase moneys to the different vendors be accepted, that raises no presumption in her favour, because she was the guardian appointed by the Court of Maung Than Tun, who was a minor when these properties were acquired, and received on his account a sum of Rs. 8,000 which came to him on his natural father's death, and had for a number of years been in receipt of the income arising from lands which Maung Than Tun had inherited from his grandmother. No doubt, the respondent has an estate of her own, apart from the estate of Maung Than Tun, but she has admitted in evidence that the income of Maung Than Tun's estate has always been inextricably mixed by her with the income of her own estate, and consequently she had in her hands large funds belonging to Maung Than Tun's estate at the time when these properties were purchased; and therefore no inference arises, from the fact that she actually handed over the purchase moneys, that these moneys belonged to her only and not to Maung Than Tun.

Consequently, it has been established that Maung Than Tun owned a half share of the properties mentioned in Schs. D and E. But as regards the possession of these properties it must be held that they were in the possession of the respondent. She has produced a large number of leases of these properties executed by tenants, and these leases were all executed in her name alone; and as against these the appellant has been able to produce only two leases executed in a single year in which the joint names of the respondent and Maung Than Tun are mentioned as lessors. It is common ground that the paddy received as the rents of the agricultural lands were all stored in a granary be-

longing to the respondent alone, and the evidence appears to be conclusive that the respondent alone negotiated the sale of his rental paddy. As regards the houses there is no evidence as to what happened to the rents of these, and, in fact, only one, which is the one which was jointly occupied by the respondent and Maung Than Tun and the appellant, is of any considerable value; but the evidence does show that the whole of the income arising from both Maung Than Tun's estate and the respondent's estate was received by the respondent and treated by her as if it were her own. Consequently, it must be held that the respondent was in possession of the properties mentioned in Schs. D and E. Schedule F consists only of one pair of bangles and a motor-cycle. The learned District Judge has dealt with these items in his judgment and there is no appeal against his decision.

Schedule G consists of two debts. It is said by the appellant that these debts were debts due to Maung Than Tun and the respondent jointly, but there is no evidence in support of her assertion. On the other hand, the two debtors, one of whom was examined as a witness for the appellant, have stated that they borrowed the money from the respondent only. Both the debts are oral loans and the money may have come from the respondent's separate income, and in the absence of any evidence that Maung Than Tun's estate contributed towards these loans it must be held that it has not been proved that he had any interest in these debts. The same reasons apply also to a security deposit of Rs. 100 of which the respondent obtained the refund. Consequently, on the evidence, it would appear that Maung Than Tun's estate consisted of the whole of the properties mentioned in Schs. A and B and, a half share of the properties mentioned in Schs. D and E, but that all these properties were in the possession of the respondent at the time of his death. Now, as we have said, on the reference to the Full Bench the learned Judges who composed it have held that the case in *Maung Ohn Khin v. U Nyo* (1), lays down the law of Burma and that s. 28 of Book X of the Manukye is applicable in a proper case; but their decision is subject to a qualification in respect of any vested interest which the appellant may have obtained in her husband's property before his death. In the course of his judgment the learned Chief Justice said:

"But, of course, the question whether the property has been brought to the marriage and has been in the common enjoyment of the married couple, though

still in the custody of the parent or parents, is all important."

In his judgment Mosely, J., said :

"It has been held in *N. A. V. R. Chattyar Firm v. Maung Than Daing* (2), and again by their Lordships of the Privy Council in *U Pe v. U Maung Maung Kha* (3), that either spouse has a vested interest (to the extent of one-third) in the payin property brought by the other spouse to the marriage, that is to say, property which has passed into the common enjoyment though it may be in the custody or keeping of the parent. . . . I would agree that the law of inheritance contained in Manukye X, 28, cannot affect the wife's interest in such property."

And Mackney, J., said :

"As my learned brother Mosely observes, the rule will not affect the vested interest of the son-in-law or daughter-in-law in the payin property brought to the marriage by the daughter and son: but property which is 'in the possession or keeping of the parents' can scarcely be deemed to be property brought to the marriage, unless it can be shown that the married couple actually enjoyed it as their own, the parents being as it were merely their agents for the management of the property."

Hence the learned Judges composing the Full Bench have held that the daughter-in-law could not be deprived by the rule in Manukye Book X, s. 28, of her vested interest in the payin property of her husband, to which vested interest the law of inheritance could have no application. The learned Judges have laid particular stress on the question of common enjoyment and have said that property cannot be said to be brought to the marriage unless it has passed into common enjoyment. With the greatest respect, these dicta would appear to be not in accordance with the judgment of their Lordships of the Privy Council in *U Pe v. U Maung Maung Kha* (3), in which their Lordships observed (at p. 268*):

"Married persons hold during the subsistence of the marriage an interest in all property belonging to either or both."

Their Lordships further observed (at p. 280*):

"After all the ancient law has still a wide scope if admittedly all property acquired by either or both of the spouses before or during marriage passes into the common enjoyment and it is only dealt with by either according to his or her vested interest therein."

We consider ourselves bound to follow these statements of the law made by the Judicial Committee, which lay down as a principle that all property acquired by either or both the spouses before or during marriage passes into common enjoyment and both spouses have a vested interest in all such property; that is, "passing into common

enjoyment" is a consequence of marriage and not a test of the vesting of property. Moreover, in the present case the property had passed into common enjoyment because the appellant and Maung Than Tun were during their married life maintained from the income of his property, and the respondent has stated in her evidence that this income was even insufficient to maintain the married couple. The interest of the wife in the payin property of her husband is one-third, and, in our opinion, the appellant had such a vested interest in the property of Maung Than Tun, which she acquired on her marriage with him, and which interest cannot be defeated by the fact that on his death his estate is inherited by some other person. On this ground the appellant is, in our opinion, entitled at least to a one-third share of the properties mentioned in Schs. A and B attached to the plaint and to a one-sixth share of the properties mentioned in Schs. D and E. A further question that has been raised on behalf of the appellant is whether s. 28 of Book X of the Manukye has any application at all in the present case. In support of the negative answer submitted by the learned Counsel for the appellant the following passage in the judgment of Page, C. J. in *Ma Pwa Thin v. U Nyo* (4), has been relied on :

"The doctrine laid down in s. 28, in my opinion, ought not to be extended. In cases where it directly applies the law will be enforced, and the Court applied s. 28 in connection with the claim to Po Aung's share. But unless the facts of any particular case bring it clearly within the terms of s. 28, in my opinion, the provisions of that section ought not to be extended by analogy or otherwise to other cases which are not brought within the ambit of the section."

The points of distinction between this case and the case in *Maung Ohn Khin v. U Nyo* (1) which dealt with the same family were: (1) Po Aung had not taken from his mother his share in the estate of his deceased father and he and his wife lived with his mother until his death leaving no issue, whereas Maung Nyun had received a sum of money from his mother in full satisfaction of his claim in the estate of his deceased father and he and his wife lived separately from his mother, and (2) the claim put forward by Maung Ohn Khin was for Po Aung's alleged share in the estate of his deceased father which was until Po Aung's death in the possession of the mother, while Ma Pwa Thin's claim was for Maung Nyun's share in the estate of his sister who lived with the mother and died a spinster. Similar points of distinction do not exist between *Maung Ohn Khin v.*

(4) 12 R 409; 152 Ind. Cas. 768; A I R 1934 Rang. 318; 7 R Rang. 173.

(2) 9 R 524; 134 Ind. Cas. 1252; A I R 1931 Rang. 262; Ind. Rul. (1932) Rang. 4 (S B).

(3) 10 R 261; 137 Ind. Cas. 1; A I R 1932 P C 152; 59 I A 216; Ind. Rul. (1932) P C 171; 55 C L J 497; 63 M L J 167 (P C).

*Pages of 10 R.—[Ed.]

U Nyo (1) and the present case. Another ground advanced by the learned Counsel for the appellant is that the property in dispute in *Maung Ohn Khin v. U Nyo* (1), was the vested interest of Po Aung in undivided family property, whereas the property in dispute in the present case consists wholly of separate property belonging to the deceased. But the wording of s. 28 of Book X of the Manukye does not appear to restrict its operation to the vested interest of the deceased in the undivided family property only but appears to extend its operation to the property of the deceased generally which is in the possession of the parent. It has further been contended on behalf of the appellant that the respondent not being the natural mother of Maung Than Tun but only his adoptive mother, the provisions of s. 28 should not be extended so as to give the right under the section to the adoptive parents. Support is lent to this contention by the fact that under ss. 25, 26 and 27 of Book X which lay down rules regarding the right of inheritance of a child "publicly and notoriously" adopted, that is, a *keittima* child, the position of an adopted child is inferior to that of a natural child and in *Maung Po An v. Ma Dwe* (5) it was held that under the *dharmathats* the position of the *keittima* child was distinctly inferior in respect of inheritance to that of own children and accordingly that the right of the *keittima* child to equality with own children should not be extended to the *orasa's* right.

But *Maung Po An v. Ma Dwe* (5) was a case in which the right of the *keittima* child, the only child of the family, to claim a quarter share from the widow on the death of the adoptive father constituted the principle point for consideration. Such right is not enjoyed under the *dharmathats* by an ordinary child though the child may be a natural child who does not possess the qualifications of an *orasa* child. The right is a preferential right even under the *dharmathats* extended to, and only to, a child who possesses certain qualifications and is, therefore, designated as an *orasa* child. As regards the general inferiority of the position of the *keittima* child in respect of inheritance to that of the own children recognized by the *dharmathats*, the Judge-made Law for more than forty years has been that the *keittima* child stands exactly in the same position as a natural child and has taken firm root in the modern Burmese Buddhist Law of inheritance. The fact that the preferential right of an *orasa* child is denied to the *keittima* child

even under the prevailing system of law does not throw any doubt on the correctness of the proposition that for ordinary purposes of inheritance the *keittima* child stands in the same position as a natural child. Nor is this fact sufficient to show that the proposition which has never been doubted during the last forty years, that adoptive parents stand in the same position as the natural parents and have the same rights so long as the relationship constituted by adoption subsists, *Ma E Dok v. Maung Ngwe Hlaing* (6), cannot be consistently applied in favour of the adoptive parent in the matter of inheritance of the *keittima* child's estate, the right of the parent under s. 26, Book X of the Manukye being a right applicable to all parents and not only to parents with certain special qualification.

In *Maung Thein v. U Tha Byaw* (7) a Full Bench of this Court has pointed out that the *keittima* adoption creates not only heirship of the adoptee to the adoptor but also the relations of a parent and child and by virtue of such relationship the adoptee acquires the rights of ordinary natural child of the adoptors in the estate of the adoptor's collaterals or ascendants. This shows that the relationship of the adoptive parent and the *keittima* child is as complete as that between an ordinary natural child and his parent in regard to rights of the *keittima* child or of the adoptive parent in the matter of inheritance. For these reasons we decline to uphold the contention that the provisions of s. 28 of Book X of the Manukye have no application at all in the present case. In the result the decree of the District Court will be set aside and there will be a decree in favour of the plaintiff-appellant for one-third share of the properties mentioned in Schs. A and B attached to the plaint and to a one-sixth share of the properties mentioned in Schs. D and E. The appellant's costs of this appeal and of the suit, including the court-fees payable on the plaint and on the memorandum of appeal, shall be paid out of the estate of Maung Than Tun.

D.

Decree set aside.

(6) (1897-01) 2 U B R 109.

(7) (1939) Rang. 341; 182 Ind. Cas. 268; A I R 1939 Rang. 197; 12 R Rang. 2 (F B).

(5) 4 R 184; 98 Ind. Cas. 621; A I R 1926 Rang. 148; 5 Bur. L J 122 (F B).

CALCUTTA HIGH COURT

Civil Rule No. 1828 of 1939

April 25, 1940

HENDERSON, J.

PYARI MOHAN MANJHI AND ANOTHER
—JUDGMENT-DEBTORS—PETITIONERS

versus

Maulvi HASHAN ALI KHAN

ARMANALI KHAN AND OTHERS—OPPOSITE
PARTY

Bengal Agricultural Debtors Act (VII of 1936), s. 34—Notice under, correctly giving number of case to be stayed—Omission of one of two decree-holders and addition of one who was not judgment-debtor, whether affect validity of notice—Civil Procedure Code (Act V of 1908), s. 47—In spite of notice under s. 34, Bengal Agricultural Debtors Act (VII of 1936), property of judgment-debtor sold—Judgment-debtor, if can apply under s. 47 for declaration that sale does not affect his title—High Court, if can interfere with decision in revision.

Where the notice under s. 34, Ben. Agri. Debtors Act correctly gives the number of the execution case which is to be stayed, an omission of one decree-holder and an addition of a person who was not a judgment-debtor are mere formal defects which can not possibly affect the validity of the notice.

Where in spite of the notice under s. 34, Ben. Agri. Debtors Act the executing Court has proceeded to execute the decree and property of the judgment-debtor is sold, the judgment-debtor is entitled to raise the question in an application under s. 47, Civil P. C., to ask for a declaration that the sale has not affected his title. The decision on that application would be appealable and it would not be open to High Court to interfere in revision.

C. Rule in the matter of application for setting aside the order of the Munsif, Second Court, at Perojpur (Bakerganj), dated August 10 and September 21, 1939.

Mr. Bhupendra Nath Das Gupta, for the Petitioner.

Mr. Satyendra Ch. Sen, for the Opposite Party.

Order.—This rule has been obtained by the judgment-debtors and arises out of rent execution case No. 405 of 1939. During the course of the proceedings the petitioners applied to a Debt Settlement Board and a notice under s. 34, Ben. Agri. Debtors Act, reached the Court on July 21, 1939. The Munsif disregarded it and the proceedings went on. A sale was held on August 10, in spite of the protests of the petitioners and the property was purchased by opposite parties. No. 3 to 7. Petitioners then filed the application which has given rise to this rule. It was dismissed. The sale was eventually confirmed on September 23, and, as the price fetched was greater than the demand, the execution case was dismissed on full satisfaction. The case of the petitioners is extremely simple. Their contention is that the Munsif

acted without jurisdiction in ignoring the notice from the Debt Settlement Board and that the sale held was a nullity. But difficulty arises as to the procedure which he should follow in order to obtain relief.

I am bound to say that I find some difficulty in understanding the reasons which induced the Munsif to ignore the notice. Under s. 55, Ben. Agri. Debtors Act, the Local Govt. may make rules to provide for the manner of giving notices under s. 34. Under those powers a form is prescribed, form No. 15, and the notice was in that form. The form correctly gives the number of the execution case which was to be stayed. There were two decree-holders, one of whom is a trustee for the other. The notice mentioned the name of the trustee only. There were two judgment-debtors, the present petitioners. The notice also mentions the name of another brother. In other words there was an omission of one decree-holder and an addition of a person who was not a judgment-debtor. These are mere formal defects which could not possibly affect the validity of the notice. It has not been and could not be suggested that there was any other pending case to which the notice really referred. There is no doubt whatever that the notice referred to this case and it was the duty of the Munsif to stay further proceedings. In dealing with the petitioners' application the learned Munsif had some difficulty in deciding whether it was an application under s. 47 or s. 151, Civil P. C., or whether it was an application in review. He finally decided that it was none of them and that the only course open to the petitioners was to move this Court.

The relief which I can now on this rule grant to the petitioners lies within a very narrow compass. They are certainly entitled to a stay of any further proceedings in connection with the execution. But that relief would be infructuous for two reasons. In the first place they want relief against the sale and in the second place there is nothing further to be stayed. The result is that no useful purpose would be served by staying further proceedings. It is impossible for me to give any relief with regard to the sale. The petitioners are certainly entitled to raise the question in an application under s. 47 to ask for a declaration that the sale has not affected their title. There can be no doubt that the application filed by them was one under that section. There was therefore an appeal to the District Court and it will not be open to this Court to interfere in revision. The second difficulty lies in the fact that the dispute is now not between the petitioners

and the decree-holders but between the petitioners and a third person namely, the auction-purchaser. In that view they can only obtain relief in a regular suit. If however they are of the opinion that the application under s. 47 was competent their proper course is to appeal against the Munsif's decision. The rule is accordingly discharged. I make no order as to costs.

D

Rule discharged.

MADRAS HIGH COURT

Insolvency Petition No. 230 of 1936 and
Application No. 271 of 1939
January 16, 1940

SOMAYYA, J.

OFFICIAL ASSIGNEE—PETITIONER

versus

SECRETARY, M. & S. M. RAILWAY
EMPLOYEE'S CO-OPERATIVE URBAN
BANK, LTD.—RESPONDENT

Presidency Towns Insolvency Act (III of 1909), ss. 49, 17, 60—Preference of one creditor over another—After-acquired property of insolvent—Payments by insolvent before adjudication to creditor without notice of insolvency, if protected—Prior to adjudication insolvent obtaining loan from bank and undertaking to pay in monthly instalments from salary—Insolvent authorising and requesting employer to pay instalments out of his salary—Completed assignment or charge, if created in favour of bank—Insolvent's adjudication, effect of, on contract—Amount ordered by Court under s. 60 (2), if vested in Official Assignee and balance, if belonged absolutely to insolvent—Official Receiver, if can recover amount paid to bank out of such balance—Rule for fixing amount under s. 60 (2).

The insolvency law aims at equal and rateable distribution of the property of the insolvent among the creditors who are entitled to prove their debts in insolvency without any preference of one creditor over another. The property of the insolvent comprises also what is known as the after-acquired property, and the payments made by the insolvent to any of his creditors will be protected provided they are made before his adjudication and the creditor has no notice of the insolvency. [p. 320, col. 1.]

Sometime before his adjudication, the insolvent got a loan from a bank during the pendency of a prior insolvency proceeding. The insolvent undertook to pay back the loan in monthly instalments out of his salary and authorized and requested his employer, the Railway Co., to pay the said instalments to the bank and the bank which had no notice of the insolvency as per contract continued to recover the instalments even after the adjudication, until the debt was fully recovered :

Held, (i) that on the date of the insolvency there was only an authority or direction and request by the debtor to the Railway Co., to pay a portion of his salary to the bank or at best a contract to assign the future salary as and when it was earned and that there was no completed assignment or charge. By the adjudication of the insolvent the contract was revoked and consequently the liability of the insolvent or his estate for breach of such contract was only in damages and the creditor was not entitled to enforce the transaction as

against his subsequent salary, at any rate not against the assignee in bankruptcy. [p. 321, col. 1.]

[English case-law relied on.]

(ii) that although any dealing by the insolvent with reference to after-acquired property was protected if the assignee acted *bona fide* and paid value, no matter that he had knowledge of the insolvency, a distinction had been made between the insolvent's after-acquired property in general and his pays, salary or other income, by reason of the provisions contained in s. 60, *Pres. Towns Insol. Act*, and that only the amount ordered by the Court under s. 60 (2) vested in the Official Assignee; and the balance being at the absolute disposal of the insolvent, he was free to pay any one of his creditors in full and consequently the Official Receiver could not recover the amount paid by the insolvent to the bank out of such balance subsequent to his insolvency. *Ex parte Huggins, In re Huggins* (6), referred to. *In re Shine, Ex parte Shine* (7) and *In the matter of C. M. J. Donaghue* (8), relied on.

(iii) that the letter of the Official Assignee permitting the bank to collect the amount from the Railway Co. according to the contract amounted to a voluntary payment. [p. 323, col. 1.]

The first one hundred rupees of the insolvent's salary and a half of the excess over one hundred are exempt from attachment; and therefore there is no reason why the balance at least should not be required to be paid for the benefit of the creditors. That should be the ordinary rule in fixing the amount under s. 60 (2). [p. 323, col. 2.]

Mr. T. R. Venkatarama Sastri, for the Petitioner (Official Assignee.)

Order.—This application has been taken out by the Official Assignee under s. 7, *Presidency Towns Insol. Act*, for an order directing the Secretary, the M. & S. M. Railway Employee's Co-operative Urban Bank, Ltd., to refund to him all sums recovered by the said bank by way of deduction from the salary of the first insolvent towards refund of the loan taken by the said insolvent from the bank. The facts are briefly as follows :

The first insolvent who was employed as a chargeman in the M. & S. M. Railway workshops, Perampur, was adjudicated on April 29, 1936. He was at that time drawing a salary of Rs. 202-8-0. Some time prior to his adjudication, i. e., on October 19, 1935 he obtained a loan of Rs. 1,500 from the bank during the pendency of a prior insolvency proceeding. The insolvent undertook to repay the loan in 36 monthly instalments of Rs. 41-10-0 each out of his salary and authorized and requested the M. & S. M. Railway Co., to pay the said instalments to the bank out of his salary and the bank was so recovering the loan from the monthly salary of the insolvent until April 1939, when the loan account was closed, and the sureties discharged.

The Official Assignee by his letter dated October 8, 1935, Ex. D-2, in the case, permitted the raising of the loan and by his

letter dated November 15, 1937, Ex. D-1, addressed to the bank permitted it to recover the amount of the loan from the salary of the insolvent. The terms on which the loan was granted by the bank were, *inter alia*, that it should be guaranteed by two sureties and that the amount was recoverable from the borrower's salaries or any other money which might be due to him from the M. & S. M. Railway Co., who were authorized and requested to deduct the amount from out of his salary and to pay it over to the bank. Exhibit D-3, which is a form of Loans Passed Register, provides:

"I...the borrower hereby authorize and request the M. & S. M. Railway Co. Ltd., to deduct from my monthly salary or any other money that may be payable to me by the M. & S. M. Railway Co. Ltd., such instalment or instalments of principal of the loan, or interest due on such loan, or, any other sum or sums which the M. & S. M. Railway Employee's Co-operative Urban Bank, Ltd., Adam's Park, Madras, may claim as due from me to the said bank."

Exhibit D-5 which is the application for loan also contains a similar clause. The service agreement Ex. D-4 also contains a similar provision:

"I also agree to deductions from my salary or any other moneys payable to me by the company being made on account of dues to the M. & S. M. Railway Co-operative Society and the M. & S. M. Railway Employee's Co-operative Urban Bank for the use of railway schools and railway institutes for services rendered by railway medical officers and for diets supplied in railway hospitals."

Rule 44 of the bye-laws of the bank, Ex. D-6, provides:

"It shall be competent for the board of directors to refuse to grant a loan unless the appellant shall agree in writing to permit the officer disbursing the pay to deduct instalments from his monthly pay to discharge the whole or part of the loan."

Rule 48 provides:

"The amount of paid up share capital, deposit and any other money to the credit of a member or a past member shall be subject to a first charge in favour of the bank in respect of any moneys due to the bank from such member or past member."

The loan in question was not recovered as provided by this rule. On the above facts the questions that arise for consideration are: (1) What is the nature of the transaction between the insolvent and the M. & S. M. Railway Employee's Co-operative Urban Bank Ltd.? Whether the transaction amounts to an equitable charge or assignment in favour of the said bank, in respect of so much of the future salary of the insolvent as is necessary for the payment of the monthly instalments? (2) What, if any, is the effect of the insolvency of the debtor on the said transaction? (3) Whether in any event the bank having recovered the loan in pursuance of the agreement such payments

are protected and the bank cannot be ordered to refund the amount recovered?

The contention of the bank is that the transaction amounted to an equitable charge or assignment in favour of the bank in respect of so much of the salary as was necessary to pay up the monthly instalments and interest thereon, and that the transaction was not in any way affected by the subsequent insolvency of the debtor. It was also contended that the salary of the insolvent did not vest in the Official Assignee in the absence of an order of Court made under s. 60, Presidency Towns Insol. Act, that the insolvent was at liberty to deal with it in any manner he pleased and that in any case the Official Assignee having permitted the raising of the loan and the recovery thereof from out of the insolvent's salary and the recovery having been made with the full consent of the insolvent and the Official Assignee and in pursuance of an agreement with the insolvent authorizing such recovery, it was no longer open to the Official Assignee to claim a refund of the amount. It was stated that the bank had no notice of the insolvency till September 12, 1939 and that it acted perfectly *bona fide*.

Before proceeding to deal with the various points it will be useful to notice the provisions of the Presidency Towns Insol. Act which have a bearing on the said points and the general scheme of the Act. The policy of the insolvency law is equal distribution of the assets of the insolvent among the creditors who are entitled to prove their debts in insolvency, and it expressly provides against preference of one creditor to another. Section 17 of the Act lays down that the property of the insolvent shall vest in the Official Assignee and shall become divisible among his creditors and that thereafter, no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency, shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent, in respect of the debt. It saves the right of the secured creditor to realize or otherwise deal with his security in any manner.

Section 49 provides for the distribution of the property of the insolvent and lays down that all debts shall rank equally between themselves and shall be paid rateably "and without any preference." Section 52 defines the property of the insolvent and it comprises all such property as may belong to or be vested in the insolvent at the commencement of the insolvency or may be acquired by or devolve on him before his discharge.

Section 57 protects *bona fide* transactions and saves any payment by the insolvent to any of his creditors and any contract or dealing by or with the insolvent for valuable consideration, provided that any such transaction takes place before the date of the order of adjudication and the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor. Section 60 deals with the pay or salary or other income of the insolvent and cl. 2 provides :

"Where an insolvent is in receipt of a salary or income other than aforesaid, the Court may at any time after adjudication and from time to time, make such order as it thinks just for the payment to the Official Assignee, for distribution among the creditors of so much of such salary or income as may be liable to attachment, the execution of a decree or of any portion thereof."

It will be apparent from the foregoing provisions that the insolvency law aims at equal and rateable distribution of the property of the insolvent among the creditors who are entitled to prove their debts in insolvency without any preference of one creditor over another, that the property of the insolvent comprises also what is known as the after-acquired property, and that payments made by the insolvent to any of his creditors will be protected provided they are made before his adjudication and the creditor has no notice of the insolvency. I shall now proceed to deal with the several questions that arise in the case in the order set out by me. First, as regards the nature of the transaction between the insolvent, the bank and the M. & S. M. Railway Co., the question is whether an equitable charge or assignment is created in respect of the insolvent's future salary. This depends upon the construction of Exs. D-3, D-4, D-5 and D-6. Exhibits D-3 and D-5 employ practically the same language and they contain an authorization and request to the M. & S. M. Railway Co., to deduct the instalments from out of the insolvent's salary every month. By the service agreement, Ex. D-6, the insolvent agrees generally to such deductions. The documents do not contain any promise to the bank to pay the loan out of the future salary. They merely authorize and request the M. & S. M. Railway Co., to withhold the amount of the monthly instalments and to pay it over to the bank. Reference may be made to r. 48 of the bye-laws of the bank, Ex. D-5, which expressly provides for a charge on certain amounts standing to the credit of the insolvent, *viz.*, share capital, deposit, etc. The language of r. 44 is differ-

ent and does not like r. 48 provide in express terms that a charge is created. But apart from the contrast with the language of r. 48, and taking r. 44 by itself, it does not appear that the documents disclose anything more than a "pay order." Rule 44 speaks of an agreement in writing to permit the officer disbursing the pay to deduct the instalments from his monthly pay to discharge the whole or part of the loan. The expression "to permit" is significant and that taken along with the expression "authorize and request" in Exs. D-3 and D-5 lends support to the view that the transaction amounts to nothing more than a mere authority or request by the debtor to his employees to pay the bank.

The decision in *Ex parte Hall; In re Whiting* (1) may be usefully referred to in this connection. In that case a customer borrowed £200 from his bankers on an agreement that the loan should be paid out of the rent of a farm which would become due to him in Michaelmas and he gave a letter to the bank addressed to the tenant by which he authorized and requested the tenant to pay £200 to the bankers when the Michaelmas rent became due. The bankers forwarded the letter to the tenant. Meanwhile, the customer was adjudicated bankrupt. It was held in that case that the letter amounted only to a revocable authority to pay the rent to the bankers and that it was revoked by the bankruptcy. Jessel M. R. says in that case:

"The only thing we can look at is the letter itself which authorizes and requests the tenants to pay £200 to the bankers. It amounts to nothing more than a request to pay the bankers. On the face of it, it is simply an authority revocable at any time and of course it was revoked by the bankruptcy."

There is also another aspect of the matter which may be considered, *viz.*, that the agreement in the case does not relate to a fund in existence but to a future contingent fund which may or may not come into existence even at a future date. It has no doubt been held that a promise to pay a debt out of a specific fund in existence at the time, whether payable *in presenti* or *in futuro*, amounts to an equitable assignment of the fund so as to entitle the assignee of the fund to claim payment out of that fund. But that principle applies only to cases where the fund was in existence on the date of the assignment though payable on a future date and will not apply to a future contingent fund. "A man cannot in equity, any more than at law, assign what has no existence:"

(1) (1878) 10 Ch. D 615; 48 L J Bk. 79; 40 L T 179; 27 W R 385.

see *Collyer v. Isaacs* (2). It has been held in *Field v. Megaw* (3) that a promise to pay out of moneys when received, i. e. promise to pay when the debtor receives a debt due to him from a third person, does not constitute an equitable assignment so as to charge the debt in the hands of such third person. I, therefore, hold there was no charge or completed assignment in this case though "a man cannot in equity, any more than at law, assign what has no existence," he

"can contract to assign property which is to come into existence in the future, and when it has come into existence equity, treating as done that which ought to be done, fastens upon that property and the contract to assign thus becomes a complete assignment."

That is, in the case of future property, though the assignment may not operate in *presenti*, it may operate as and when the property comes to existence. Until then the assignment constitutes only a contract in respect of the future property and equity attaches to it as soon as the property comes into existence, when the contract to assign becomes a completed assignment. As was observed by Jessel M. R. in *Collyer v. Isaacs* (2):

"The assignment in fact constituted only a contract to give him the after-acquired chattels and until the property comes into existence the contract remains only a contract by which the party entering into it will be bound, and when the property comes into existence it is a contract for the breach of which he will incur liability."

In that case there was a bill of a sale by the debtor transferring for value to a creditor all the chattels at his place of business and all other chattels which may at any time be brought thereon. The creditor did not prove in bankruptcy but claimed certain chattels which were brought into the premises after the insolvent's adjudication. To the same effect are the following observations of Lindley, L. J., in *Ex parte Nichols; In re Jones* (4) which was a case of an assignment by a trader of the future receipts of his business:

"It is an agreement to assign to Younger & Co., not property of Jones and Barber, but money which would become due to them under the arrangement between them and the Railway Company. It is a mere agreement for the breach of which no doubt an action would lie."

If therefore a person agrees to pay his creditor out of his future salary or income which is contingent on his earning the same, the transaction amounts to a mere contract to assign until the salary or income comes

into existence and will become complete only after the salary becomes due or after the income accrues and not before. Applying that principle to the present case, it will be seen that in respect of salary accruing subsequent to insolvency there was only a contract to assign as and when it was earned and that there was no completed assignment on the date of the adjudication. If that is so, the liability of the insolvent or his estate for breach of such contract will be only in damages and the creditor will not be entitled to enforce the transaction as against his subsequent salary, at any rate not against the assignee in bankruptcy.

The result of the foregoing discussion is that on the date of the insolvency there was only an authority or direction and request by the debtor to the M. & S. M. Railway Co., to pay a portion of his salary to the bank or at best a contract to assign the future salary as and when it was earned. There was no completed assignment or charge. What then is the effect of the insolvency on such direction to pay or contract to assign? Is it sufficient to give the creditor a right to the fund which will prevail over the right of the Official Assignee? As was pointed out in *Ex parte Hall; In re Whiting*, (1), already, referred to it is simply an authority revocable at any time and of course it was revoked by the bankruptcy. Treating it as a contract to assign, even then, as pointed in *Collyer v. Isaacs* (2).

"when the party who contracts becomes bankrupt the liability in respect of the contract is a liability provable in bankruptcy."

The observations of Lindley, L. J. in *Ex parte Nichols; In re Jones* (4), may also be usefully referred to:

"It is mere agreement for the breach of which no doubt an action would lie but which cannot prevail against the title of the trustee so far as regards payments received by the Railway Company under it after his title accrued."

To the same effect are the observations of Lopes, L. J. in *Wilmot v. Alton* (5).

"If the amount in question had been a debt which had accrued due at the date of the bankruptcy the case would have been different. But that was not so. In order to determine the right which was assigned to the plaintiff, it is necessary to consider the terms of the contract. Having regard to those terms it appears to me clear that there was only a debt which might or might not become due to the assignor in future according as the conditions of the contract were or were not fulfilled. That being so the case appears to me to come directly within the decision in *Ex parte Nichols; In re Jones* (4)."

The position is well summed up by Mulla in his book on the Law of Insolvency at

(5) (1897) 1 Q B 17; 66 L J Q B 42; 45 W R 113; 4 Manson 17.

(2) (1881) 19 Ch. D 342; 51 L J Ch. 14; 45 L T 567; 30 W R 70.

(3) (1869) 4 O P 660.

(4) (1883) 22 Ch. D 782; 52 L J Ch. 635; 48 L T 492; 31 W R 661.

p. 348, s. 520:

"The effect of the subsequent insolvency of an assignor of future or after-acquired property may now be considered. If after-acquired property comes into existence prior to the insolvency of the assignor, the equitable assignment is complete and the Official Assignee will take the property subject to the assignment. If the property comes into existence subsequently to the insolvency and before the discharge of the insolvent, the Official Assignee will take the property subject to the assignment if the right of the assignor to recover that which is claimed by the assignee had become complete prior to the insolvency but not if the right had not become complete before then. In the latter case the assignee has no right to the property. Thus if a debt which is to fall due at a future time is assigned and the debt only falls due after insolvency the assignee has no right to it."

This takes me to the next point, viz., how far the insolvent was competent to deal with his subsequent salary in the absence of an assignment or charge in favour of the bank and how far can the bank claim protection in respect of the payments made to it from out of the subsequent salary. It was argued that the insolvent was absolutely entitled to his after-acquired properties and can deal with and dispose of them as he pleased unless and until the Official Assignee intervened and that all dealings and transactions had or entered into by the insolvent before such intervention were valid and cannot be questioned by the Official Assignee or by the creditors. It was further argued that so far as the salary was concerned, under the special provisions of s. 60, Presidency Towns Insol. Act, it did not vest at all in the Official Assignee in the absence of an order of Court fixing such portion of the salary as it thinks fit for payment to the Official Assignee for distribution among his creditors, and that at any rate when an order has been made by the Court fixing what proportion of the salary should be paid to the Official Assignee month after month the balance of the salary was at the absolute disposal of the insolvent and that the Official Assignee cannot claim anything more. The law in regard to after-acquired properties is that any dealing by the insolvent with reference to such property will be protected if the assignee acts *bona fide* and pays value, no matter that he has knowledge of the insolvency. In the present case, it cannot be denied that the bank had paid value. It is also claimed by the bank that it had no notice of the insolvency until April 1939 and that it advanced the loan in the ordinary course of business prior to the insolvency. The averments are not controverted on behalf of the Official Assignee.

We have next to consider whether the

payments made to the bank are protected. No doubt a distinction has been made between the insolvent's after-acquired property in general and his pay, salary or other income, by reason of the provisions contained in s. 60 which corresponds to s. 51, English Bankruptcy Act of 1914, and s. 53, Bankruptcy Act of 1883. What then is the position of the Official Assignee and the creditors with reference to his subsequent salary? Does the whole of it vest in the Official Assignee subject to the insolvent's retaining a sufficient portion necessary for the maintenance of himself and his family or is it only so much of it as is liable to attachment in execution of a decree which vests in him or is it that no part of it vests in the Official Assignee until an order is made by the Court fixing so much of it as it considers proper? Judicial opinion on the subject is not uniform. It was held in *Ex parte Huggins*; *In re Huggins* (6), by the Court of Appeal on a construction of the Bankruptcy Act of 1869 that the effect of ss. 15 and 17 was to vest in the trustee all property including those dealt with by ss. 87 to 95 which relate to salaries, income, etc., (corresponding to s. 60, Presidency Towns Insol. Act,) but subject to the qualifications and exceptions introduced by those sections. But the decision in *In re Shine*; *Ex parte Shine* (7), seems to point in the other direction. That was a case in which an actor agreed to act in a theatre on a salary of £30 a week payable weekly and became bankrupt. He entered into an agreement with the theatre manager that he should retain £90 of his salary and discharge all his debts. The question was raised as to how for the arrangement was operative as against the trustee in bankruptcy. In upholding the arrangement, Esher, M. R. says:

"With regard to the particular salary or income which does not pass to the trustee the bankrupt had a right, notwithstanding the receiving order to make any bargain he chose."

Bowen, L. J., remarks dealing with s. 53 (2):

"Until the sub-section was put in force against him by diverting to the use and advantage of the creditors that which was *prima facie* up to that moment his own, he had a perfect right, although he was bankrupt, to make any bargain he pleased with any person as to the remuneration which he was to receive for his personal services."

The only Indian decision directly bearing on the point is the decision of a single Judge in *In the matter of C. M. J. Donaghue* (8),

(6) (1882) 21 Ch. D 85; 51 L J Ch. 935; 47 L T 659; 30 W R 878.

(7) (1892) 1 Q B 522; 61 L J Q B 253; 66 L T 146; 40 W R 386; 9 Morrell 40.

(8) 19 B 232.

which turned on the construction of 11 and 12 Vict., Chap. 21, ss. 7 and 27. It lays down that the Official Assignee is not entitled to the subsequent salary or income except by means of an order obtained under s. 27 (corresponding to s. 60). I am of opinion, that only so much of the salary as is ordered by the Court under s. 60 (2) to be paid to the Official Assignee vests in him. In this case an order having been made under s. 60 (2) of the Act, only the amount ordered by the Court vests in the Official Assignee; at any rate the balance was at the absolute disposal of the insolvent. Assuming that the rest of the income did not vest in the Official Assignee, can the insolvent pay one creditor in full out of his subsequent salary? No doubt, the insolvency law aims at equal and rateable distribution of the assets of the insolvent among his creditors without any preference of one creditor over another. The bank in the absence of any assignment or charge is only in the position of an ordinary creditor entitled to prove in the insolvency for its debt. It is opposed to the very spirit of the insolvency law that a creditor who is entitled merely to share equally with the other creditors in the distribution of the assets of the insolvent should receive payment in full of his amount. He cannot be allowed to have any such advantage by any act of the insolvent. But the allocation under s. 60, cl. (2) of the Act, has been made and the rest of the salary is absolutely at the disposal of the insolvent. If he had spent the whole of it himself the Official Assignee cannot complain. On this ground, I think the Official Assignee cannot recover from the respondent the moneys in question.

There is one other aspect, *viz.*, that the letter of the Official Assignee Ex. D-1, may amount to a voluntary payment. By this letter the Official Assignee permitted the bank to collect the amount from the Railway Company and the bank did so. Suppose the Official Assignee had collected the whole amount and that he afterwards paid the sums to the bank they would be voluntary payments which the Official Assignee cannot recover. I am of opinion, in this case the Official Assignee's conduct does bring the case within the rule that a voluntary payment cannot be recovered.

The allocation was evidently fixed very low by the master on the representation that the payment to the respondent bank should be taken into account when fixing the allocation. I have held that the respondent had no preferential right to be paid these sums from

the salary. The first one hundred rupees and a half of the excess over one hundred are exempt from attachment; and, there is no reason why the balance at least should not be required to be paid for the benefit of the creditors. That should be the ordinary rule in fixing the amount under s. 60 (2). In the result this application is dismissed but without costs as the respondent has failed in many of its contentions. The Official Assignee will have his costs out of the estate.

N.-D.

*Application dismissed.***RANGOON HIGH COURT**

First Appeal No. 67 of 1939

May 1, 1940

MYA BU AND MOSELY, JJ.

YIN WIN LIN AND OTHERS—APPELLANTS
versus

MA KYIN SEIN AND OTHERS—RESPONDENTS

Res judicata—Previous decisions as to existence of law or custom of persons domiciled in Burma whether binding on Courts in Burma as res judicata.

No number of previous decisions as to the existence of some law or custom of persons domiciled in Burma are binding on the Courts in Burma in the sense that they are *res judicata*; all that can be said is that a long line of decisions is always taken judicial notice of by the Court, and to that extent the law is to be regarded as settled law; but if any party so chooses, the question can always be reargued and an issue must formally be framed.

F. A. against the decree of the District Court, Myingyan, dated February 28, 1939.

Messrs. Hay and U Chan Htoon, for the Appellants.

Dr. Ba Han, for the Respondents.

Mya Bu, J.—The suit out of which this appeal has arisen relates to a piece of immovable property which formed part of the estate of Yin Kyaung Yo, a Chinese Buddhist who died at Myingyan in August 1927. Yin Kyaung Yo had been married to Ma Kyin Sein, a Sino-Burmese lady, and lived with her at Myingyan, while he had a Chinese wife in China. On his death, Yin Kyaung Yo left him surviving Ma Kyin Sein as his widow but no issue whatever. He also had a brother Yin Kyaung Sint, who lived in Burma. Plaintiff-appellant No. 1 is the only surviving child of Yin Kyaung Sint by his first wife, while plaintiff-appellants Nos. 2 and 3 are the sons of Yin Kyaung Sint by his second wife. After the death of Yin Kyaung Yo in 1927 the property in suit fell into the hands of Ma Kyin Sein who subsequently sold it to defendants-respondents Nos. 2 and 3 by a registered deed of sale in July 1935. The suit of the plaintiff-appellants

is for a decree for possession of that property, or in the alternative for pre-emption of the sale.

When it was first instituted it was by plaintiff-appellant No. 1 alone alleging that he had been adopted by Yin Kyaung Yo as a son and that under the Chinese Customary Law, by which the question of succession to the estate of Yin Kyaung Yo was governed, he was the sole heir to the exclusion of even the widow Ma Kyin Sein. The suit was filed on May 9, 1936. On March 1, 1937 judgment was delivered in First Appeal No. 93 of 1936 *Khoo Soo Cheng v. Ta Ma Shwe Zin* (1) of this Court where it was held to the effect that on death of a Chinese Buddhist domiciled in Burma and dying intestate a sole surviving son was entitled to succeed to the exclusion of the widow; that where the deceased left no son but an adopted son, the adopted son would have the same right as a natural son; and further that a son of the deceased's next younger brother must be adopted and that if such a nephew had not already been adopted, by the deceased, he should be deemed to have been so adopted and was thus entitled to all the rights of an adopted son and consequently of a natural son. After the passing of that judgment plaintiff-appellant No. 1 had the plaint amended by bringing on the record his two younger half brothers, Yin Win Chi and Yin Win Yin, as plaintiffs, stating that in the event of the Court holding that the alleged adoption of Yin Win Lin by Yin Kyaung Yo was not established, plaintiffs Nos. 2 and 3, or any one of them, might be declared to be the heir of Yin Kyaung Yo, and was thus entitled to the estate of Yin Kyaung Yo to the exclusion of the widow.

By their written statements, the defendants denied the alleged adoption of Yin Win Lin, and also denied that the Chinese Customary Law governed the question of succession to the estate of Yin Kyaung Yo, or that under that law an adopted son is entitled to inherit the estate or that nephews, such as the plaintiffs, were to be deemed to have been adopted sons, or were entitled *qua* adoptee or potential adoptee or *qua* nephews to inherit the estate. The defendants further averred that Yin Kyaung Sint and plaintiff No. 1 Yin Win Lin, having taken part in the settlement under which Ma Kyin Sein received the property in suit, plaintiff No. 1 was estopped from denying Ma Kyin Sein's title to it. Upon the pleadings the following issues were *inter alia* framed:

"4. Was the succession to the estate of the late Yin

Kyaung Yo governed by Chinese Customary Law or by Burmese Buddhist Law?

5. Was plaintiff No. 1 adopted by the late Yin Kyaung Yo with a view to inherit his estate? If so, is he the sole heir to the estate of the late Yin Kyaung Yo? Or in the alternative are the plaintiffs the heirs to the estate of Yin Kyaung Yo to the exclusion of defendant No. 1?

6. Was such settlement acted upon and acquiesced in by the plaintiff? If so, are the plaintiffs estopped from questioning the sale of the suit properties by defendant No. 1 to defendants Nos. 2 and 3?"

Certain witnesses were called to prove issues Nos. 4 and 5, the first two set out above; but when the Court delivered judgment no substantial reference was made to the evidence of witnesses on issue No. 4 and the learned District Judge, following the principles enunciated in the judgment of this Court in First Appeal No. 93 of 1936 *Khoo Soo Cheng v. Ta Ma Shwe Zin* (1), held that Chinese Customary Law was applicable. On the issue as to adoption the finding of the learned District Judge was that the adoption was not proved. He further observed:

"I do not think that all three plaintiffs, as nephews, can be heirs to the estate of the deceased Yin Kyaung Yo. According to the passage from Von Mollendorf, which has already been quoted, to the effect that if the younger brother has only one son he has to marry a second legal wife and give the first-born son of that marriage to his elder brother in adoption, plaintiff No. 2 Yin Win Chi, the eldest son of Yin Kyaung Sint's second marriage, is the person entitled to be adopted and succeed to the deceased Yin Kyaung Yoe's estate. But there is no estate of Yin Kyaung Yoe in existence as it has been divided up by a family arrangement in which Yin Kyaung Sint, the father of plaintiffs Nos. 2 and 3, participated and can be said to have acted and claimed a share in their interests."

and held that not only Yin Win Lin but the two minors Yin Win Chi and Yin Win Yin are entitled to no relief whatsoever. The District Court delivered this judgment on February 28, 1939, and the plaintiffs filed this appeal on May 26, 1939.

The judgment of this Court in First Appeal No. 93 of 1936 *Khoo Soo Cheng v. Ta Ma Shwe Zin* (1) was appealed against to the Judicial Committee of the Privy Council; *Tan Ma Shwe Zin v. Koo Soo Chong* (2) at p. 568 and their Lordships of the Privy Council, in the judgment delivered by Sir George Rankin on June 22, 1939, reversed the appellate decree of this Court. In the course of the judgment it was observed:

"In the present case it is not in dispute that the propositus Khoo Boon Tin and his wife Tan Ma Thin were Chinese Buddhists and that unless the plaintiff can show that the law applicable in Burma to them in questions of succession is Chinese Customary Law his suit cannot succeed. Their Lordships are of opinion that the Burmese Buddhist Law is

(1) A I R 1937 Rang. 351; 172 Ind. Cas. 550; 10 R. Rang. 257.

(2) (1939) Rang. 548, (568); 182 Ind. Cas. 993; A I R 1939 P C 228; 1939 O L R 491; 12 R P C 52; 5 B R 908; (1939) 2 M L J 731 70 C L J 341 (P C).

the law applicable to them, and it is not contended that according to that law the plaintiff has any claim to be the heir of either.

Their Lordships are further of opinion that on the evidence adduced in the present case it is not proved that according to Chinese Customary Law the plaintiff as nephew would be entitled although not in fact adopted to succeed as heir of Khoo Boon Tin in preference to the widow. No reliable expert witness was called to speak to this question, and though the book relied on by the Division Bench may have been admissible under s. 60, Evi. Act the conclusion drawn from its contents is drawn precariously and from material both obscure and inadequate. The order of succession which is essential to the plaintiff's case is not established by the evidence either as a matter of foreign law or as a custom and his suit must fail.¹

In these circumstances when this case is called on for hearing it is urged on behalf of the appellant that before this Court considers the evidence as to the alleged adoption and the case with reference to the other issues, they may be permitted to adduce further evidence specifically on the question as to whether the Chinese Customary Law is applicable to the case or not and, if so, what that law is with reference to the rights of nephews or adopted sons or persons entitled to be adopted as against the widow of the deceased. Whether this prayer should be allowed or not depends on whether the judgment of their Lordships of the Privy Council regarded it as a concluded matter of law that to the estates of Chinese Buddhists domiciled in Burma the Burmese Buddhist Law, and not the Chinese Customary Law, is applicable or whether the judgment of their Lordships still leaves room for evidence to be adduced upon this point as a question of fact. In view of the wording of s. 13 (1) itself of the Burma Laws Act (XIII of 1898) we are of the opinion that all that their Lordships intended to lay down—and actually did lay down—was that *prima facie* inheritance to the estate of a Chinaman who was domiciled in Burma and was a Buddhist was governed by the Buddhist Law of Burma, and that the burden of proving any special custom or usage opposed to the ordinary rules of the Burmese Buddhist Law of inheritance was on the person asserting that variation. Their Lordships found that in that case there was insufficient evidence to prove any Customary Chinese Law opposed to the ordinary rules of the Burmese Buddhist Law of inheritance. In our opinion the head-note of the Rangoon Law Reports of that ruling of their Lordships at p. 548 of 1939 Rangoon Reports correctly represents the trend of that decision.

The learned Advocate for the respondents in opposing this prayer submitted that the question as to whether the Chinese Customary Law was applicable or not was expressly

put in issue, and that the plaintiffs therefore had adequate opportunity of adducing such evidence that they might deem desirable, and do not deserve any further opportunity to be given for this purpose. It is true that an issue was expressly framed as is seen in issue No. 4 and in the second part of issue No. 5, but these issues had to be formally framed because there were allegations in the pleadings and denials of those allegations in the written statement. It is, in our opinion, a correct statement of the law to say that no number of previous decisions as to the existence of some law or custom of persons domiciled in this country are binding on the Courts in this country in the sense that they are *res judicata*; all that can be said is that a long line of decisions is always taken judicial notice of by the Court, and to that extent the law is to be regarded as settled law; but if any party so chooses, the question can always be reargued and an issue must formally be framed.

It had been held consistently in the Court of this province since the case in *Fone Lane v. Ma Gyee* (3), a decision dating from 1903, with one or two exceptions, until the decision of their Lordships of the Privy Council in *Tan Ma Shwe Zin v. Koo Soo Chong* (2), that Chinese Customary Law was the law applicable to such cases of inheritance or succession in Burma amongst members of the Chinese community domiciled in Burma. Those cases are as follow: *Fone Lane v. Ma Gyee* (3), *Ma Pwa v. Yu Lwai* (4), *Kyin Wet v. Ma Gyok* (5), *Ma Shwe Thit v. Maung Kyin* (6), *Maung Po Maung v. Ma Pyit Ma* (7), *Ma Sein v. Ma Pan Ngun* (8), *Chan Pyu v. Saw Sin* (9), *Tan Ma Shwe Zin v. Tan Ma Ngwe Zin* (10), *Ma Sein Byu v. Khoo Soon Thye* (11), *Ah Pein v. M. C. Deva* (12) and *Chan Thwin v. Khoo Zin Nee* (13). In all these cases Chinese Customary Law was

(3) 2 L B R 95; 21 C 882; 21 I A 96; 6 Sar-453 (P.C.).

(4) 8 L B R 404; 34 Ind. Cas. 99; A I R 1916 L B 12; 9 Bur. L T 187.

(5) 9 L B R 179; 47 Ind. Cas. 148; A I R 1919 L B 133; 12 Bur. L T 21.

(6) 11 Bur. L T 224; 50 Ind. Cas. 513; A I R 1919 L B 68.

(7) 1 R 161; 74 Ind. Cas. 993; A I R 1923 Rang. 180; 2 Bur. L J 79.

(8) 2 R 94; 80 Ind. Cas. 749; A I R 1924 Rang. 219.

(9) 6 R 623; 114 Ind. Cas. 513; A I R 1929 Rang. 22; Ind. Rul. (1929) Rang. 81.

(10) 10 R 97; 137 Ind. Cas. 211; A I R 1932 Rang. 59; Ind. Rul. (1932) Rang. 97.

(11) 11 R 310; 148 Ind. Cas. 492; A I R 1933 Rang. 313; 6 R Rang. 229.

(12) A I R 1937 Rang. 543; 174 Ind. Cas. 390; 10 R Rang. 401.

(13) A I R 1938 Rang. 254; 177 Ind. Cas. 507; 11 R Rang. 134.

applied. The sole exceptions are *Apana Charan v. Shive Mu* (14), where it was said that a Chinese Buddhist Law, if any would apply and not Chinese Customary Law; *Ma Thein Shin v. Ah Sein* (15), where it was said that justice, equity and good conscience should be the rule of decision; and the Full Bench case in *Phan Tiyoek v. Lim Kyin Kauk* (16) where the Succession Act was said to be the law applicable.

Considering the state of the law prevailing, or thought to be prevailing by the parties, at the time the parties adduced evidence in this case, it is not surprising that the evidence on both sides was scanty. There was evidence given by a considerable number of witnesses on behalf of the plaintiffs to say that Chinese Customary Law applied. The knowledge of some of those witnesses of the Chinese Customary Law was not very extensive and the number of instances which they could give where Chinese Customary Law had in fact been applied was not very large. On the other hand the defence took the matter even more lightly. There was hardly any cross-examination and the evidence in rebuttal was negligible. Both parties then took issues Nos. 4 and 5 (except on the question as to the alleged adoption) lightly, and it would not be fair to either side, or a satisfactory way of determining this suit, if it had to be determined on that evidence and if the parties were not allowed a further opportunity of adducing evidence, now that the legal position has been so changed by the decision of their Lordships of the Privy Council which was only announced after the appeal in the present suit was filed. For these reasons, we consider that this is a fit case in which we should require further evidence on these two matters in issue, namely (1) whether the Chinese Customary Law is the law applicable to this case, and (2) if so, what that Chinese Customary Law is. The case is therefore sent back to the trial Court in order that the Court may give the parties further opportunity of adducing such evidence that they desire on these matters in issue. The Judge of the District Court will resubmit this evidence with his finding by November 2, of this year. Costs of the present hearing to be costs in the cause.

D.

Case remanded.

(14) 4 L B R 124.

(15) 7 Bur. L T 246; 24 Ind. Cas. 367; 8 L B R 222; A I R 1914 L B 144.

(16) 8 R 57; 124 Ind. Cas. 849; A I R 1930 Rang. 81; Ind. Rul. (1930) Rang. 209 (F B).

BOMBAY HIGH COURT

Criminal Appeal No. 513 of 1940

December 4, 1940

BEAUMONT, C. J. AND SEN, J.

MOHANLAL BABABHAI—ACCUSED—

APPELLANT

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 103—Panchnama—Identification parade—Police relying on panchnama must call panch to prove it—Object of calling panch witness—Independent evidence that identification parade was properly and fairly held—Panchnama can be used only to refresh panch's memory—Police Officer cannot bring panchnama on record in his evidence in chief—Police holding panchnama but not offering to call panch—Adverse inference against them can be drawn.

If the Police relied on a *panchnama*, they must call a *panch* to prove it, the practice of allowing a *panchnama* to be put in by a Police witness is wrong. The object of having *panch* witnesses is to provide evidence which is independent of the Police. In searches under Chap. VII, Criminal P. C., or the City of Bombay Police Act, it is necessary to call *panchas*, but s. 103 (2) of the Code provides that they need not be called as witnesses unless they are specially summoned. That does not mean that the *panchnama* can be used if no *panch* is called. Apart from searches, it is, of course, not a rule of law or practice, that Police evidence must be corroborated; but in case of an identification parade, and where it is of vital consequence to show that the accused was duly identified, it is obviously desirable, to have some independent evidence that the parade was properly and fairly held. 136 Ind. Cas. 868 (1), relied on. [p. 328, col. 1.]

The *panchnama* is merely a record of what a *panch* sees, and the only use to which it can properly be put is that when the *panch* goes into the witness-box and swears as to what he saw, the *panchnama* can be used as a contemporary record to refresh his memory. But a Police Officer is not entitled to give evidence of what the *panch* told him, that he saw, and that is what it comes to if a Police Officer is allowed to put in the *panchnama*. A Police witness may state that he held a *panchnama* and offer to produce the record if the accused asks for it, but he cannot bring it on record in his evidence-in-chief. If the Police hold a *panchnama*, and do not offer to call the *panch*, an inference may be drawn against them from the fact that the *panch* is not submitted for cross-examination. The putting in of a *panchnama* without calling the *panch* is not only an infringement of the rules of evidence against the admission of hearsay evidence, but it is unfair to the accused, because it enables the Police to get the advantage of evidence in corroboration without putting that evidence to the test of cross-examination. [p. 328, cols. 1 & 2.]

Cr. A. from conviction and sentence passed by the Presidency Magistrate, Fourth Court, Bombay.

Messrs. M. R. Vidyarthi and S. A. Kher, for the Accused.

Mr. R. A. Jahagirdar, Govt. Pleader, for the Crown.

Beaumont, C. J.—This is an appeal by the accused against his conviction under ss. 454 and 380, I. P. C., by the Presidency

Magistrate, Fourth Court, Bombay. The story of the complainant is that the accused was brought to his flat by a mutual friend on September 14, 1939, and on the 18th the complainant went to Surat, and left the accused and a relation of the complainant named Kodarlal in the flat. Part of the flat was locked up; the rest was left open. The complainant returned to Bombay on October 23, and then found the locks on the doors of the flat and cupboards broken, and some of his goods missing. He went round to the Police at once and gave information. He gave a list of the articles which, he said, he had lost, which were articles of no great value, worth about Rs. 50 or Rs. 60 and he stated that he had no suspicion against anybody. Police Sub-Inspector Harris went round to the flat and found that things were disturbed, and it looked, as if there had been house-breaking. The complainant says, and that no doubt is true, that the Police asked him not to touch anything because they hoped to find some fingerprints. The next day, the complainant says, after the Police allowed him to touch his things he looked into a secret drawer, and then discovered for the first time that he had lost some pearl necklaces and pearl bangles of the value of over Rs. 7,000. He says that when he went to Surat he left these articles in the secret drawer, and having discovered their loss, he made a supplemental statement to the Police. The accused could not be found for some time, and eventually on March 1, 1940, he surrendered to the Police, and he is charged with having stolen all these articles.

The learned Magistrate seems to have accepted the whole of the complainant's story, but a good deal of it seems to me to be, on the face of it, absurd. The complainant is a gentleman who has suffered from thieves before, according to his own story, and it is inconceivable that he would go off for a month to Surat, leaving valuable jewels in his flat in some secret drawer, the secret of which could no doubt be discovered by any thief, and with the accused whom, he says, he knew nothing about in occupation of his flat. If he had done so incredibly foolish a thing, I am quite certain that on his return from Surat and on discovering that his flat had been broken into, the first thing he would have done would have been to go to the secret drawer and find out whether the pearls were there. It is absurd to suggest that he never looked into the secret drawer until the next day, and only then discovered the loss of these pearls of very substantial value. I am perfectly certain

that the pearls were not lost at all; but, on the other hand, probably somebody did break into the flat. I should think it unlikely that the whole thing was stagemanaged, although that is conceivable. There is no doubt that when the Police went to the flat, it showed signs of having been broken open.

Now, the evidence against the accused is, first of all, that he was admittedly left in the flat. He says that he remained there for some time. He wrote two letters, which are in evidence, asking the complainant for money to enable him to continue to live in the flat, and as the complainant did not send any money, he says that he left, throwing the key into the flat through a window. At any rate he was at one time in charge of the flat, and the evidence that he committed the house-breaking is that of two witnesses, Gopal, who was a *bhaiya* employed on the first floor of Kansara Chawl, the complainant's first being on the third floor, and a locksmith named Hasanali. Gopal says that he had seen the accused and a *ghati*, who was a servant of the complainant, and whom he had known as a servant of the complainant for seven months previously. He saw these two people removing various articles from the flat, and he was asked by Hasanali, the locksmith, whether these two people were servants of the complainant, because they had asked him to break open certain locks in the flat. Hasanali says that the *ghati* called him up to the complainant's flat, where was the accused, and they asked him to make keys for some of the locks, but he said that he could not do that, but would break them open, and accordingly, he says, he did break open the locks. Now, if the accused and the *ghati* got the locks broken open, it is no doubt a fair inference that they probably stole anything which was stolen. But I may point out that it is not the usual practice for house-breakers to send for an expert locksmith to help them in their work. I find it very difficult to suppose that, if they were minded to break open the locks, two men would not have done it without seeking the assistance of somebody who could afterwards identify them. But it is obvious that the value of the evidence of these two witnesses, assuming their main story to be true, must depend on their identification of the accused. So far as Gopal is concerned, his evidence is obviously wrong in respect of the *ghati*, because the complainant says that he never had a *ghati* in his employ, and yet Gopal says that he knew him as the employee of the

complainant for seven months. It is difficult to see why, if the evidence as to the *ghati* is entirely false, the evidence as to the accused should be accepted as entirely true. There is no such criticism of Hasanali's evidence, but he had not seen the accused before and the evidence of identification of the accused is most unsatisfactory. Deputy Inspector Kale, who was in charge of the case, says that he held an identification parade at which Hasanali and Gopal at once identified the accused, and he then produced a *panchnama* of the identification parade, which was put in as Ex. E.

Now, this Court pointed out some years ago in *Emperor v. Rustam Cursetji Lam* (1), that if the Police relied on a *panchnama*, they must call a *panch* to prove it, and that the practice of Presidency Magistrates in allowing a *panchnama* to be put in by a Police witness was wrong. The object of having *panch* witnesses is to provide evidence which is independent of the Police. In searches under Chap. VII, Criminal P. C. or the City of Bombay Police Act, it is necessary to call *panchas*, but s. 103 (2) of the Code provides that they need not be called as witnesses unless they are specially summoned. That does not mean that the *panchnama* can be used if no *panch* is called. Apart from searches, it is, of course, not a rule of law of practice that Police evidence must be corroborated, but where one is dealing with an identification parade, and where it is of vital consequence to show that the accused was duly identified, it is obviously desirable, as the Police recognize themselves, to have some independent evidence that the parade was properly and fairly held, because there is nothing easier than for the Police to stage an unfair identification parade, in which the witness is shown the accused before he identifies. I do not suggest that the Police often hold unfair identification parade, but it is obviously desirable that there should be independent evidence to show that a parade has been properly held, and Deputy Inspector Kale recognized that in this case and summoned *panchas*, but if the prosecution wish to prove by independent testimony what happened at the parade, they must call the independent witness.

The *panchnama* is merely a record of what a *panch* sees, and the only use to which it can properly be put is that when the *panch* goes into the witness box and swears as to what he saw, the *panchnama* can be used as

a contemporary record to refresh his memory. But a Police Officer is not entitled to give evidence of what the *panch* told him, that he saw, and that is what it comes to if a Police Officer is allowed to put in the *panchnama*. A Police witness may state that he held a *panchnama* and offer to produce the record if the accused asks for it, but he cannot bring it on record in his evidence-in-chief. If the Police hold a *panchnama*, and do not offer to call the *panch*, an inference may be drawn against them from the fact that the *panch* is not submitted for cross-examination. The putting in of a *panchnama* without calling the *panch* is not only an infringement of the rules of evidence against the admission of hearsay evidence, but it is unfair to the accused, because it enables the Police to get the advantage of evidence in corroboration without putting that evidence to the test of cross-examination. Such cross-examination might show that the *panch* was nothing but a Police agent and that his evidence is worthless. If the practice of allowing the prosecution to put in a *panchnama* without calling the *panch* is still in force despite the decision of this Court, I hope that Magistrates will see that it is stopped. Having regard to the extreme importance in this case of the identification of the accused by Gopal and Hasanali, and to the fact that evidence on this point was improperly admitted, the appeal must be allowed. I am not prepared to act on the uncorroborated testimony of the Police Officer as to what took place at this identification parade, particularly as evidence in corroboration was available and not called. The accused must therefore be acquitted. Fine, if paid, to be refunded.

S.

Appeal allowed.

MADRAS HIGH COURT Full Bench

Letters Patent Appeal No. 70 of 1939
December 9, 1940

LEACH, C. J., GENTLE AND KRISHNASWAMI
AYYANGAR, JJ.

Sri KASIKANANDA GNANACHARYA
SWAMIGAL—APPELLANT

versus

SARAVANAPERUMAL PILLAI

AND ANOTHER—RESPONDENTS

Limitation Act (IX of 1908), s. 14—*Ongus to prove good faith lies on person claiming benefit of s. 14.*

A person who claims to come within s. 14, Lim. Act, has to show that in pursuing his remedy in other proceedings he acted in good faith; the burden of showing lack of good faith is not on his opponent. This is made

(1) 34 Bom. L R 267; 136 Ind. Cas. 868; A I R 1932 Bom. 181; 33 Cr. L J 389; Ind. Rul. (1932) Bom. 22; (1932) Cr. Cas. 240.

clear by O. VII, r. 6, Civil P. C., and s. 103, Evi. Act. *Alagappa Chettiar v. Somasundara Chettiar* (1), **Overruled.** *Benodram Sen v. Brojendro Narain Roy* (2) and *Roy Dhunput Singh v. Madhomotee Dabia* (3), explained and distinguished.

L. P. A. against the judgment of Wadsworth, J., in C. M. A. No. 260 of 1938, dated August 25, 1939.

Messrs. K. Rajah Iyer and P. P. Ramabhadra Iyer, for the Appellant.

Mr. V. Ramaswamy Iyer, for the Respondents.

Leach, C. J.—The only question which arises in this appeal is whether a person who claims to come within s. 14, Lim. Act, has to show that in pursuing his remedy in other proceedings he acted in good faith or whether the burden of showing lack of good faith is on his opponent. The appellant obtained a decree on a promissory note against one Nataraja Pillai on October 22, 1930. On December 10, 1931, Nataraja Pillai sold certain immovable properties to the respondents. On August 12, 1932 the appellant attached these properties in execution of the decree which he had obtained on the promissory note and at the sale, which was held on January 15, 1935, he purchased the properties. When he desired to enter into possession he was obstructed by the respondents, who claimed title by reason of their purchase of the properties on December 10, 1931. On June 27, 1935 the appellant applied to the District Munsif of Manamadurai, in whose Court the execution proceedings had taken place, for an order against the respondents under O. XXI, r. 97, Civil P. C., requiring them to deliver possession to him. This application was dismissed by an order of the District Munsif passed on October 14, 1935. The appellant preferred an appeal to the Subordinate Judge of Sivaganga, who dismissed it on November 26, 1936, on the ground that the appellant's remedy was by suit and not by an appeal. Rule 103 of O. XXI provides that a party, not being a judgment-debtor, against whom an order is made under r. 98, r. 99 or r. 101 may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of a suit the order is conclusive.

On December 7, 1936 the appellant instituted the suit out of which this appeal arises. He asked for a declaration that the sale of the properties to the respondents was invalid and for an order requiring them to vacate. The respondents pleaded that the suit was barred by the law of limitation, and clearly it was if the time taken up by the appeal from the order of the District Munsif

dismissing the appellant's application under O. XXI, r. 97, was not to be excluded. The District Munsif held that the respondents' plea was well founded and dismissed the suit, but his decision was reversed on appeal by the Subordinate Judge. The respondents appealed to this Court and their appeal was allowed by Wadsworth, J. who however gave a certificate which has permitted the filing of the present appeal under cl. 15 of the Letters Patent.

There is nothing on the record which shows the circumstances under which the appellant filed the appeal against the dismissal of his application under O. XXI, r. 97 and the decision in this appeal must turn on the question on whom lies the burden of proof. Section 14, Lim. Act, says :

"In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

Then follow three explanations, but it is not necessary to set them out. Section 2 (7) defines "good faith" for the purposes of the Act. The definition is that nothing shall be deemed to be done in good faith which is not done with due care and attention. I should have thought that when a person is claiming the benefit of s. 14, Lim. Act, he must prove that he acted in good faith in instituting the earlier proceedings. Order VII, r. 6, Civil P. C., states that where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff shall show the ground upon which exemption from such law is claimed. This must mean that when a suit has been filed beyond the period allowed by law the burden of proving that there is ground for exemption from limitation is on the plaintiff, but apart from this the wording of s. 14, Lim. Act, seems to me to be here quite clear.

But a different opinion has been expressed by a Bench of this Court. In *Alagappa Chettiar v. Somasundara Chettiar* (1), Varadachariar, J. sitting with Mockett, J. discussed s. 14, Lim. Act, and it would appear that he was of the opinion that Privy Council in deciding *Benodram Sen v. Brojendro Narain Roy* (2) had placed the burden of proof on the defendant and not on the plaintiff. With the greatest respect to all that was said in the judgment of Varadachariar, J., I am unable to agree that the Judicial Committee

(1) (1937) M W N 465.

(2) 21 W R 97; 13 Beng. L R 169 (P C).

can there be taken to have laid down a rule that a person seeking the benefit of s. 14, Lim. Act, is not required to show that he acted *bona fide* in the previous proceedings and that it is incumbent on his opponent to prove *mala fides*. In that case, the Privy Council were considering the effect of s. 10, Lim. Act of 1859 and not s. 14 of that Act, which corresponds to s. 14 of the present Act. Section 20 of the Act of 1859 corresponds to Art. 182 of the Act of 1908 and it reads as follows :

"No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree or order or to keep the same in force within three years next preceding the application for such execution."

It was alleged in *Benodram Sen v. Brojendro Narain Roy* (2) that certain proceedings in execution had not been instituted *bona fide* and therefore the decree-holder was not entitled to claim a fresh starting point of limitation by reason of his application. There was nothing in the Lim. Act of 1859 which required the decree-holder to show *bona fides*, but in resisting the proceedings the person concerned set up a specific charge of *mala fides*. The Judicial Committee decided that in such circumstances the person who alleged *mala fides* ought to prove his allegation. There is nothing in the judgment in that case or in the judgment of the Privy Council in the earlier case in *Roy Dhunput Singh v. Madhomotee Dabia* (3), the earlier case referred to in *Benodram Sen v. Brojendro Narain Roy* (2) which can, in my opinion, be taken as supporting the interpretation placed upon s. 14, Lim. Act, in *Alagappa Chettiar v. Somasundara Chettiar* (1).

As I have already indicated, a person who asks the Court to hold that he is entitled to the benefit of s. 14 must in my judgment show that he comes within it. To the reasons I have given I may add that s. 103, Evi. Act, expressly states that the burden of proof of any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by law that the proof lies elsewhere. I have no hesitation in holding that in this case the burden of proving that he acted *bona fide* in his earlier action rests on the appellant. He has not made any attempt to show that in filing the appeal against the claim order he was acting on advice and the Court is left in entire ignorance why he appealed from the order on his application under O. XXI, r. 97 before he filed

the present suit. As the appellant has not shown that in filing the appeal he acted in good faith he is not entitled to the benefit of s. 14, Lim. Act. For these reasons I consider that the decision of Wadsworth, J. was correct and that the appeal should be dismissed with costs.

Gentle, J.—I agree.

Krishnaswami Ayyangar, J.—I also agree but I desire not to be understood as expressing any opinion on the question whether an appeal lay to the Subordinate Judge in the prior proceedings or not. The matter was argued on the assumption that no such appeal lay and that the remedy was by way of suit only.

N.-S.

Appeal dismissed.

CALCUTTA HIGH COURT

Suit No. 118 of 1940

June 26, 1940

LORT-WILLIAMS, J.

Syed MAHOMMED YAQUB—PLAINTIFF

versus

IMPERIAL BANK OF INDIA—DEFENDANT

Negotiable Instruments Act (XXVI of 1881), ss. 85 (1), 10—Plaintiff having current account in Bank drawing post dated cheque on Bank in favour of M—Plaintiff subsequently counter-mandling his order for payment—Bank acknowledging instruction but yet cashing cheque and making payment to M—Payment, if made without negligence—Payment, if in due course so as to discharge Bank.

The plaintiff had at all material times a current account with the defendant Bank. He drew a cheque, on the Bank in favour of M post dated March 20, 1937. On February 14, 1937, he wrote to the Bank counter-mandling that order for payment, which was acknowledged by the Bank on March 20, 1937. Nevertheless, and contrary to these instructions, on June 10, 1937, the Bank cashed the cheque, made payment to M, and debited the plaintiff's account with the amount :

Held, that the payment in this case was not made "without negligence" and was not, therefore, a payment made in due course, within the meaning of ss. 85 (1) and 10 so as to discharge the Bank. *Foley v. Hill* (1), *Cohen v. Hale* (2), *Wianholt v. Spitta* (3) and *Reade v. Royal Bank of Ireland* (4), relied on.

Messrs. I. P. Mukherjee and J. P. Mukherjee, for the Plaintiff.

Mr. S. Chowdhury, for the Defendant.

Judgment.—The plaintiff's claim is for money had and received. He had at all material times a current account with the defendant Bank. In the first week of February 1937 he drew a cheque, No. A14766, on the Bank for Rs. 6,250 in favour of B. S. Makani, post-dated March 20, 1937. On February 14, 1937, he wrote to the Bank counter-mandling

that order for payment, which was acknowledged by the Bank on March 20, 1937. Nevertheless, and contrary to these instructions, on June 10, 1937, the Bank cashed the cheque, made payment to Makani, and debited the plaintiff's account with the account. The plaintiff alleges and the Bank denies negligence. The Bank also relies on cl. 5 of its Current Account Rules, knowledge of which is admitted by the plaintiff, and which reads as follows:

"The Bank will register instructions from the drawer regarding cheques lost, stolen, etc., but cannot guarantee constituents against loss in such cases in event of a cheque being paid."

There can be no doubt that the Bank was guilty of negligence, which was the direct cause of the plaintiff's loss. In a letter dated July 12, 1937 from the Bank to Messrs. Thos. Cook and Son (Bankers) Ltd., it is stated that the payment had been made by mistake and through clerical oversight, and in a letter dated July 13, 1937 from the Bank's agent, he admitted that the payment had been made, on account of oversight due to rush of heavy work on a particular day, from the register of stopped cheques, and explained how the ledger-keeper had not followed the instructions regarding the recording of stop, and promised to make good the loss. In my opinion, the rule, relied on by the Bank is irrelevant. The cheque was not lost or stolen, and 'etc.' must be read *ejusdem generis*. The rule is intended to apply to events happening prior to the time when a cheque reaches the Bank and is presented for payment. Not to negligence committed by the Bank after presentation.

"The relation between a banker and his customer who pays money into the Bank is the ordinary relation of debtor and creditor, with the super-added obligation to honour the customer's cheques when the banker has sufficient assets of the customer available for that purpose, the money so paid into the Bank being, in fact, money lent to the banker on the terms that it should be repaid, when called for by cheque: *Foley v. Hill* (1) and the Negotiable Instruments Act, s. 31."

In s. 75 (1), Bills of Exchange Act, 1882, it is provided that the duty and authority of a banker to pay a cheque drawn on him by his customer are determined by countermand of payment. This Act is not applicable to India, but the Common Law, including the Law Merchant, is applicable to suits on the original side of this Court, and upon this point is the same as provided in s. 75 (1). Thus, in *Cohen v. Hale* (2) it was held that upon a cheque being stopped the position was the same as if it had never been given, and in

Wianholt v. Spitta (3), Lord Ellenborough observed that a stopped cheque became a piece of waste paper in the hands of the payee. In *Reade v. Royal Bank of Ireland* (4), the plaintiff had a current account in the defendant's bank, which was in funds. The plaintiff drew a cheque on this account in payment of a gambling debt, but prior to its presentation countermanded by telegram payment of the cheque. Notwithstanding the countermand, the defendants subsequently honoured the cheque on presentment. The plaintiff did not sue the payee of the cheque for the recovery of the money, nor did he prove that he could not have recovered from the payee. It was held by the Court of appeal that the defendants were guilty of a breach of duty as bankers, and that the plaintiff was entitled to recover from them the amount of the cheque. *Ronan, L. J.*, said at p. 25*:

"But what was the effect of the countermand? Section 75, sub-s. (1), Bills of Exchange Act, 1882, says (and the Lord Justice read the words of the section). Four years before, the case in *Cohen v. Hale* (2) was decided. It is cited as applying to the section by Sir M. Chalmers, and referred to Hart on Banking as the existing law. I take the statement of the case from pp. 326-327 of that book. This puts the case in the same position as if the payment had been made without any cheque for the amount having ever existed. It follows, therefore, that as between the plaintiff and the defendant the case must be treated precisely in the same way as I have dealt with the case of no cheque and no request. The question here would directly arise if the plaintiff brought an action of debt for his balance, and the bank sought to set off this payment *pro tanto*."

And O'Connor, L. J., said at p. 26*:

"The relation of a bank to its customer is that of debtor to creditor. A bank can, and, indeed must, diminish, its indebtedness to the customer by obeying the mandate of the customer to pay away to third parties moneys up to the amount which the bank owes to the customer, or, in other words, which is standing to the credit of the customers' current account. The mandate is, of course, usually given by cheque. But a bank cannot diminish its indebtedness where no such mandate is given, or where a mandate is given but subsequently withdrawn, for that is the same as if no mandate were given at all."

Moreover, though s. 85 (1), Negotiable Instruments Act, provides that where a cheque payable to order purports to be endorsed by or on behalf of the payee, the drawee is discharged by payment in due course. Section 10 defines "payment in due course" as meaning payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive.

(1) (1848) 2 H L C 28.

(2) (1878) 3 Q B D 371; 47 L J Q B 496; 39 L T 35; 26 W R 680.

(3) (1813) 3 Camp 377.

(4) (1922) 2 Ir. R 22.

*Pages of (1922) 2 Ir. R.—[Ed.]

payment of the amount therein mentioned. As I have shown already, the payment in this case was not made "without negligence" and was not, therefore, a payment made in due course, so as to discharge the bank. The result is that the bank was not entitled to debit the plaintiffs' account and is still indebted to him in the sum of Rs. 6,250. The Bank does not pay interest on current accounts, therefore, the plaintiff has not suffered any damage on that score, and no other damage has been proved. The plaintiff is entitled to judgment for Rs. 6,250 only with interest and costs.

a.D.

Suit decreed.

MADRAS HIGH COURT

Referred Trial No. 53 and Criminal Appeal

No. 225 of 1940

August 5, 1940

KING, J.

on difference between

GENTLE AND PATANJALI SASTRI, JJ.

In re SANKAPPA SHETTY—

ACCUSED

Penal Code (Act XLV of 1860), ss. 84, 302—Held on facts that plea of insanity was not established and accused guilty of murder—Case held did not call for extreme penalty—Murder—Sentence—Absence of motive is material in considering question of sentence—Act unpremeditated and result of impulse and temper—Proper sentence—Plea of insanity—Burden of proof—Circumstances to be considered in considering plea of insanity—Principles to be applied to case of insanity, stated—Brutal assault by husband on wife—Husband not known to be ill-treating his wife—Insanity of husband, if can be presumed from mere absence of motive—Conflicting statements by person, whether sign of insanity—Criminal trial—Evidence—Murder—Deliberate opinion of doctor conducting autopsy that nature and number of wounds indicated that either there was deep motive for murder or murderer must have been insane—Admissibility—Prosecution witness not cross-examined by accused before committing Court—Statement by him of incident indicating accused's insanity in Sessions Court—His omission to state in committing Court does not affect his veracity.

A loving husband and an affectionate father who had never been known to have beaten or ill-treated his wife on any previous occasion suddenly killed her in a closed room bolted from inside by battering her head and body with a sitting plank inflicting as many as twenty wounds and bruises. There was an absence of any motive for the crime. The accused pleaded insanity. The evidence showed that the accused had been strange and eccentric in his actions for some days previous to the committing of the crime. He was labouring under a delusion that some relation of his had given him drugs and that *krutrima* (witch craft) had been done to him. After the room in which the occurrence took place was broken open by five persons, the accused made no attempt to escape but appeared dazed:

Held, (per King and Gentle, JJ., Patanjali Sastri,

J., *contra*.)—That the offence committed was murder and the plea of insanity was not established.

Held, further that the case did not call for the extreme penalty of the law and the sentence of transportation was proper as there was no premeditation and the accused must have received what he felt to be considerable provocation before he attacked his wife in the way he did. [p. 314, col. 2.]

Per Gentle, J.—The absence of an apparent motive on the part of the accused in committing a murder is material when the question of sentence is considered. Where the offence committed was not premeditated in any way but was the result of impulse and temper, the proper sentence is one of transportation for life, though the assault was a violent one. [p. 338, col. 1.]

Per King and Patanjali Sastri, JJ.—The burden of proving insanity is cast upon the accused by s. 105, Evi. Act, and under s. 84, I. P. C., he must prove that at the time of the killing he was by reason of unsoundness of mind, incapable of knowing the nature of his act or that he was doing what was wrong or contrary to law. [p. 343, col. 1.]

Per Patanjali Sastri, J.—It is true that a mere lack of apparent motive for the deed does not necessarily or always lead to an inference of intellectual aberration or insanity, but a total lack of an apparent motive may in some cases, taken along with other facts legitimately give rise to an inference that the act was done under an insane impulse. Similarly, it is true to say, that a crime is not excused by its own atrocity. But it cannot be said that the nature of the act or the mode of perpetrating it can under no circumstances be taken into account in considering a plea of insanity. It may be that as a rule of prudence, Courts will be slow to infer from such material that the person committing the act was not conscious of its criminality. But there is no warrant for laying down, as a rule of evidence that one must look outside the act itself for the evidence as to how much the accused knew about it. The truth is that in dealing with all such cases no general rule can be applied and the only proper course to adopt is to decide each case on its own peculiar facts bearing in mind, of course, that the point for determination is whether the evidence before the Court is sufficient to establish that the person charged with the offence was not conscious of the nature of the act he was doing or that he was doing what was wrong or contrary to law. 170 Ind. Cas. 74 (1) and 91 Ind. Cas. 78 (3), referred to. [p. 340, col. 2.]

Per Gentle, J.—Where a husband who has never been known to have ill-treated his wife, assaults his wife which results in her death, from the mere fact that there was an absence of a deep-seated motive, it cannot be said that the husband must have been insane. 170 Ind. Cas. 74 (1), relied on.

A conflicting statement by a person is not necessarily a sign of insanity.

Per Patanjali Sastri, J.—The deliberate opinion of a doctor who conducted the autopsy that from the nature and number of the injuries on the body of the deceased which he had examined, there must have been either some deep-seated motive for the murder or the offender must have been insane, is admissible in evidence. *M'Naghten's case* (2), relied on. [p. 339, col. 1.]

Where a prosecution witness who has not been cross-examined by the accused in the committing Magistrate's Court states an incident indicating the accused's insanity in the Sessions Court for the first time, no adverse inference against the veracity of the witness can be drawn from his omission to refer to the incident in committing Magistrate's Court though he might have voluntarily placed the information before the Magistrate.

Refd. Trial and Cr. A. referred by the Court of the Session, South Kanara Division, dated March 11, 1940.

Mr. *Sivaramakrishnan*, for the Accused.
The Public Prosecutor, for the Crown.

Gentle, J.—The appellant has been convicted by the learned Sessions Judge of South Kanara of the offence of murder under s. 302, I. P. C., and has been sentenced to death. The appellant is Sankappa Shetty and the deceased was his wife, Kaveri. They had been married for eight years and had four children, issues of the marriage, of the ages between seven years and 18 months. The offence is alleged to have taken place in the house of Honnaya Hegde who is the uncle of the mother of the deceased. P. W. No. 2, Hoovamma, is the wife of Honnaya Hegde. In the community to which the accused and the deceased belonged, it is the custom for the husband to bear the expenses of the wife's confinement. Eighteen months before the death of the deceased, as her parents were dead, the deceased went to the house of P. W. No. 2 in Kuthavoor village for her confinement. The appellant was unable to bear the cost of the confinement or for his wife to return to him at his own village about 11 miles distant, and during the period of 18 months following her last confinement she remained at her relation's house where he visited her from time to time.

On November 28, 1939, the appellant arrived at the house. The deceased, P. W. No. 2 and her son, P. W. No. 3, were then present. He spent the night with his wife and children in a room in the house. On November 29, 1939, P. Ws. Nos. 2, 3 and 5, the brother of the deceased who also lived in the house but had been absent the previous night, took their food with the appellant and the deceased at about 10 A. M. The appellant asked the deceased to give him Rs. 25 and she replied that if he returned her jewellery which he had previously taken, she would let him have that amount. It was said that upon her marriage she had jewellery worth about Rs. 200 which the appellant had taken and upon which he had raised some money. About noon, P. W. Nos. 2, 3 and a servant, P. W. No. 4, went to a building about 45 feet away from the room which the deceased, the appellant and their children occupied, in order to pound paddy. About two hours later, these three witnesses heard the deceased cry "killing" and the children shouting "father is killing mother." They went to the room in the house and found the door shut and bolted or locked from inside. P. Ws. Nos. 2 and 3 went

to an open window and saw the appellant inflicting a blow with a plank, upon which food was served, upon the deceased's temple. P. W. No. 5 was not then in the house, having gone out. P. W. No. 2 immediately raised an alarm which brought two neighbours, P. Ws. Nos. 6 and 7. P. W. No. 3 fetched P. Ws. Nos. 9 and 10 who were working nearby. P. W. No. 6 forced open the door with a crowbar. The deceased was lying dead on the floor, and the appellant was seized, brought out and secured. He appears to have offered but little, if any, resistance and some of the witnesses said he appeared dazed. Communication was made to P. W. No. 16, the village patel, who sent his report to the Police and the Police Officer arrived later.

On December 1, 1939, P. W. No. 1, the Medical Officer in charge of the Local Fund Hospital at Mulki, performed the *post mortem* examination upon the body of the deceased. He found 20 injuries of which 10 were on the head and the others on the various parts of her body. Seventeen of the injuries could have been caused by the plank with which P. Ws. Nos. 2 and 3 had seen him striking the deceased, two of the head injuries would have occasioned death within five minutes. Learned Counsel on behalf of the appellant stated that he was unable to suggest that the evidence of the above witnesses could in any way be attacked or disputed. There is nothing which shows that these witnesses were unreliable or their evidence unacceptable and that it is beyond doubt that the appellant caused the death of the deceased by striking her with a wooden plank which, in the way he used it, was a dangerous weapon. The defence which was put forward before the learned Sessions Judge and which has been argued before us is that at the time he killed his wife, the appellant was insane. Section 84, I. P. C., provides as follows:

"Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law."

The question of the sanity of the appellant was not raised or suggested to be in doubt until the trial in the Sessions Court which commenced in February 1940, about three months after the occurrence. In the statement which he made before the committing Magistrate on January 10, 1940, the appellant said he did not know anything and that the rest, he would tell in the higher Court; he had no witnesses to be examined in that Court; it was not possible for him to give a list of witnesses at that stage, as he would

produce them in the Sessions Court. The facts and circumstances which are relied upon to substantiate the plea of the insanity are (1) the matters given in evidence in the Sessions Court by P. Ws. Nos. 1 and 14 and P. W. No. 1; (2) that the deceased and the appellant throughout their married life had lived upon affectionate and friendly terms; (3) that there was no motive to cause the appellant to take the life of the deceased and (4) that when the prosecution witnesses went to the scene of occurrence, the appellant appeared to be dazed and offered no resistance when he was seized and secured. All the witnesses who were acquainted with the deceased and the appellant said they were always upon affectionate terms together.

Prior to the happenings on November 28, 1939, there is no doubt that the appellant was in some financial embarrassment. He was also concerned in regard to some property belonging to his wife or in which she was entitled to a share and which he described as "our" property. The *ejaman* of the deceased's family is the husband of P. W. No. 2, a mortgage was subsisting upon this property and the *ejaman* had not kept up payment of the interest and some amount in respect both of principal and interest was outstanding. Some approaches to, or negotiations with, a bank in Mangalore had taken place to borrow the necessary funds to discharge the mortgage debt, but these had not been successful. On November 23, 1939, six days before the occurrence P. W. No. 15, a Sub-Inspector of Police had questioned the appellant regarding a piece of jewellery which was stolen and examined him as a witness who had some knowledge of the theft. The relevancy of these two matters will appear later.

It is now convenient to refer to the testimony of the three witnesses upon which the defence relies. P. W. No. 1, the Medical Officer who performed the *post mortem* upon the body of the deceased, was asked about the mental condition of the appellant when he was cross-examined before the learned Sessions Judge. He said that from the nature and the number of the injuries which he found the attack was very brutal. There must be some deep-seated motive for a man to cause so many injuries and if the deep-seated motive was absent, then the assailant must be an insane man especially when he is the husband of the victim. In reply to further questions by the learned Advocate for the appellant, he then gave the following evidence. One or two days before the death of the deceased, he travelled in a bus with the appellant. Both of them alighted

at a village called Mulki. A little later, he said, he saw the appellant prostrating himself before a man who had been a passenger in the bus and talking incoherently to him, that his behaviour was not quite normal and that he was excited. In one part of his evidence he said he could not make out what the appellant was saying. Later he stated he did not pay any attention to what exact words were uttered, but corrected himself and said that he heard now and then some of the words which the appellant spoke to the passenger and which were "you are my saviour," "had it not been for you I would have been ruined," and "a telegram must be sent to Mangalore" and later still the witness said he did not catch the subject-matter of the talk. The appellant bent his head and touched the feet of the passenger several times. He did not say that the passenger presented the attentions of the appellant or that he tried to get rid of or escape from him, and added that whilst this man was a stranger to the witness, he was not sure that he was a stranger to the appellant.

The appellant is a villager and conduct of this kind is not a unique way for such a man expressing his thanks and appreciation for help and services rendered by another who might be in a higher station in life. If, as he said, he did not know what the subject was of the remarks made by the appellant and heard only the words which are set out above, it is difficult to see how he could say the appellant was talking incoherently. Hearing only three short disjointed sentence of a conversation without knowing the remainder or the subject of the remarks should not lead to an inevitable conclusion that the words which were heard must be incoherent, that is to say, inconsistent. The sentences seem to me to be more compatible with consistency than with incoherence. The witness said that it was the words he heard and, being incoherent, made him understand the appellant was not in his senses. As a general proposition, one cannot accept the opinion which this witness expressed that in the absence of what he described as a deep-seated motive, the brutal assault must have been committed by an insane man. P. W. No. 1 said that later he went to the house of one Raman Shetty where he saw P. W. No. 14, Jayarama Shetty, and told him of the incident of the appellant behaving "like a mad man." P. W. No. 14 said he had been so informed.

P. W. No. 14, Jayarama Shetty, in examination-in-chief said that he knew the appellant, who had stayed in his house at Mulki

from November 26 to 28 and that it was the custom of the appellant to do this whenever he was in that village. During this particular visit, the appellant told him that there was a debt upon "our" property, Rs. 1,000 was due which it was necessary to pay and to do this, application had been made to a bank in Manglore for a loan which at first was promised but subsequently it had not been sanctioned. P. W. No. 5, the deceased's brother, who lives at the house of P. W. No. 2, said in cross-examination that there was a mortgage upon their family property the amount of which had been reduced to Rs. 3,000, it was decided to raise a loan to discharge this, and the appellant had been to a bank in Manglore to obtain a loan. He apparently was not asked and did not say whether the bank declined to grant it. There is no suggestion that the evidence of P. W. No. 5 was incorrect and therefore the statements by the appellant in regard to the mortgage and the attempts to obtain a loan are substantially correct. The appellant also told P. W. No. 14 that on account of financial difficulties he had not been able to cultivate his land and had let it out on lease, although no evidence was forthcoming about this, as the appellant was in straitened circumstances, it is likely to be correct. In re-examination, P. W. No. 14 said that when the appellant discussed financial matters, he talked like a sane man. From this part of this evidence, there is nothing from which it can be contended that the appellant was not in possession of his senses. Reliance is placed upon the evidence which this witness gave in his cross-examination. In this part of his testimony, P. W. No. 14 said that P. W. No. 1 had told him of a man behaving like a mad man, and that he, P. W. No. 14, guessed that P. W. No. 1 was referring to the appellant. On the night of November 26, 1939, the appellant stayed in his house, his behaviour was not quite normal, he was talking much, which talk was incoherent and nonsense. He expressed the fear he was going to die, that "Thamma," (younger brother or cousin) had given him some medicine which had made him ill and that he felt a strange sensation in his head. It was this talk which the witness said caused him to guess that the appellant was the man to whom P. W. No. 1 had referred as the former told him he had arrived by bus.

On November 27, 1939, P. W. No. 14 said the appellant was acting or behaving like a mad man on the road, someone informed him that a man who had stayed at his house the previous night was behaving in this way

and on going up to a large crowd found the appellant, he ascertained that some rupees had been scattered on the road which had been picked up by a Konkani, except two, which the witness secured and took the appellant back to his house. He did not see the appellant throwing money on the road. At about 8-30 that evening the appellant suddenly got up and struck him a blow, attempted to run away, and with the help of two other persons who were present he was caught, brought back and made to sit down. He wept like a child and when asked why he struck the witness he said "When I looked at you, you appeared frightful. So I beat you. I am sorry for having beaten you." Later that evening he the appellant ran from an upper story in the house saying that he would jump into a well. On the morning of November 28, 1939, P. W. No. 14 said the appellant was all right. He took him to the bus station, obtained a ticket for him to Kimmigowli which he gave to the appellant and asked some man in the bus to arrange for two people to go with him. At the conclusion of his evidence, he, the witness, said that only occasionally the appellant would go off his head and that for most part of the time during his stay, the appellant was all right, by which the witness must mean he was behaving normally. There can be little doubt, indeed, the learned Public Prosecutor said that he would concede, that at times the appellant's conduct and behaviour were peculiar, but the expressions of regret which the appellant made to P. W. No. 14 after he had struck him indicate that he realized what he had done and that it was wrong. The incoherency and nonsense mentioned by P. W. No. 14 appear to refer to the appellant saying he feared he might die and blamed "Thamma" for having given him some medicine which made him feel ill and that he felt a strange sensation in his head. The evidence does not establish it was the appellant who threw money on the road; the defence suggests this should be inferred. The incident when he said he would jump into a well, if it occurred, reflects a suicidal and not a homicidal tendency. The effect of his evidence, whilst it shows the appellant's actions and conduct were strange and eccentric does not establish either that he did not know what he was doing or did not realize what he had done was wrong.

P. Ws. Nos. 1 and 14 both described the appellant's conduct as not quite normal which is not unsoundness of mind of the degree required by s. 84, I. P. C. Neither P. W. No. 1 nor P. W. No. 14 mentioned any of the

matters to which I have just referred when they gave evidence before the Committing Magistrate and they were disclosed for the first time in the Sessions Court. Whatever might excuse P. W. No. 14 not referring earlier to the conduct of the appellant, P. W. No. 1 is a gentleman of education and a doctor, and one would have thought that if he had formed the opinion that the appellant was not responsible for his actions, he might have mentioned it earlier and not wait until he gave evidence in the Sessions Court. Mr. Ethiraj, the learned Public Prosecutor, however, stated that he did not wish that the position of the appellant should be adversely affected by the failure of these two witnesses to disclose the matters to which they spoke; would make no observations regarding the belated nature of their evidence but confine himself to criticising their testimony. He submitted it did not establish that the appellant, at the time he inflicted the injuries upon his wife, did not know what he was doing, or if he did not know that it was wrong or unlawful.

D. W. No. 1, Sridhara Shetty, did not give evidence until the trial in the Sessions Court. He said that he knew the appellant and saw him at the end of November in Kimmigowli sitting on a bench in a coffee hotel. There were other people present including a man named Degu Bhandari, who gave some rupees to the appellant. The witness said that he told the appellant that P. W. No. 14 had sent word that he (the appellant) should be sent to his house escorted by two other persons and asked him whether he was going to his wife's house at Kodappa (this is the name of the house where the deceased was living with P. W. No. 2). The appellant replied that he had been drugged, *krutrima* has been done to him and went on talking. The witness said he paid no attention to this. Upon being asked again where he intended to go, the appellant informed him that he was going to Kodappa. The witness said that he told two men, Isthu and Babu, who were not called to give evidence, to take the appellant and leave him at Kodappa. Incidentally, P. Ws. Nos. 2 and 3 when cross-examined said that the appellant arrived alone. D. W. No. 1 did not remain long at the hotel or talk to him much. When the appellant said he would go to his relations at Kodappa he spoke rationally, that he was now and then all right and talked properly. The only matter to which this witness deposed showing abnormality was the appellant's reference to drugs and *krutrima* and as he remained only a

short time his statement that the appellant was all right now and then, suggesting at other times he was not, carries little, if any, weight.

In the Sessions Court, the appellant made a lengthy statement in the course of which he said that prior to the occurrence he was not well and felt that his enemy had administered evil drugs to him. At that time a man named Aga Kala Dasu Chetty had stolen a jewel. He had informed the Sub-Inspector who was responsible for the theft and ten days afterwards his illness grew worse and he had some fear and a sensation in his stomach. On one occasion when in the dark he felt as though he saw an apparition like a big man. In the journey to Mulki in the bus he felt a sort of fear and was unwell. He lost some rupees which he had on arrival and asked P. W. No. 14 and others where they had gone. The next day he felt better. He referred to his stay with P. W. No. 14 and the visit to the hotel of Kimmigowli where he had taken food. He said two persons accompanied him to the house where his wife was, one a Christian and the other a dark man. He felt a chill and was shivering as if he had fever. On arrival at the house, his wife and P. W. No. 2 asked him if he had fever. They applied some medicine to his head and gave him a bath. The next day he said that P. W. No. 2 and his wife told him that there was some talk that he had stolen the jewel. Later he said his wife alone told him this. At noon his wife roused him from his sleep and asked him to take some food and then inquired about the stolen jewellery and at that time he was not well. The statement then continues that he was unaware after this if he beat his wife or not. There was no disagreement between them; he did not ask his wife for money; she had none; and that whenever she needed any he gave it to her. The next day he was told by the Police that he had killed his wife and he said that he had no recollection of doing so. P. W. No. 2 and her son P. W. No. 3 bore feelings of enmity against him arising out of a mortgage loan to be obtained from a bank, a disagreement over a marriage and a dispute regarding money, and they had given evidence against him on account of this animosity. He added that he first became aware of his surroundings during the night when he was in the yard with his legs and hands tied. The learned Sessions Judge put to the appellant a large number of questions which more resembles cross-examination than an examination under s. 342, Criminal P. C.

P. Ws. Nos. 2 and 3 denied the appellant was brought to the house by two men, that he was ill on arrival and had been given treatment and a bath. These two witnesses, and P. W. No. 5 said that he was in his senses and alright. The evidence regarding the occurrence is given by P. Ws. Nos. 2 and 3; it was not suggested they were not speaking other than the truth. There is no reason to reject their testimony upon the appellant's state and condition of mind. The case for the appellant is that his conduct and behaviour during the three days prior to and on the day of the occurrence shows that he was of unsound mind to a degree that he was unable to distinguish between right and wrong. According to his own statement, he underwent a 'black out' at the time of the attack upon the deceased and his memory of that event is a complete blank. There was no evidence, indeed there was no suggestion, that previous to the period covered by the occurrence and the three days prior thereto or at any time since, the appellant has shown any signs of mental derangement, his unsoundness of mind being limited to those few days. In his statement, he gives the places to which he went during that time and his arrival at Kodappa house. His statement is at variance with the evidence of P. Ws. Nos. 2 and 3 regarding his arrival with two persons and being given treatment and a bath, but a conflicting statement is not necessarily a sign of insanity. He therefore had a recollection of his movements during this period. His reference to the loss of some money at Mulki and his enquiries of P. W. No. 14 what had become of it doubtless refers to the affair in the road to which this witness spoke and the inference is sought to be drawn that his mind is a blank in respect of that incident. Whilst this incident may have occurred, one is dependent upon the accused's own statement that he has no recollection of it, the suggestion being that this freak of memory is similar to his want of recollection of the occurrence in the room where his wife was killed. If he was suffering from unsoundness of mind, it is unlikely it would have been manifest only during the period of four days and terminated immediately after the attack upon his wife, when, for a short time, the suggestion is that he became a homicidal maniac.

Even accepting the whole of the evidence of P. Ws. Nos. 1, 14 and D. W. No. 1 of whom the first two witnesses described the conduct of the appellant as not quite normal, it shows he was strange and eccentric, he was

under a delusion that a brother or cousin had given him drugs and that *krutrima* had been done to him, and putting it at the highest, was acting upon some insane impulse when he struck P. W. No. 14, but nevertheless, his expression of regret shows he must have known he was then doing what was wrong. P. W. No. 14 said that when he told him of his financial troubles, he talked like a sane man and it would seem with substantial accuracy. D. W. No. 1 said he spoke rationally when he said he was going to his relations at Kodappa house. His cognitive faculties were therefore not absent. When a man is worried with his affairs or distracted about money matters, as the appellant was, slight annoyance may rouse his anger which at other times would be left unperturbed and may cause him to lose his temper and do an act even of violence. Can it be said that such a person is insane to a degree the section requires? The appellant and the deceased were in the room for two hours prior to the occurrence. Their young children were with them but are too young to give evidence of what transpired. Whilst there is no apparent motive for the appellant's act, it is not without some significance that the door was bolted from inside the room at the time and although there is no evidence who secured the door the attack was made at a time when entry into the room was obstructed and prevented. This factor is relevant also when considering the appellant's knowledge. The absence of motive and the violence used to cause the death of another alone are not sufficient to establish that the assailant was insane at the time: see *Emperor v. Gedka Goala* (1), and the cases cited in the judgment.

The last two matters requiring consideration are that the appellant appeared dazed and offered no resistance when he was secured after the occurrence. It is likely that he would be dazed when he realized what he had done and as five men broke into the room, in such circumstances a man who is not out of his senses would appreciate the futility of offering resistance. If the appellant had exhibited violence to, and fought with, these men, such conduct might well reflect a disordered mind. If an inference is to be drawn from his behaviour at this time, it is that he appreciated what he had done and knew that resistance was useless.

(1) 16 Pat. 333; 170 Ind. Cas. 74; A. I. R 1937 Pat. 363; 18 P. L. T. 294; 10 R. P. 66; 38 Cr. L. J. 846; 3 B. R. 650.

Upon consideration of all the evidence, facts and circumstances, including the absence of an apparent motive and the appellant's conduct both before and after the occurrence, it is not established that he did not understand the nature and quality of his act. Although his behaviour may have been unusual and strange, he was not suffering from unsoundness of mind so as to be incapable of knowing the nature of his act or that he was doing what was either wrong or contrary to law when he put his wife to death. The defence under s. 84, I. P. C. should therefore fail.

The appellant inflicted grievous injuries upon his wife with a wooden plank which was, by the way in which it was used, a dangerous weapon. The persistence of the attack evidenced by the number of injuries and the grievous nature of at least two of them show that when he was beating his wife he intended to kill her. Therefore the offence which he committed is murder. The absence of an apparent motive is material when the question of sentence is considered. The offence which the appellant committed was not premeditated in any way and must have been the result of impulse and temper. In these circumstances, I consider that although the assault was a violent one, the proper sentence is one of transportation for life. I would therefore, affirm the conviction but reduce the sentence.

Patanjali Sastri, J.—I regret I am unable to agree with my learned brother in the conclusion he has arrived at. I would accept the appellant's plea of insanity and set aside his conviction. The facts of the case have been fully stated in the judgment of my learned brother which I have had the advantage of reading and it is unnecessary to recapitulate them here. I would content myself with briefly indicating the grounds of my decision. The appellant's plea is based upon s. 84, I. P. C., and the onus of establishing it is on the appellant; see s. 105, Illustration (a), Evl. Act. The question for determination therefore is whether the appellant has succeeded in proving that when he killed his wife, he was incapable, by reason of unsoundness of mind, of knowing the nature of the act or that he was doing what was either wrong or contrary to law. It may be observed at once that the appellant was not placed under any medical observation soon after the occurrence and we have thus no expert medical evidence relating to the cognitive faculties of his mind during the period immediately following the occurrence. There is, however,

sufficient evidence, in my opinion, to establish the appellant's plea of insanity.

In the first place, there is such a complete lack of apparent motive and the act of killing was done with such needless fury and violence that it is difficult to regard it as the act of a person in the unimpaired possession of his cognitive faculties, especially as the deceased was the appellant's wife and it is abundantly proved by the prosecution evidence itself that they were living on quite affectionate terms. Some attempt was no doubt made by the prosecution to suggest a motive of a sort, namely that the appellant had previously taken and sold the jewels of the deceased for his own purposes and when he asked her on the morning of the day of occurrence to give him Rs. 25, the latter replied that if he returned what he took from her previously, meaning the jewels, she would pay the sum required. This is said to have so enraged the appellant that he killed her in a fury. P. Ws. Nos. 2, 3 and 5 speak to this incident in the morning but the story is very thin and the witnesses themselves admit that even after the appellant took away the jewels of the deceased, they were living on very affectionate terms. P. W. No. 2 the grandaunt of the deceased said:

"Yes, the accused was showing great affection to her. Kaveri never complained to me or to my husband about the accused. They were loving each other very much. Even about his having taken away her jewels, she never complained to me or to any of us. The accused was also loving his children very much."

P. W. No. 5, the brother of the deceased, said:

"Kaveri did complain to me about the accused having sold away her jewels and having himself utilized the proceeds. Yes, in spite of that both husband and wife were loving each other. Up till that Wednesday I have not known of any instance of the accused having beaten or ill-treated Kaveri on any other occasion."

This evidence clearly shows that there was no ill-feeling or misunderstanding due to the appellant having sold away his wife's jewels and it could not have possibly served as a motive prompting the perpetration of the deed. Then as to the appellant having asked his wife for Rs. 25, on the morning of the day of the occurrence, it is difficult to accept the evidence as it was admitted by P. W. No. 5 that the deceased had no money at the time and that the appellant also knew that she had no money, and, in any case, it has been elicited from P. W. No. 2 that the appellant did not show any signs of having got irritated by his wife's alleged answer to his demand for money. The attempt, there-

fore, on the part of the prosecution to make out that the appellant's act of killing his wife was prompted by a rational motive must be held to have completely failed and indeed, the learned Public Prosecutor made no such attempt before us.

We have thus the spectacle of a loving husband and an affectionate father who had never been known to have beaten or ill-treated his wife on any previous occasion suddenly killing her by battering her head and body with a sitting plank inflicting as many as twenty wounds and bruises. The *post mortem* certificate (Ex. K) describing the injuries shows that the appellant must have been seized with a frenzy of violence which led him to deal blow after blow indiscriminately all over the body, and the doctor (P. W. No. 1) who conducted the autopsy gave it as his deliberate opinion that from the nature and number of the injuries which he had examined, there must have been either some deep-seated motive or the man must have been insane. Comment was made that this was a mere matter of opinion. I did not however understand the Public Prosecutor to argue that it is inadmissible in evidence. In *M'Naghten's case* (2) the learned Judges who were consulted by the House of Lords expressed the view that a medical man who had been present in Court and heard the evidence might be asked as a matter of science, whether the facts, assuming them to be true, showed a state of mind incapable of distinguishing between right and wrong. If so, I do not see why the opinion of P. W. No. 1, who was a medical man and had himself seen the injuries on the body of the deceased, should be rejected as inadmissible. Even apart from this opinion of P. W. No. 1, I consider that the nature and circumstances of the appellant's act justify the inference that it must have been committed under an insane impulse when he was incapable of understanding what he was doing. This inference is supported by the evidence in the case relating to the abnormal behaviour of the appellant spoken to by P. Ws. Nos. 1 and 14 during the two days immediately preceding the occurrence. P. W. No. 1 said that one or two days before the death of the deceased, he saw the appellant at Mulki "behaving like a mad man." He deposed:

"I saw this accused prostrating before a passenger (in the bus) and talking incoherently to him. His behaviour that day was not quite normal. He was excited. I could not make out what he was saying to the passenger.....I told him (P. W. No. 14) about this incident—the accused behaving like a mad man."

(2) (1843) 10 Cl. & F 200; 59 R R 85.

In re examination he added :

"The accused's prostrating to the passenger" was on the road. He did not lie flat on the ground. He simply stooped and bent his head and touched the feet of the passenger so many times: He said 'You are my saviour and so on'.....He would say some words, now and then, touch the feet of the passenger and then keep quiet and then he would say some words. The words that I caught now and then, while he talked, were incoherent and they made me understand that he was not in his senses."

It is true that this witness did not refer to this incident when he was examined before the Committing Magistrate. But it must be remembered that he was not cross-examined on behalf of the appellant in that Court and though he might have voluntarily placed the information that he possessed before the Magistrate, no inference against his veracity could, in my opinion, be drawn from his omission to do so. It might well be that he thought that it is none of his business to bring it to the notice of the Court. It might also be that he did not want to run the risk of his statement being discounted or disbelieved as something volunteered on account of his supposed interest in the appellant. The learned Public Prosecutor stated quite fairly before us that he would not question the veracity of this witness on the ground that he failed to refer to this incident when he gave evidence before the Committing Magistrate and argued only that taking his evidence to be true, it was not sufficient to support a plea under s. 84, I. P. C. P. W. No. 14, also gave evidence as to the accused's state of mind during the same period, *i. e.*, the two days prior to the occurrence. He is a resident of Mulki and he said that whenever the appellant came there, he used to take his food in a hotel but stay in the witness's house during the nights. This witness was examined for the prosecution to show the financial condition of the appellant at about the time of the occurrence. In cross-examination, however, certain important incidents throwing light on the appellant's state of mind have been elicited. The witness said that on the night of the 26th, when the appellant came to his house, the appellant was talking incoherently and even talked nonsense. He expressed some fear and was saying that he was going to die. He said that "Thamma" (younger brother or cousin) had given him some medicine and after that he had been keeping ill and was feeling a strange sensation in his head. On November 27th witness saw the appellant acting and behaving like a mad man on the road in Mulki. Some one told the witness that the man who had slept in his house on the previous night was behaving like a mad man on the road,

whereupon the witness went and saw a large crowd round the appellant on the road where he noticed rupees lying scattered. Some of the coins had been picked up by a Konkani and the witness picked up two which had been left on the road and took the appellant to his house. The witness also said that on hearing his voice, the appellant sat down on the road.

After the appellant was taken to the house at about 8-30 in the night, he suddenly got up and gave the witness a blow when the latter was talking to certain other persons in the room. After the appellant gave the blow, he attempted to run and the witness and another caught hold of him and brought him back to the house. When asked why he beat the witness, the appellant did not talk at all for an hour; then he wept like a child and said that he was sorry, explaining that he beat the witness as the latter "appeared frightful" to look at. Later, in the course of the night, the appellant ran down from the upper storey saying that he would jump into a well. The next morning, however, the appellant was all right and left the house of the witness saying that he would go to his place. The witness accompanied him to the bus station and bought him a ticket to Kinnigowli where the appellant wanted to go. Finding one Deju Shetti also going to Kinnigowli, the witness asked him to take the appellant to one Shridhara Shetti there and to request the latter to arrange for two men to escort the appellant to this place. In view of these statements of the witness the prosecution obtained permission to cross-examine him. All that was elicited in such cross-examination to shake his credit was that he did not refer to these incidents when he was examined before the Committing Magistrate. He explained the omission by saying that the prosecuting inspector in that Court did not ask him what all talks passed between him and the appellant but asked him only to say what the appellant told him about his financial difficulties and to answer only questions that were put to him. The witness denied that the appellant was his particular friend. He added that only occasionally the appellant would go off his head and would think and talk incoherently, but most of the time during his stay on that occasion, the appellant was all right. As in the case of P. W. No. 1, the learned Public Prosecutor said that he was not prepared to impeach the testimony of this witness on the ground of his failure to refer to those incidents before the Committing Magistrate but only urged that it did not assist the appellant any more

than the evidence of P. W. No. 1 to bring himself within the exemption under s. 84, I. P. C.

The learned Public Prosecutor contended, placing reliance upon *Emperor v. Gedka Goala* (1) that it is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption under s. 84 and that neither the apparent lack of motive nor the particulars of the appellant's behaviour as described by P. Ws. Nos. 1 and 14 on the two days immediately preceding the occurrence are sufficient to bring the case within that section. It is no doubt well-settled that unless the unsoundness of mind pleaded is such as to render the accused incapable of understanding the nature of the act with which he is charged or that what he was doing was wrong or contrary to law, he is not excused from criminal responsibility. It is also true to say that a mere lack of apparent motive for the deed does not necessarily or always lead to an inference of intellectual aberration or insanity, but a total lack of an apparent motive may in some cases taken along with other facts legitimately give rise to an inference that the act was done under an insane impulse: see *Subbigadu v. Emperor* (3). Similarly, it is true to say, as was said by the learned Judges in the case referred to above that a crime is not excused by its own atrocity. This indeed is a truism. But can it be said that the nature of the act or the mode of perpetrating it can under no circumstances be taken into account in considering a plea of insanity? It may be that as a rule of prudence, Courts will be slow to infer from such material that the person committing the act was not conscious of its criminality. But I can see no warrant for laying down, as a rule of evidence that one must look outside the act itself for the evidence as to how much the accused knew about it. The truth is that in dealing with all such cases no general rule can be applied and the only proper course to adopt is to decide each case on its own peculiar facts bearing in mind, of course, that the point for determination is whether the evidence before the Court is sufficient to establish that the person charged with the offence was not conscious of the nature of the act he was doing or that he was doing what was wrong or contrary to law. It will be seen that in the case referred to above, the evidence showed that at the time he committed

(3) 49 M L J 598; 91 Ind. Cas. 78; A I R 1925 Mad. 1238; 27 Cr. L J 46; (1925) M W N 649; 22 L W 550.

the offence, the accused

"knew what killing was and meant to do it, knew what he had done already, knew who was his brother and his sister-in-law and where they lived and the way to that place."

In the present case, not only is there nothing to show that the appellant was aware of what he was doing but the extracts given above from the evidence of P. Ws. Nos. 1 and 14 as well as the conduct of the accused immediately after the occurrence would seem, to my mind, to show that the accused was incapable by reason of his mental aberration of knowing the nature of his act. His incoherent talk to a passenger in the bus which led P. W. No. 1 who was a medical man himself, to think that the appellant "was not in his senses," and his abnormal behaviour to repeatedly stooping and touching the feet of the passenger on a public road "so many times," hailing him as his saviour certainly show that his reason was affected at the time, and his conduct in throwing rupees on the road is a strong indication that he was not conscious of what he was doing. No doubt, P. W. No. 14 said that he did not see the appellant throwing rupees on the road but his evidence leaves no reasonable doubt that the act of scattering the rupees which had attracted a crowd round the appellant on the road was an act of the appellant. The learned Public Prosecutor urged that the impression formed by P. W. No. 1 about the mental condition of the appellant cannot be accepted as correct as it is not warranted by what the witness said he observed and heard with reference to the behaviour and utterances of the appellant. It was said that the appellant's conduct towards the passenger is not an uncommon way among villagers of expressing gratitude for help rendered and that the words which the witness said he heard from the appellant did not indicate that the appellant's talk was incoherent or that he was not in his senses. I cannot agree with this criticism. Surely it is a strange way, either for villagers or townsfolk to express gratitude by stooping and touching the feet of a helper "so many times" on a public road with intervals of silence; and as for incoherent talk the witness does not say that the words he was able to quote from his recollection three months later were all the words he heard the appellant utter on the occasion of such a casual incident. The impression which the witness says definitely he formed from the conduct and utterances of the appellant that the latter was "behaving like a mad man" and "was not in his senses"

goes a long way, in my judgment, to support the appellant's plea of insanity.

The learned Public Prosecutor also laid stress on the statement of P. W. No. 14 that the appellant attempted to run after beating him and later expressed regret, as indicating the appellant's consciousness that what he did was wrong. But it is significant that when the appellant was asked why he beat the witness, he did not give any reply at all for an hour and then wept like a child and expressed regret saying that he struck the witness because he was frightful to look at. The attempt to run away might have been therefore due to the "frightful appearance" of P. W. No. 14 in the eyes of the appellant, and the expression of regret which followed only after an hour of dazed silence in spite of questioning, is more consistent with the absence of cognitive faculties at the time when he struck the blow than with possession of such faculties.

Turning next to the appellant's conduct on the day of the occurrence, he said in the course of his examination by the learned Sessions Judge that after his wife roused him at about noon when he was sleeping and served him food and questioned him about some stolen jewels, his mind became a perfect blank and when he became aware of his surroundings in the night he found himself placed in the yard, his hands and legs tied, with people crowding round him and talking. The appellant also stated that he did not know if the door of the room in which the deceased was killed was bolted from inside or not, or if the door was forced open or not, and that he was not aware whether Bogga Shetty (P. W. No. 7) and others caught hold of him, tied his hands and feet and kept him in the yard. This statement of the appellant receives some support from the admission of several prosecution witnesses in cross-examination that when the appellant came out of the room and was tied after the occurrence, he did not offer any resistance. P. W. No. 6 said:

"When the accused came out after I forced open the door, he did not try to run away. He quietly submitted when we tied him and did not offer resistance. I did not ask the accused why he beat his wife."

P. W. No. 10 said:

"When we caught and tied the accused after he came out after the door was broken open, he did not offer resistance. He made no attempt to escape from our hold and to run away. We ourselves tied him to avoid his escaping and running away. We tied him up, because we were afraid that he might beat somebody else."

P. W. No. 7 no doubt spoke to some resistance on the part of the appellant at the

time but in the face of the clear admissions of P. W. No. 6 and P. W. No. 10 in their cross-examination, it must be taken that the appellant offered no resistance when his hands and feet were tied and he was taken and placed in the yard of the house where he remained until the Sub-Inspector of Police came and arrested him in the afternoon of the next day. It is no doubt true that there were so many persons present when the appellant came out of the room and his attempt to resist would have been ineffectual and though it is possible that the non-resistance might be due to the realization of this fact, I think it is more probable that it was due to a blank mind, for, it would be a natural instinct of a sane person in the situation of the appellant to try to escape without pausing to think whether such an attempt would be effectual or otherwise. And it is somewhat remarkable that if the appellant was quite all right, as the prosecution witnesses would have the Court believe, that none of the persons who came on the scene ever attempted to question him regarding his apparently unaccountable conduct in killing his wife. Even the brother of the deceased (P. W. No. 5) did not ask him the reason why he beat his wife to death. He said:

"It struck me as strange that the accused should have beaten and killed her, knowing that he and his wife were affectionate before that. Yet, I did not ask the accused, what I am to ask, after he has killed her?"

None of the witnesses said that he asked the appellant why he committed the deed. This somewhat strange conduct lends countenance to the suggestion made for the defence that the prosecution witnesses were aware at that time that the appellant did the act when he was not in his senses and that they tied him hand and foot lest he should inflict injury on others, though they denied this at their examination. The learned Public Prosecutor drew attention to the circumstance that the appellant had bolted the door of the room before committing the crime and argued that this was an act of preparation showing that the appellant was conscious of the criminality of the act he was about to perpetrate. The argument would have force if there was clear evidence to show that the appellant bolted the door from inside just prior to the act by way of preparation for it. All that the evidence discloses, however, is that the appellant and the deceased had been in the room for about two hours before the occurrence and that the room was found bolted from inside when other persons came to the spot on hearing the cries of the deceased. It may well be that

the deceased bolted the door for privacy or that the appellant did so for the same reason before the idea of killing his wife ever occurred to him. This circumstance cannot therefore be relied upon as definitely pointing to the appellant's knowledge of the nature of the act.

Lastly, the Public Prosecutor referred to the evidence of P. W. No. 15, the Sub-Inspector, who said the appellant appeared quite normal when he was examined as a witness in the course of investigation of a theft case about six days prior to the occurrence, and also from the time when the witness arrived at the scene of occurrence till the time he got the appellant remanded, and argued that the appellant's case of mental aberration only during the three or four days about the time of the occurrence was highly improbable. I am unable to see any force in this contention. Temporary fits of insanity which come all of a sudden and disappear after a short while are by no means uncommon. Indeed, the evidence of P. Ws. Nos. 1 and 14 shows that even during this period the appellant had perfectly lucid intervals. The evidence of P. W. No. 15 and of some of the other prosecution witnesses who say that he appeared all right when they saw him either before or after the occurrence is not therefore necessarily inconsistent with the truth of the appellant's case. On the whole I am of opinion that the appellant must be held to have killed the deceased under an insane impulse without understanding the nature of his act, and must therefore be acquitted.

[On difference of opinion between Gentle and Patanjali Sastri, JJ. the case was posted before King, J.]

King, J.—The accused in this case, one Sankappa Shetty, has been convicted by the learned Sessions Judge of South Kanara for the murder of his wife, Kaveri, on November 29, last and has been sentenced to death. He is about 35, she was about 24 years of age. They had been married for eight years and had four children of which the youngest was about 18 months old. That child had been born in the house of Kaveri's family in Kuthethur and since its birth the husband and wife had not been living together. The evidence however is that this fact was not due to any estrangement, but to financial reasons; and that the accused frequently came and stayed with his wife for some days. It was on such a visit that accused last went to Kuthethur on November 28. On the early afternoon of the 29th, accused and his wife were alone in a locked

room together. Cries were heard coming from the room and when the witnesses broke open the door they found Kaveri still alive, and her body covered with injuries, found at the *post mortem* to be twenty in number, ten of them being on the head. Accused was seized and kept tied up until in due course report was made to the village Munsif and the Police arrived. Kaveri died within a very short time. The accused did not deny at his trial that he was alone with his wife at the time when she was killed but put forward the plea of insanity and stated that he had no recollection whatever of what happened. The learned Sessions Judge has rejected this plea. Whether he was right or wrong in this rejection is the only point at issue before me.

The burden of proving insanity is cast upon the accused by s. 105, Evi. Act, and under s. 84, I. P. C., he must prove that at the time of the killing he was by reason of unsoundness of mind, incapable of knowing the nature of his act or that he was doing what was wrong or contrary to law. His case is sought to be made out in the following way: (i) by a consideration of the circumstances attending upon the actual offence; (ii) by medical evidence; (iii) by the evidence of P. W. No. 14; (iv) by the evidence of D. W. No. 1; and I will deal with each of these in turn. In regard to the first point stress is laid upon the lack of motive or of adequate motive, the exceptionally brutal nature of the attack, and upon the fact that upon discovery the accused made no serious attempt to escape. That there was lack of adequate motive is clear, but everyone who has to do with the administration of criminal justice in this country is unfortunately aware that the commission of crimes of violence, including murder, as the result of the most trivial quarrels is all too common. It is also clear that accused might well have achieved his purpose with a lesser degree of violence, but here again experience amply proves that once an offender has lost control of his temper he gives way unrestrainedly to his passion, without any thought for what may or may not be precisely necessary to carry out his intention. That the accused made no serious attempt to escape on discovery was no doubt due to the fact that five men were there to seize him and the weapon he had used was no knife, but only a wooden footstool. It is further argued for the accused that he appeared to be dazed, but this, I think, is natural enough upon any view of accused's state of mind when he committed the act. No doubt there

is nothing positive in the evidence relating to accused's conduct to prove conclusively that he was able to think of his position and make rational decisions—but this evidence standing alone, is equally inconclusive in favour of accused's plea.

The medical evidence was given by P. W. No. 1, the officer in charge of the Local Fund hospital at Mulki. So far as it deals with insanity as a branch of medical jurisprudence it is of no value whatever. He quotes no text books but gives it as his opinion that a husband who inflicts so many injuries without a deep-seated motive must be insane—and he says this without any reference to the knowledge referred to in s. 84. He, however, also describes an incident which occurred on November 26 when he saw the accused prostrating himself before a man and talking incoherently to him. I do not think P. W. No. 1's evidence—which may be accepted as true—is of any assistance to the accused. Whether talk is incoherent or not is a matter of opinion. P. W. No. 1 heard only snatches of the conversation and the statements which he heard are by no means incoherent. These statements and accused's action are quite consistent with the theory that accused was deeply grateful to another man for help rendered, and was expressing his thanks to him. There is no evidence at all to show that the man was a stranger, or the help rendered a delusion.

P. W. No. 14 is a landholder of Mulki. His evidence is that accused came to him on the evening of November 26 and stayed until the morning of the 28th. He says that during this time the accused frequently talked incoherently; once accused a relation of having given him medicine which made him ill; once gave him a blow and fell to weeping and did not reply for an hour when asked why he had done so, and said finally it was because the witness looked frightful. He also said he would jump into a well, and once on the 27th took out Rs. 17 and scattered them on the roadside. When he left, the witness bought a bus ticket for him, and gave him in charge to one Deju Shetti with instructions to see that he got safely home. Now this evidence, if believed, certainly reveals some measure of eccentric conduct on the part of the accused but the learned Sessions Judge does not believe it. He points out, that according to the witness himself accused was able to speak quite rationally about his cultivation and his financial difficulties and that the witness took no steps to inform others about or protect himself against possible further violence from the accused.

For these and for other reasons which I shall mention later, I agree that the learned Sessions Judge was right in rejecting this evidence, however, respectable the social position of the witness may be.

D. W. No. 1 is a cultivator of Mennakettu, and the president of the Panchayat Court in that village. His evidence is that he arranged on what must have been November 28 to send accused to his wife's house. He was told by one Degu Bandari that accused was unwell. He called two men Isthur and Babu, and told them to take accused to his wife's house and to tell its inmates that he was sick. Accused told him that he was the victim of witchcraft, but the witness paid very little attention to his remark, and was unable to say positively whether accused's talk in general was coherent or not. Neither Degu Bandari nor Isthur nor Babu was called as a witness to support him. In these circumstances it is not surprising that the learned Sessions Judge thinks his evidence of no importance.

I may now state that, apart from the lack of corroboration to which reference has already been specifically made I am unable to believe P. W. No. 14 or D. W. No. 1 in so far as they seek to establish insanity because if their evidence were true, further corroboration should inevitably have been available. If we take the evidence for the accused at its best, we have in this case proof of delusions, and of some degree of eccentric conduct extending over the extremely short period of three days (November 26 to 28). There is no proof of any form of insanity or eccentricity before November 26; no proof of any accident or shock or any other event which might have brought on insanity; and no indication whatever of anything abnormal during the Police investigation, the period of accused's detention in jail, the preliminary inquiry, or the trial. I do not wish to be too dogmatic on the very difficult subject of insanity, but I feel convinced that it is impossible for manifestations of an insanity so serious as to result in the killing of a wife, to be confined to these comparatively trivial incidents over a period of only three days—and for the witnesses to such incidents to be confined to comparative strangers. And even on November 28 and 29 themselves it is to be noted, we get no indications at all (apart, of course from the murder) of eccentric conduct on the part of the accused as it appeared to his wife and her relations. The Kuthethur witnesses are unanimous on this point. It is argued that they are so determined to see that accused suffers the penalty

for his crime that they are wilfully suppressing evidence which would help him to establish his plea. I am unable to take this view of their evidence and must point out on the contrary that all are anxious to emphasize that accused and his wife were on good terms.

For the reasons which I have given I am thus of opinion that the learned Sessions Judge was justified in not accepting the evidence of P. W. No. 14 and D. W. No. 1. Even if it were accepted as true, it would still in my opinion be insufficient to prove accused's plea. Delusions about the witchcraft and poisonous medicine may have been mentioned—there is nothing whatever to connect these with accused's wife. Accused himself does not say who it is who has practised witchcraft upon him. Surely if insanity be the cause of this crime it is explicable only on the hypothesis that accused was actuated by homicidal mania, or killed his wife under the delusion that she was not his wife at all, or that he was bound to kill her for some reason or other. Of homicidal mania there is really no trace in the evidence. The 'blow' to P. W. No. 14, if given, must have been a trivial one. Of any delusion concerning the identity or actions of accused's wife, there is clearly no trace. I find accordingly that the accused has been rightly convicted for murder. I think, however, that this is a case which does not call for the extreme penalty of the law. There cannot have been any premeditation—and I feel sure that the accused must have received what he felt to be considerable provocation before he attacked his wife in the way he did. I accordingly in confirming the conviction commute the sentence into one of transportation for life.

N.-S.

Sentence commuted.

ALLAHABAD HIGH COURT

Second Appeal No. 228 of 1938

December 12, 1940

THOM C. J. AND GANGA NATH, J.

RAMGOPAL SRINIWAS—PLAINTIFF—

APPELLANT

versus

NET RAM AND ANOTHER—DEFENDANTS

RESPONDENTS

Partnership Act (IX of 1932), ss. 74 (b), 69—S. 74 (b), scope of—Whether limits exemption from operation of s. 69 only to pending proceedings.

Sub-section (b) of s. 74, Partnership Act, relates to those legal proceedings or remedies which were open to a party in respect of any right, title, interest, obligation or liability which had already been acquired, accrued or incurred before the commencement of the Act. It does

not limit the exemption from the operation of s. 69 only to pending proceedings. 160 Ind. Cas. 277 (1), not approved.

Messrs. *Shiva Prasad Sinha* and *Chaturbhuj Sahai*, for the Appellant.

Messrs. *N. P. Asthana*, *Harnandan Prasad* and *Kamla Nandan Prasad*, for the Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit in which the plaintiff, an unregistered firm, sued for the price of certain goods supplied to the defendants. The only question raised in this appeal is as to whether s. 69, Partnership Act, applies to the plaintiff's suit. Section 69 prohibits unregistered firms from suing to recover money due to them for goods supplied. Section 74 of the Act, however, is to the effect :

"Nothing in this Act or any repeal effected thereby shall affect or be deemed to affect (a) any right, title, interest, obligation or liability, already acquired, accrued or incurred before the commencement of this Act, or (b) any legal proceeding or remedy in respect of any such right, title interest, obligation or liability, or anything done or suffered before the commencement of this Act."

Learned Counsel maintained that in view of these latter provisions the learned Civil Judge was not justified in dismissing the suit because the plaintiff was an unregistered firm. The learned Judge found upon a consideration of the evidence that the plaintiff firm was not a joint family firm and that s. 69 therefore applied to the case.

There has been some divergence of opinion in this Court and in other High Courts in India as to the effect of s. 74, Partnership Act. We have considered the decision in this Court in *Danmal Parshotamdas v. Baburam Chhote Lal* (1). In that case Bennet, J. expressed the view which does not appear to have been shared by Sulaiman, C. J. that s. 74 (b) related to legal proceedings instituted before the commencement of the Act. In our judgment this construction of the provision is not sound. The word "pending" does not appear in the sub-section. The sub-section in our judgment relates to those legal proceedings or remedies which were open to a party in respect of any right, title, interest, obligation or liability which had already been acquired, accrued or incurred before the commencement of the Act. This in our judgment is put beyond doubt by the opening words of the sub-section, "any legal proceeding or remedy." If the intention of the Legislature had been to exempt from the operation of s. 69 only proceedings which had been instituted, the opening words would have been "any legal proceeding pending or remedy taken." The

(1) 58 A 495; 160 Ind. Cas. 277; A I R 1936 All. 3; (1935) A L J 1245; 1936 A L R 76; 8 R A 588.

words "pending" and "taken" do not appear. The provision seems to us to be perfectly clear and straightforward and we see no reason to introduce into the section words which the Legislature must be taken to have deliberately omitted.

In the result the appeal is allowed and the order of the learned Civil Judge is set aside. The learned Judge dismissed the suit upon the ground that the plaintiff firm was not entitled to sue. He did not go into the merits of the case. The record will be returned accordingly to the lower Appellate Court with a direction that the appeal be admitted to its original number and disposed of according to law. The appellant firm is entitled to its costs.

S.

Appeal allowed.

BOMBAY HIGH COURT

Criminal References Nos. 98 to 112 of 1940

October 3, 1940

BROOMFIELD AND WASSOODEW, JJ.

EMPEROR—PROSECUTOR

versus

CHAMPAKLAL CHUNILAL BANKER—

ACCUSED

Criminal Procedure Code (Act V of 1898), s. 234. Criminal cases, when can be consolidated and tried together on same evidence—Bombay Municipal Boroughs Act (XVIII of 1925), s. 159—What is to be proved under s. 159, stated—Waste water of dyeing and bleaching department of mill, if necessarily offensive—Secretary of mill is not as such liable to be convicted under s. 159 as having control over premises.

Criminal cases cannot like civil suits be consolidated and tried together on the same evidence except within the limits as to the joinder of charges laid down in the Criminal P. C. Hence, where there are a series of complaints of an offence alleged to have been committed on different occasions it is not permissible to the Magistrate to hear the evidence and write a judgment in one of the cases and then proceed to pass merely consequential orders in other cases. *Emperor v. Pannubhai Laljibhai*, Cr. Revn. No. 267 of 1938, relied on.

Under s. 159, Bom. Municipal Boroughs Act, it has got to be proved, firstly, that the accused is a person, who has the building or land under his control, secondly, that he allowed the water to run upon any street, land or space, and, thirdly, that the water was or was likely to become offensive. Waste water of the bleaching and dyeing departments of a mill would not necessarily be offensive or likely to become offensive in the absence of any proof.

The secretary of a mill is not as such liable to be convicted under s. 159 as being in control of the premises. *Prima facie*, the secretary of a mill would be a person to attend to the office and clerical work, but he would certainly not be a person to control the working of the mill or to see in what manner the waste water is to be discharged. That would be for the manager. If the secretary of the mill has control of the mill, there ought to be evidence to that effect.

Cr. Refs. made by the Sessions Judge, Ahmedabad.

Messrs. S. T. Desai and M. H. Chhatrapati, for the Accused.

Mr. J. C. Shah, for the Complainant.

Broomfield, J.—These are references from the Sessions Judge of Ahmedabad in 15 cases in which the Additional Stipendiary First Class Magistrate, Ahmedabad convicted one C. C. Banker, said to be the secretary of the New Manekchowk Mill at Ahmedabad, of offences under ss. 159 and 160 Bom. Municipal Boroughs Act (Bom. XVIII of 1925). In nine cases the prosecution was under s. 159 which renders punishable the act of causing or allowing the water of any sink or sewer or any other liquid or other matter which is or which is likely to become offensive, from any building or land under the control of the accused, to run, drain, or be thrown or put upon any street or open space. In the other six cases the charge was under s. 160 which makes it an offence for the owner or occupier of any building or land to keep or allow to be kept for more than 24 hours, or otherwise than in some proper receptacle, any dirt, dung, bones, ashes, night soil, etc., in or upon such building or land. It appears that at the suggestion of the defence Pleader the learned Magistrate recorded evidence in one of the cases only, which is the subject of the first of these criminal references, No. 98. Having convicted and imposed sentence in that case the Magistrate then passed orders in the other cases without recording any further evidence. As the learned Sessions Judge says, this procedure is not contemplated by the Criminal P. C. and is clearly illegal. We had to deal with the same kind of illegality in another case, Criminal Revision No. 267 of 1938, decided on October 6, 1938, by Broomfield and Macklin, JJ., *Emperor v. Panubhai Laljibhai* from the Ahmedabad District not very long ago, and as it appears that the Ahmedabad Magistrates are under a serious misapprehension as to their powers in this respect, it is desirable to repeat what was said in the judgment in that case, which applies exactly to the present case :

"We agree with the learned Sessions Judge of Ahmedabad that when you have a series of complaints of an offence alleged to have been committed on fourteen different occasions it is not permissible to do as the Magistrate in this case did, viz., to hear the evidence and write a judgment in one of the cases and then proceed to pass merely consequential orders in the other cases. Criminal cases cannot like civil suits be consolidated and tried together on the same evidence except within the limits as to the joinder of charges laid down in the Criminal P. C. It would have been per-

missible for the Magistrate to try the charges in groups of three, and I may say incidentally that I should have thought it quite sufficient for all practical purposes if the Municipality had restricted themselves to lodging three or at the most six complaints. However, that may be, the Magistrate's procedure is plainly illegal and the illegality is not cured by the fact that the accused's Pleader appears to have consented to the procedure adopted."

In the present case it appears that the defence Pleader suggested the adoption of this procedure. That makes no difference. It is plain therefore that the conviction of the accused in all the cases in which no evidence was recorded, that is, the cases which are the subject of references Nos. 99 to 112 of 1940, must be set aside and the fines and process fees ordered to be paid must be refunded to the accused. The learned Sessions Judge has also recommended that the conviction in the first case (No. 98), in which evidence was recorded, should also be set aside. He points out quite correctly that under s. 159, Bom. Municipal Boroughs Act, it has got to be proved, firstly, that the accused is a person who has the building or land under his control, secondly, that he allowed the water to run upon any street, land or space, and, thirdly, that the water was or was likely to become offensive. He says in his letter of reference that there is no finding of the Magistrate on any of these points. The accused denied that he was the secretary of the mill; evidence was given to show that he was; the Magistrate held that he was; and on the strength of that finding, according to the learned Sessions Judge, he convicted the accused.

Mr. J. C. Shah, who appears for the Municipality which was the complainant in these cases, disputes the statement of the learned Sessions Judge that there is no finding of the Magistrate on points Nos. 2 and 3. He says that the first sentence of the order shows that the accused was charged with having discharged waste water of the bleaching and dyeing departments on the street land and thus committed an offence punishable under s. 159, and that further on in the judgment the Magistrate said : "Here the offence has been committed as supported by the prosecution evidence." It is by no means clear, I think, that the particulars of the charge have been stated sufficiently clearly to make it appear that the learned Magistrate had applied his mind to the necessary ingredients of the offence. "Waste water" would not necessarily be offensive or likely to become offensive, which is what the section requires, and the Magistrate's statement that the prosecution evidence justifies a conclusion that

the offence had been committed hardly enables one to say that the necessary evidence as to the offensive character of the waste water had been produced. However it is not necessary to deal with the matter on points Nos. 2 and 3.

It is quite clear from the learned Magistrate's judgment that he did not apply his mind to the question whether the accused was a person who had the building or land of the mill under his control. Mr. Shah has not suggested that there was any evidence produced to show that he had such control. He says that the secretary is an officer of the company and that the Magistrate may have assumed that as secretary he was liable to be convicted. It may well be that the Magistrate did make this assumption, but if he did, it was a wrong assumption. It was recently pointed out by this Court in Criminal Reference No. 71 of 1940, decided on July 30, 1940, by Beaumont, C. J., *Emperor v. Jagannath P. Thakur* that the secretary of a mill was not as such liable to be convicted under s. 159 as being in control of the premises. The learned Chief Justice said in that case:

"*Prima facie*, the secretary of a mill would be a person to attend to the office and clerical work, but he would certainly not be a person to control the working of the mill or to see in what manner the waste water is to be discharged. That would be for the manager. If the secretary in the case of this mill has control of the mill, there ought to be evidence to that effect."

In the present case also there is no presumption that the accused as secretary was in control of the premises, and, as far as we can see, no evidence to that effect was produced. In this case also therefore we agree with the learned Sessions Judge that the conviction cannot stand. In the case which is the subject of reference No. 98 of 1940 the conviction is set aside and the fine and process fees must be refunded to the accused.

S.

Conviction set aside.

ALLAHABAD HIGH COURT

First Appeal No. 104 of 1939

October 3, 1940

IQBAL AHMAD AND VERMA, JJ.

B. RAMMAN LAL—APPELLANT

versus

RAGHUNATH SHANKER AND ANOTHER—

RESPONDENTS

U. P. Encumbered Estates Act (XXV of 1934), ss. 11, 9, 10, 4—Application under s. 4—Issue of notice under s. 9—Alleged creditor denying to be creditor and claiming to be lessee of applicant's mahals and claiming protection of possession during term of lease—Claim, if falls under s. 11—Whether must file

fresh claim after notice under s. 11—Deed—Construction—Zarepeshgi lease and usufructuary mortgage—Distinction—Transaction held lease and hypothecation clause did not change its character—Lease—Terms of deed should be looked to, to ascertain character of document—Executant's description is not infallible guide—Document styled as "wasika qaimmuqami" held was lease.

A claim under sub-s. (2) of s. 11, U. P. Encum. Estates Act, has to be filed within a period of three months from the date of the publication of the notice in the *Gazette*. But this provision does not debar the Court from entertaining, and adjudicating upon, a claim which was filed before the publication of the notice, if, in fact and in substance, the claim amounts to a claim under sub-s. (2) of s. 11. Where therefore the alleged creditor in an application under s. 4 appears in consequence of a notice under s. 9 and files a written statement denying his status as a creditor and claiming protection of his possession of the applicants' mahals on the ground of his being a lessee, during the term of the lease, his claim falls within the purview of sub-s. (2) of s. 11 and not within the purview of ss. 9 and 10. The lessee need not file a fresh written statement after the publication of a notice under s. 11 and no question of his claim being time-barred under s. 11 (2) arises. [p. 349, col. 1.]

Both in the case of a *zarepeshgi* lease and in the case of a usufructuary mortgage the person in whose favour the document is executed is entitled to possession. Similarly, in both cases there is an advance of money to the executants of the deed. But in the case of a usufructuary mortgage, there is a statutory liability for accounting cast upon the mortgagee by s. 76 (g), T. P. Act. In the case of a *zarepeshgi* lease however normally there is no such liability on the lessee. Further, in the case of a *zarepeshgi* lease pure and simple the lessee is not given any security for the amount advanced by him. Whereas in the case of a usufructuary mortgage there is a transfer of interest in the property mortgaged in favour of the mortgagee. It is clear from the provisions of s. 105, T. P. Act, that in the case of a lease there is a mere transfer of a right to enjoy the property leased, and no interest in the same is transferred in favour of the lessee. Again, in the case of a lease there is no right of redemption vested in the lessor, whereas such a right exists in the case of a mortgage.

Held, on construction that the transaction was a lease and the hypothecation clause did not alter the character of the transaction. *Nidha Sah v. Murli Dhar* (1), relied on.

In order to ascertain the real character of the document one has to look to the terms of the deed, and the description of the document given by the executant cannot be an infallible guide.

Held, that the document styled as "*wasika qaimmuqami*" (instrument of representation) fulfilled all the characteristics of a lease.

F. A. from the order of the Special Judge, First Grade, Bareilly, dated March 9, 1939.

Mr. G. S. Pathak, for the Appellant.

Mr. L. N. Gupta, for the Respondents.

Iqbal Ahmad, J.—This appeal is directed against an order passed by a Special Judge, first grade, in proceedings under the U. P. Encum. Estates Act (Act XXV of 1934) and arises under the following circumstances. Raghunath Shanker and his minor son, Girish Prasad, the respondents in the present appeal, filed an application

under s. 4, U. P. Encum. Estates Act, before the Collector who, in accordance with the provisions of s. 6 of the Act, in due course, forwarded that application to the Special Judge. After the receipt of the application by the Special Judge, the applicants filed a written statement on February 12, 1937 containing the particulars enumerated in s. 8 of the Act. In their written statement the applicants alleged that B. Ramman Lal, the appellant in the present appeal, was one of their creditors. The learned Judge then directed the publication and the service of the notices prescribed by s. 9 of the Act. There was however this irregularity that the publication of the notice in the *Gazette* enjoined by sub-s. (1) was subsequent to the publication and the service of the notices in accordance with the provisions of sub-s. (2) of s. 9. But it is admitted that on March 2, 1937, notice was served on Ramman Lal calling upon him to file a written statement of his claim. In pursuance of this notice Ramman Lal, on April 29, 1937, filed a written claim. In the claim submitted by him, Ramman Lal denied that he was a creditor of the applicants and maintained that under two documents, both dated September 12, 1935, executed by the applicants in his favour, three *mahals* of village Deosas, viz., *Mahal Surkh*, *Mahal Lakhi* and *Mahal Zard*, were leased to him for a period of ten years commencing from 1343 *F.* On the basis of this allegation he maintained that he was entitled to remain in possession of the three *mahals* as a lessee for the period reserved by the two leases. He, accordingly, submitted that the *mahals* could not be attached or sold for the satisfaction of the debts due from the applicants so as to prejudicially affect his rights as a lessee.

After Ramman Lal had preferred this claim, a notice in accordance with the provisions of sub-s. (1) of s. 9 was published in the official *Gazette* on June 12, 1937. Thereafter on April 9, 1938, notice in accordance with the provisions of sub-s. (1) of s. 11 was published, specifying the properties mentioned by the applicants in the written statement filed by them under s. 8 of the Act, as also the properties specified by the claimants under s. 10 of the Act. Admittedly no fresh claim was filed by Ramman Lal asserting his rights as a lessee within three months of the publication of the last-mentioned notice as required by sub-s. (2) of s. 11. The case was taken up for settlement of issues on September 12, 1938, and, on that date, the Counsel for Ramman Lal was called upon to

state whether the claim preferred by Ramman Lal was under s. 9 or s. 11 (2) of the Act. The Counsel stated that Ramman Lal's claim should be treated primarily as a claim under s. 11 and that his claim was that the three *mahals* referred to above could not be sold or mortgaged until the expiry of the period for which Ramman Lal was entitled to remain in possession as a lessee. The Counsel further stated that after the claim under s. 11 was decided, the claim of Ramman Lal, if necessary, might also be treated as a claim under s. 9. The Court then passed the following order: "Seen. Let the W. S. filed by these claimants be treated as one under s. 11 of the Act." It is clear from this order that the learned Judge, who was then seized of the case, treated the claim filed by Ramman Lal on April 29, 1937, as a claim under sub-s. (2) of s. 11. The issue that he framed was in the following terms:

"What were the rights of the claimant Ramman Lal in the *zamindari* property of *Mouza Deosas* and on what condition is it liable to attachment, sale or mortgage in satisfaction of the debts due from the applicants?"

The claim of Ramman Lal was eventually heard and decided by a Judge other than the Judge who had passed the order and framed the issue quoted above. The learned Judge dismissed the claim of Ramman Lal on three grounds. He held that, if the statement made by Ramman Lal's Counsel on September 12, 1938, be treated as a claim under s. 11, "it was manifestly time-barred." Secondly, he held that the claim filed by Ramman Lal on April 29, 1937, was a claim under s. 9 and not under s. 11 of the Act. Thirdly, he held that the position of Ramman Lal under one of the documents was that of a usufructuary mortgagee, and under the other document was that of a mere manager and, as such, Ramman Lal was not entitled to the possession of the three *mahals* in the capacity of a lessee.

Ramman Lal has filed the present appeal and it is argued on his behalf that the conclusions arrived at by the learned Judge are erroneous. In our judgment this contention is well-founded and this appeal must prevail. The applicants, as already stated, had in their written statement, mentioned Ramman Lal as one of their creditors, and it was in that capacity that Ramman Lal was served with a notice and was called upon to file a written statement of his claim. Ramman Lal admittedly filed a written statement within the time fixed by the notice but, in the written statement, he disclaimed being a creditor of the applicants. He definitely asserted that his position was that of a lessee

and that, in view of the stipulations contained in the two documents referred to above, his possession over the three *mahals* could not be disturbed for a period of ten years. In other words, the assertion contained in the written statement of Ramman Lal was that the applicants' proprietary rights in the *mahals* were subject to the right of Ramman Lal to remain in possession of those *mahals* for a period of ten years. In consequence of these allegations Ramman Lal's contention was that the three *mahals* could not be attached, sold or mortgaged in satisfaction of the debts due from the applicants so as to prejudicially affect his rights as a lessee. The claim embodied in the written statement of Ramman Lal was in substance a claim that fell within the purview of sub-s. (2) of s. 11 and not within the purview of ss. 9 and 10. That this is so is apparent from the fact that a claim under the last-mentioned sections could be preferred only by a creditor, whereas Ramman Lal, as stated before, disclaimed the position of a creditor.

It is true that Ramman Lal did not, after the publication of the notice under s. 11, prefer a claim. But as he had already done so, it would have been idle for him to file a fresh claim reiterating the very grounds that were embodied in the claim already filed by him. A claim under sub-s. (2) of s. 11 has to be filed within a period of three months from the date of the publication of the notice in the *Gazette*. But this provision does not debar the Court from entertaining, and adjudicating upon, a claim which was filed before the publication of the notice, if, in fact and in substance, the claim amounts to a claim under sub-s. (2) of s. 11. In this view of the matter, it was open to the Court to treat the claim filed by Ramman Lal as a claim under s. 11 (2) of the Act, and the Judge, who framed the issues, was therefore right in passing the order that we have quoted above. As the claim was filed even before the publication of the notice there can be no question of the claim being time-barred. In this connection we may point out that the statement made by Ramman Lal's Pleader on September 12, 1938 was not a claim, but was a mere statement specifying the nature of the claim that had already been filed by Ramman Lal.

This brings us to the consideration of the merits of the claim preferred by Ramman Lal and it necessitates an examination of the two documents on which Ramman Lal's claim was based. Both the documents were executed on one and the same date. But as

the terms of the two documents are not identical it would be convenient to deal with them separately. One of the documents is in terms described as a lease (*patta*). This document was executed by the applicants as first party and by Ramman Lal as second party. It relates to *Mahal Surkh* and *Mahal Lakhi* of village Deosas. It begins with a recital that the executants first party had given a *zarepeshgi* lease of the two *mahals* for a period of ten years (1343-1353-F.) and that the executant second party was liable to pay Rs. 990 a year on account of Govt. revenue and had already paid profits at the rate of Rs. 500 a year to the executants first party. It was stated in the deed that a sum of Rs. 5,000 on account of the profits for ten years at the rate of Rs. 500 a year had already been paid in advance by the executant second party to the executants first party, and that the executant second party was entitled to remain in possession "in the capacity of a lessee" for a period of ten years. There was a clear stipulation in the deed that the sum of Rs. 5,000 paid in advance would be liquidated in full on the expiry of ten years.

There was no provision in the deed entitling the executants first party to demand accounts from the executant second party, nor was any liability cast on the latter to maintain accounts of the profits of the two *mahals*. By para. 3 of the deed, executant second party was authorized to institute suits for arrears and enhancement of rent, for ejectment and to realize *nazrana* from the *ryots* who constructed new houses in the *mahals*. In short, all the rights that the executants first party could exercise in the management of the affairs of the *mahals* were given to executant second party. The document consists of twelve paras. and provisions contained in ten of those paragraphs clearly disclose a transaction of lease. But by paras. 7 and 9 of the deed, Ramman Lal was authorized, in certain contingencies, to realize the balance of the money paid by him in advance with interest by enforcement of charge against the two *mahals*. By the last mentioned paragraphs the two *mahals* were hypothecated by the executants first party and, in the event of the possession of Ramman Lal being disturbed, he was given the right to realize the balance of the *zarepeshgi* with interest at 12 per cent. per annum, as well as such profits as he could have made if the lease had remained in operation for the full period of ten years by enforcement of the charge against the two *mahals*. It is argued on behalf of the respondents that in

view of the hypothecation of the two *mahals* the document in question embodied a transaction of usufructuary mortgage and not of a lease. We are unable to agree with this contention.

The answer to the question whether a transaction amounts to a mere *zarepeshgi* lease or to a usufructuary mortgage is often attended with considerable difficulties. Both in the case of a *zarepeshgi* lease and in the case of a usufructuary mortgage the person in whose favour the document is executed is entitled to possession. Similarly, in both cases there is an advance of money to the executants of the deed. But in the case of a usufructuary mortgage, there is a statutory liability for accounting cast upon the mortgagee by s. 76 (g), T. P. Act. In the case of a *zarepeshgi* lease however normally there is no such liability on the lessee. Further, in the case of a *zarepeshgi* lease pure and simple the lessee is not given any security for the amount advanced by him. Whereas in the case of a usufructuary mortgage there is a transfer of interest in the property mortgaged in favour of the mortgagee. It is clear from the provisions of s. 105, T. P. Act, that in the case of a lease there is a mere transfer of a right to enjoy the property leased, and no interest in the same is transferred in favour of the lessee. Again, in the case of a lease there is no right of redemption vested in the lessor, whereas such a right exists in the case of a mortgage.

The question that arises is as to what was the effect of the inclusion of paras. 7 and 9 in the document in question. Those paragraphs no doubt created a charge over the two *mahals*, but the charge could become operative only on the happening of the contingencies mentioned in those paragraphs. The document primarily embodied a transaction of lease and it was simply with a view to secure to Ramman Lal the rights given to him in his capacity as a lessee that a charge was created over the two *mahals*. In other words, the covenant as to the charge contained in the document was with a view to ensure the performance of their part of the contract by the lessors. But the inclusion of the paragraphs mentioned above could not and did not nullify the transaction of lease. Because of the inclusion of the two paragraphs the document became more than a mere *zarepeshgi* lease. It embodied a transaction of *zarepeshgi* lease and it also contained a hypothecation clause which was to come into operation on the happening of specified contingencies. In short, it partook of the character both of a *zarepeshgi* lease and

of a simple mortgage. In *Nidha Sah v. Murli Dhar* (1) their Lordships of the Privy Council were concerned with the interpretation of a document which was described as a deed of mortgage. Their Lordships made the following observation in that case :

"This instrument, though it is called a mortgage, and though it will be convenient to follow the nomenclature used in the document itself and in the pleadings and judgments in the Courts below, is not a mortgage in any proper sense of the word. It is not a security for the payment of any money or for the performance of any engagement. No accounts were to be rendered or required. There was no provision for redemption expressed or implied. It was simply a grant of land for a fixed term . . . , in consideration of a sum made up of past and present advances."

In the case before us the document fully satisfies the tests laid down by their Lordships of the Privy Council for holding that the document before their Lordships did not embody a transaction of mortgage. We therefore hold that by the document the appellant acquired the rights of a lessee and his possession as a lessee could not be disturbed for a period of ten years.

The second document was also executed by the applicants as executants first party and by Ramman Lal as executant second party. The document is styled as "*wasqa qaim-muqami*" (instrument of representation). It is recited in the deed that the executants first party had appointed executant second party as their "*qaim-muqam*" (representative). The document relates to *Mahal Zard* and authorises executant second party to remain in possession of that *mahal* and to exercise all proprietary rights with a view to realise the profits of that *mahal*. The liability to pay the Govt. revenue and a sum of Rs. 50 a month as profits to executants first party is cast by the document upon the executant second party. The document was to remain in operation for a period of ten years and the possession of executant second party during that period could not be disturbed by the executant first party. There is a clear provision in the deed that the executants first party shall not be entitled to demand accounts from the executant second party. In short, the rights given by the document to Ramman Lal are identical with the rights possessed by a lessee. The document is however not described as a deed of lease.

But in order to ascertain the real character of the document one has to look to the terms of the deed, and the description of the document given by the executant cannot be an infallible guide. The document secures to Ramman Lal the right of possession over the *mahal* for a period of ten years certain,

(1) 25 A 115; 30 I A 54; 8 Sar. 435 (P C).

and casts on him the liability to pay the Govt. revenue and Rs. 600 a year on account of profits to executants first party. Ramman Lal has therefore the right to enjoy the property covered by the document for the period mentioned above and this right was transferred to him by executants first party. The document therefore fulfils all the characteristics of a lease and must be regarded as such. We may mention that the document is inscribed on a stamped paper of Rs. 15 which, in the year 1935, was the correct stamp duty payable on a deed of lease of this character. If by the document Ramman Lal was to be appointed a mere manager, as found by the Court below, much less stamp duty would have been paid. We therefore hold that this document also embodies a transaction of lease.

In view of the conclusions arrived at by us this appeal must prevail. We accordingly allow the appeal, set aside the order of the Court below and send the case back to that Court with the direction to treat Ramman Lal as a lessee under the two documents for a period of ten years from 1343 F. and then to proceed with the case according to law. Ramman Lal is entitled to the costs of this appeal.

s.

Appeal allowed.

LAHORE HIGH COURT Full Bench

Civil Revision Petitions Nos. 168 and 234
of 1940.

February 13, 1941

YOUNG, C. J., TEK CHAND AND
BECKETT, JJ.

SHIA YOUNGMEN'S ASSOCIATION—
PETITIONER

versus

Sayed FATEH ALI SHAH AND ANOTHER—
RESPONDENTS

Mussalman Waqf Act (XLII of 1923), s. 10—District Judge if has jurisdiction to enquire into nature of property—Non-compliance by mutawalli with provisions of Act—District Judge, if can impose fine.

In proceedings under s. 10, Mussalman Waqf Act XLII of 1923, the District Judge has no jurisdiction to hold an inquiry into the nature of the property where the alleged *mutwalli* denies the existence of the *waqf*. 138 Ind. Cas. 725 (1), dissented from.

In case the *mutwalli* has not complied with the provisions of the Act the District Judge is not empowered himself to impose a fine on him. The offence must be dealt with by a Court constituted under Criminal P. C., i. e., by a Magistrate.

C. R. Ps. referred by Tek Chand and Beckett, JJ, dated January 16, 1941.

Order of Single Judge.

Din Mohammad, J.—This order will cover both Civil Revisions Nos. 168 and 234 of 1940. On February 9, 1939, the Shia Youngmen's Association, Lahore, (hereinafter to be called the Association) made an application under s. 10, Mussalman Waqf Act (XLII of 1923) praying that action be taken against Sayyed Fateh Ali Shah and Sayyed Hussain Ali Shah (hereinafter to be called the respondents) as they had failed to furnish a statement of account prescribed by the Act. This application was resisted by the respondents on several grounds. They contended *inter alia* that no *waqf* existed and consequently no action could be taken against them under the Act and that no penalty could be imposed on them by the District Judge. The District Judge repelled their contentions but instead of taking any action against them under s. 10, allowed them further opportunity to furnish a statement of account as contemplated by s. 3 of the Act. Both the Association and the respondents have put in petitions for revision against the order of the District Judge, the former urging that the District Judge should have imposed some penalty on the petitioners under s. 10 of the Act, and the latter contending that the District Judge had no jurisdiction to determine the nature of the *waqf* and to make the direction that he had made.

Two important questions emerge from these proceedings: (1) whether the District Judge has any jurisdiction to determine the nature of the property involved in the proceedings, if the so-called *mutwalli* denies the existence of any *waqf* and (2) whether the District Judge is empowered in case of default of the *mutwalli* to impose a penalty under s. 10. On the first question, the Association refers to a case reported in *Mohammad Baqar v. Mohammad Casim* (1) where a majority of the learned Judge of the Chief Court held that this power was vested in the District Judge. On behalf of the respondents, however, reliance is placed on *Ali Mohammad v. Collector of Bhagalpur* (2), *Waheed Hasan v. Abdul Rahman* (3) and *Abdul Hussain v. Mohamad Ibrahim Raza* (4) which all lay down that no such power is

(1) A I R 1932 Oudh 210; 138 Ind. Cas. 725; 7 Luck. 601; 9 O W N 538; Ind. Rul. (1932) Oudh 321 (F B).

(2) A I R 1927 Pat. 189; 101 Ind. Cas. 207; 8 P L T 233.

(3) A I R 1935 All. 254; 157 Ind. Cas. 1088; 57 A 754; 1935 A L J 307; 1935 A L R 914; 8 R A 261.

(4) A I R 1939 Nag. 205; 183 Ind. Cas. 465; 1 L R. (1939) Nag. 564; 1939 N L J 249; 12 R N 67.

vested in the District Judge. My personal view is that the decision of the majority of the learned Judges in the *Oudh* case (1) is incorrect and that the law has been correctly enunciated in the three judgments relied on by the respondents. There is no provision in the Act which confers any jurisdiction on the District Judge to determine whether a certain property, in relation to which a denial is made as to its being *waqf*, is *waqf* or not. In fact, as I read the Act, it applies only to those cases where the *waqf* nature of the property is not disputed by any person interested therein; and if any proceedings are taken under the Act against any person on the ground that he is a *mutwalli* of a *waqf* as contemplated by the Act, the District Judge ceases to have jurisdiction as soon as that person asserts that there is no *waqf* of which he can be called a *mutwalli*.

On the second question, the Association relies on a remark made by Sulaiman and Niamat Ullah, JJ., in a case reported in *Nasrullah Khan v. Wajid Ali* (5) which in a way favours the contention that the District Judge is himself empowered to impose a penalty under s. 10 on a *mutwalli* who fails to furnish a statement of account as required by the Act. I am, however, not disposed to agree with the learned Judges in this matter. In my view, there is nothing in the Act which empowers the District Judge to exercise magisterial powers and to punish the so-called offender under s. 10. The language of the section rather negatives the possibility of any such power being vested in the District Judge. All that the Legislature intended to do in enacting s. 10 was to create an offence for non-compliance with the provisions of the Act, but the mere creation of an offence in a special Act does not confer any magisterial jurisdiction on the particular Court before which the proceedings under that special Act are to be taken. Take for instance the Companies Act which creates offences in certain cases, but the mere fact that penalties are provided in the Act does not empower the liquidation Court to assume magisterial jurisdiction against the delinquents. Similarly, in several other special Acts penalties are provided for non-compliance with the bye-laws or the rules made under those Acts but in all cases the procedure laid down in the Criminal P. C., must be observed before an offender is punished. I am, therefore, disposed to hold that the District Judge has neither the

power to determine whether a certain property is *waqf* or not when the existence of a *waqf* is denied by any interested person nor is he empowered to impose any penalty on any delinquent under s. 10. In the former case, parties have to be referred to an ordinary Civil Court and in the latter, to an ordinary Criminal Court. Though I am clear in my views, I do not propose to decide these cases myself as at least four Muslim Judges of different Courts in India have taken a contrary view. The matter involved is important from the point of view of the Muslim community and I accordingly forward these cases to the Hon'ble the Chief Justice with the request that they may be laid before a larger Bench with a view to have an authoritative pronouncement of this Court on the questions involved therein.

Order of Reference

Tek Chand and Beckett, JJ.—The following questions of law arise in this case and were referred by Din Mohammad, J. to a Division Bench for an authoritative decision: (1) Whether in proceedings under s. 10, Mussalman Waqf Act, XLII of 1923, the District Judge has jurisdiction to hold an enquiry into the nature of the property where the alleged *mutwalli* denies the existence of the *waqf*; and (2) Whether in case of default by the *mutwalli* the District Judge is empowered to himself impose a fine on him, or whether he should file a complaint against the *mutwalli* in a Criminal Court.

The provisions of the Act are by no means clear and there is a serious conflict of judicial decisions bearing on the point. The questions are of public importance and we think that they should be settled by a Full Bench. We, accordingly, refer the two questions above-mentioned to the Full Bench. The rulings bearing on the points are: *Mohammad Baqar v. Mohammad Casim* (1), *Abdul Wahid v. Chheddu* (6), *Nasrullah Khan v. Wajid Ali* (5), *Nasrullah v. Wahid Ali* (7), *Wāheed Hasan v. Abdul Rahman* (3), *Tahar Saifuddin v. Emperor* (8), *Nanhe Shah v. Abdul Hasan* (9), *Ali Mohammad v. Collector of Bhagalpur* (2), *Abdul Hassain v. Mohamad Ibrahim Raza* (4), *Abdul Hadi v. Abdul Latif* (10) and *Ali Mohamed v. Em-*

(6) A I R 1940 Oudh 313; 188 Ind. Cas. 134; 1940 O W N 598; 12 R O 418; 1940 O L R 312.

(7) 54 A 475; 136 Ind. Cas. 812; A I R 1932 All. 362; (1932) A L J 262; Ind. Rul. (1932) All. 244.

(8) 58 B 302; 154 Ind. Cas. 940; A I R 1934 Bom. 169; 36 Bom. L R 311; (1934) Cr. Cas. 546; 7 R B 384.

(9) A I R 1938 Pat. 137; 174 Ind. Cas. 152; 10 R P 481; 4 B R 391; 19 P L T 617.

(10) A I R 1940 Nag. 161; 188 Ind. Cas. 543; 1940 N L J 98; 12 R N 311.

(5) A I R 1930 All. 81; 118 Ind. Cas. 717; 52 A 167; (1930) A L J 233; Ind. Rul. (1929) All. 925.

peror (11). The papers shall be laid before the Hon'ble Chief Justice for constituting a Full Bench to hear the case at an early date.

Messrs. *Barkat Ali and Kartar Singh Chawla*, for the Petitioner.

Messrs. *Feroze-ud-Din Ahmad and V. N. Sethi*, for the Respondents.

OPINION

Young, C. J.—Two questions of law have been referred to this Full Bench for decision. They are :

"(1) Whether in proceedings under s. 10 Mussalman Waqf Act, XLII of 1923 the District Judge has jurisdiction to hold an inquiry into the nature of the property where the alleged *mutwalli* denies the existence of the *waqf*; and

(2) Whether in case the *mutwalli* has not complied with the provisions of the Act the District Judge is empowered himself to impose a fine on him?"

Dealing first with the first question of law, Mr. Barkat Ali relies upon *Mohammad Baqar v. Mohammad Casim* (1) where it was decided that the District Judge had power to decide whether the property was *waqf* or not. Counsel argues upon this authority on behalf of the petitioner that the Act applies to all *waqfs* whether they are admitted to be *waqfs* or not, and secondly that the jurisdiction of the District Court applies to all *waqf* properties, and therefore the District Judge must decide as a preliminary point whether the property in question is *waqf* or not and that a mere denial by the respondent that the property is *waqf* cannot oust the jurisdiction of the Court. It is an elementary proposition of law that every Court acting in a judicial capacity, whose jurisdiction is denied, has jurisdiction to decide whether it has jurisdiction or not: *Budh Singh Dudhuria v. Niradbaran Roy* (12) at p. 437. It is necessary however to look at the Mussalman Waqf Act itself to see whether this proposition of law applies or not. Under s. 3 (1) it is enacted that every *mutwalli* shall furnish to the Court (i. e., under s. 2 (b), the Court of the District Judge or such other Court subordinate to the High Court as the Provincial Govt. may by notification in the official *Gazette* designate in this behalf) a statement containing particulars of the *waqf* property, the income, etc. Under s. 3 (2) every such statement must be accompanied by a copy of the deed or instrument creating the *waqf*. Under s. 4 (1) of the Court shall cause notice of the

furnishing of such a statement to be affixed in some conspicuous place in the court-house, etc., and thereafter any person may apply to the Court by a petition in writing for an order requiring the *mutwalli* to furnish further particulars or documents. Under s. 4 (2) the Court may, after making such inquiry as it thinks fit, order the *mutwalli* to furnish such particulars or documents. Under s. 5 *mutwalli* must furnish accounts and s. 6 provides for the audit of such accounts. Under s. 10 the Act provides that if there is any failure to furnish the necessary statements or documents, or if the *mutwalli* furnishes false statements or documents, he is punishable with a fine which may extend to Rs. 500.

When the nature and scope of the Act are considered, it appears to me that the Act merely confers administrative powers upon the "Court." The object is to have on record full particulars of all *waqf* property and to enforce that the *mutwalli* shall honestly carry out the provisions of the trust imposed upon him, and to have in a convenient place information available to the public, or to any beneficiary of the *waqf*, in order that they may see whether the *waqf* property is being properly administered and, if it is not, that any one may file an information against the *mutwalli* so that the penalty imposed by s. 10 may be inflicted upon him. The "Court" is nowhere in the Act said to be acting in its judicial capacity. The "Court" under this Act has duties almost identical with those of the Registrar, Joint Stock Companies, under the Indian Companies Act. Under the latter Act, it is the duty of the companies to lodge certain information and documents with the Registrar and if there is a failure on the part of a company or its officials so to act, penalties are provided as in s. 10, Mussalman Waqf Act. It has never been contended that the Registrar, Joint Stock Companies, acts in any way in a judicial capacity. It has been assumed in the authorities relied upon by the petitioner here that the "Court" under the Mussalman Waqf Act is a judicial tribunal acting in its judicial capacity. In my opinion, there is nothing in the Act to justify this assumption. The mistake has occurred by a misconstruction of the use of the word "Court" in the Act itself.

It does not appear to me to matter whether the nature of the *waqf* property is admitted or not. The "Court" is simply a depository for the information required under the Act. There is nothing in the Act itself which authorizes the District Judge to

(11) A I R 1928 Sind 43; 105 Ind. Cas. 666; 28 Cr. L. J. 954; 22 S L R 141; 9 A I Cr. R 142.

(12) 2 C L J 431, (437).

take any action if there is a failure to comply with the provisions of the Act. Of course he could, as any citizen could, if an infringement of the Act is brought to his notice, lodge an information before a Magistrate. It is conceded by Mr. Barkat Ali that if the District Judge did take upon himself to decide the nature of the *waqf* property, his decision would not be binding on anyone. Further, he has been forced to admit that only administrative powers are conferred on the "Court." It is clear that no appeal lies from the decision of the District Judge on this point. It would merely be a summary trial. I would be unwilling, therefore, to decide unless forced to do so, that the "Court" must take upon itself the duty of deciding whether the property is *waqf* or not when its decision was not binding. Such a proceeding would be a sheer waste of time. The use of the word "jurisdiction" in connection with this Act is misleading, this Act merely confers administrative powers upon the Court. With regard to the second point, it is clear that the District Judge cannot himself impose a fine for neglect of the duties imposed upon a *mutwalli* by this Act. This point is concluded by a reference to s. 28, Criminal P. C., which provides that any offence under the I. P. C. may be tried by the High Court, the Court of Session, or by any other Court by which such offence is shown to be triable and to s. 29 which enacts that (1) any offence under any other law, when any Court is mentioned in this behalf in such law, shall be tried by such Court, and (2) when no Court is so mentioned, it may be tried by the High Court or by any Court constituted under this Code by which such offence is shown to be triable. The offence under the Mussalman Waqf Act is an offence "under any other law." No Court is mentioned in this Act as a Court which has jurisdiction to try such an offence. It must therefore be dealt with by a Court constituted under the Criminal P. C., i. e., by a Magistrate.

If it was held that the District Judge has jurisdiction to inquire into the nature of the *waqf* property and to punish any neglect on the part of the *mutwalli* to provide the necessary information and particulars, the result would be that the trial by the District Judge would be summary in its nature and no appeal would lie from the District Judge's decision, his decision would not be binding on anybody and the Civil Court might, in the meantime, be moved to decide the matter judicially and might come to a decision, after a full investigation, contrary

to the decision of the District Judge, but in the meantime the *mutwalli* might be penalized by heavy fines imposed upon him by the District Judge. Quite apart from the considerations set out in this judgment, it appears to me that no such extraordinary state of affairs could have been contemplated by the Act. We answer both the questions in the negative. The revision petitions will be returned to the Single Judge to be dealt with in accordance with the answers to the questions put to this Bench.

Tek Chand, J.—I agree.

Beckett, J.—I agree.

D. Answered in negative.

OUDH CHIEF COURT

Civil Revision Application No. 89 of 1940

March 18, 1941

BENNETT AND GHULAM HASAN, JJ.

BAIJNATH—OPPOSITE PARTY No. 5—

APPLICANT

versus

RAM NARAIN AND OTHERS—APPLICANTS—
OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), ss. 115, 105, 151, O. IX, r. 9—Order setting aside dismissal of case for default—Revision, if lies—Dismissal for default—Setting aside of 'Sufficient cause', within meaning of O. IX, r. 9—Inherent jurisdiction of Court to restore case.

Under s. 105 (1), Civil P. C., the propriety of the order setting aside the dismissal of a case for default of the plaintiff cannot be set forth as a ground of objection in the memorandum of appeal from the decree ultimately passed in the suit, and hence where an order sets aside the dismissal for default and restores the case, there is a case decided within the meaning of s. 115 and an application in revision lies against the order restoring the case. 133 Ind. Cas. 129 (3) and 90 Ind. Cas. 180 (4), followed, 143 Ind. Cas. 222 (1) and 143 Ind. Cas. 307 (2), dissented from.

The plaintiff's application for permission to sue as pauper was dismissed by the Court for plaintiff's default. An application for restoration was made by the plaintiff the same day alleging that he was present in the Court compound from 10 a.m. and explaining that he did not attend the Court when the case was put up for hearing because he did not hear the case called out. The Court held that there was not a sufficient cause for restoration because there was no sufficient cause for the non-appearance within the meaning of O. IX, r. 9 of the Civil P. C. He added however "but in the interest of justice, I am of opinion that the case be restored on payment of costs to the contesting opposite party":

Held, that as the plaintiff was present in the Court on the date fixed for hearing, the Court was not justified in holding that there was no sufficient cause for the restoration under O. IX, r. 9, Civil P. C., and it had, therefore, power to restore the case and in the circumstances of the case was justified in restoring it.

[Case-law referred to.]

C. R. App. of the order of the Munsif, Haveli, Lucknow, dated September 21, 1940.

Mr. Govind Behari Lal, for the Applicant.

Mr. Imtiaz Ali Sufi, for Opposite Party No. 1.

Order.—This is an application in revision under s. 115, of the Civil P. C. against certain orders passed by the learned Munsif of Haveli, Lucknow, restoring a case which he had dismissed because the applicant failed to attend in Court when the case was called out.

The applicant, Ram Narain, had applied for permission to sue as a pauper under O. XXXIII, r. 1, of the Civil P. C. and August 24, 1940, was fixed for hearing this application. Ram Narain did not attend when the case was called out. The application was opposed by one of the opposite parties, Baijnath, who is the applicant in the present revision application, and the application was dismissed under O. IX, r. 8.

An application for restoration was made by Ram Narain the same day. Ram Narain alleged that he was present in the Court compound from 10 A.M. and explained that he did not attend the Court when the case was put up for hearing because he did not hear the case called out. He filed an affidavit and produced two witnesses to support it. The Munsif did not consider that the witnesses, who stated that Ram Narain had been present in the Court compound from 10 A.M., were reliable because they contradicted each other as to what Ram Narain had done that morning, though both agreed that he had been in the compound. The learned Munsif held that there was not a sufficient cause for restoration because it was Ram Narain's own fault if he did not hear the case called out, that is we understand he did not consider that there was sufficient cause for the non-appearance of Ram Narain within the meaning of O. IX, r. 9, of the Civil P. C. He added however :—

"But in the interest of justice I am of opinion that the case be restored on payment of costs to the contesting opposite party."

He accordingly allowed Ram Narain's application and restored the case to its original number on payment by Ram Narain of Rs. 10 as costs. These costs were paid.

It is contended by Baijnath in this application in revision that the Munsif had no jurisdiction to set aside the order dismissing Ram Narain's application, apart from the provisions of O. IX, r. 9. Having held that

there was no sufficient cause made out for the non-attendance of Ram Narain, the Munsif acted, it is argued, without jurisdiction, or, at any rate, with material irregularity in restoring the case.

The first question for consideration is whether an application in revision lies. On this point we have been referred to various authorities.

In *M. Mohiuddin Ahmad v. Hanuman Pershad* (A. I. R. 1933 Oudh, 331) (1), it was held by a Single Judge of this Court that an application against an order for restoration of a suit under O. IX, r. 9 cannot be entertained for the simple reason that the validity of such an order could be attacked under s. 105 in an appeal from the final decree passed in the suit.

In *Panna Lal v. Basdeo*, (A. I. R. 1933 All. 118) (2), a similar view was taken by a Bench of the Allahabad High Court. In this case a suit had been restored by an Assistant Collector who had originally dismissed it under O. IX, r. 8. It was said that that order could be set aside by the Assistant Collector either under O. IX, r. 9, or under the inherent jurisdiction vested in Courts by s. 151. The order was not appealable to the District Judge and, therefore, no revision lay to the High Court.

A different view had, however, been taken previously by a Full Bench of the Allahabad High Court in *Radha Mohan Dutt v. Abbas Ali Biswas*, (A. I. R. 1931 All. 294) (3). It was said by the Full Bench in this case that under s. 105 (1) of the Civil P. C. the propriety of the order setting aside an *ex parte* decree cannot be set forth as a ground of objection in the memorandum of appeal from the decree ultimately passed in the suit, and that where an order sets aside an *ex parte* decree there is a case decided and not merely an interlocutory order during the pendency of the suit. Consequently the High Court is entitled to interfere in revision.

The same view had been taken by a Full Bench of the Allahabad High Court in an earlier case, *Ram Sarup v. Gaya Prasad*, (A. I. R. 1925 All. 610) (4).

We are of opinion that the question whe-

(1) A I R 1933 Oudh 331; 143 Ind. Cas. 222; 10 O W N 1316; Ind. Rul. (1933) Oudh 172.

(2) A I R 1933 All. 118; 143 Ind. Cas. 307; (1932) A L J 1100; L R 14 A 31 Rev.; 17 R D 154; Ind. Rul. (1933) All. 226.

(3) A I R 1931 All. 294; 133 Ind. Cas. 129; 53 A 612; (1931) A L J 377; Ind. Rul. (1931) All. 577 (F B).

(4) A I R 1925 All. 610; 90 Ind. Cas. 180; 48 A 175; 24 A L J 56; L R 6 A 601 Civ. (F B).

ther the application was properly restored could not be raised in an appeal from a decree passed in the suit, and, therefore, there was a case decided within the meaning of s. 115 and an application in revision lies.

The second question for consideration is whether the Munsif was justified in passing an order which must have been passed under s. 151, of the Civil P. C. when he was not justified on his own admission in passing the order under the provisions of the law which applied to such a case, namely, O. IX, r. 9.

In most of the cases to which we were referred on this point the question was whether a Court has power, apart from the provisions of O. IX, r. 13, to set aside an *ex parte* decree passed by itself.

In *Neelavani v. Narayana Reddi*, (I. L. R. 43 Mad. 94) (5), it was held that a Court has no such power. Similarly in *K. B. Dutt v. Shamsuddin Shah Shaheb*, (A. I. R. 1930 Cal. 488) (6), it was said that if no case is made out to satisfy r. 13 of O. IX, it is not open to the Court to enlarge the rule by taking recourse to s. 151, and that where the Court invokes its inherent jurisdiction under s. 151 in these circumstances it is an instance of a decree being set aside irregularly, the Court purporting to exercise powers which it does not possess.

A similar view was taken by the Allahabad High Court in *A. H. Ghaznavi v. Sardar Gurcharan Singh*, (A. I. R. 1937 All. 691) (7), where it was also remarked that no revision lies to the High Court under s. 115 from an order passed under O. IX, r. 13, refusing to set aside an *ex parte* decree, as the person aggrieved could appeal against that decree. That, however, is not the position in the present case.

We have already referred to the observation of the Allahabad High Court in *Panna Lal v. Basdeo* (2), that an order under O. IX, r. 8, could be set aside either under O. IX, r. 9, or under the inherent jurisdiction vested in Courts by s. 151.

It has also been recently held by a member of this Bench in *Badri Prasad v. Ambika Persad*, (1940 O. W. N. 1086), (8), that the proposition that where an alternative remedy is provided the Court is pre-

(5) 43 M 94; 53 Ind. Cas. 847; 37 M L J 599; 26 M L T 377; 10 L W 606; (1920) M W N 19; A I R 1920 Mad. 640 (F B).

(6) A I R 1930 Cal. 488; 128 Ind. Cas. 94; 34 C W N 419; 52 C L J 524; Ind. Rul. (1931) Cal. 14.

(7) A I R 1937 All. 691; 172 Ind. Cas. 72; (1937) A L J 831; 10 R A 369; 1937 A L R 932.

(8) 1940 O W N 1086; 192 Ind. Cas. 332; A I R 1941 Oudh 91; 1941 O L R 215; 13 R O 349.

cluded from exercising its inherent jurisdiction under s. 151, is too wide and does not take into account cases of special and exceptional character which may demand the exercise of the equitable jurisdiction in the ends of justice to correct palpable mischiefs.

We are not prepared to hold in the present case that the Munsif had no power to restore the application. We are not indeed satisfied that he was justified in the view that there was no sufficient cause for restoration, that is under O. IX, r. 9. It was held in *Ram Shankar Tewari v. Ram Narain Tewari*, (A. I. R. 1928 All. 301) (9), that no order of dismissal in default should have been passed till the end of the day when the Court was rising, because there could be no default until the Court rose for the day.

In the present case we know that Ram Narain was present at the Court on the day fixed for the hearing of his application because he applied for restoration of the case that very day. It is not stated at what time application for restoration was made, and this, we think, should have been noted by the Court below. Nor did the Court below note the time when the case was dismissed. It is possible that Ram Narain was not present in the Court compound when the case was originally called out, the case having been taken early in the day. It is also possible that the case was not called out in such a way that every one in the compound could hear. A third possibility is that Ram Narain had gone away temporarily, as litigants may no doubt sometimes be obliged to. The Munsif did not discuss the question how it was that Ram Narain failed to hear the case called out. He did not find that Ram Narain was not present in the compound at the time: he merely said that it was the applicant's fault that he did not hear the case being called out. That is not a satisfactory way of dealing with the matter. In any event we are of opinion that since Ram Narain was present and attended in Court on the date fixed the Court below was justified in restoring the case.

We do not consider that there is any good ground for interference with the orders passed and we accordingly dismiss this application with costs.

S.

Application dismissed.

(9) A I R 1928 All. 301; 108 Ind. Cas. 576; 26 A L J 382.

FEDERAL COURT

Case No. I of 1941

April 22, 1941

GWYER, C. J.; S. VARADACHARIAR
AND BEAUMONT, JJ.

In the matter of THE HINDU WOMEN'S
RIGHTS TO PROPERTY ACT, 1937 (CEN-
TRAL ACT XVIII OF 1937) AND THE HINDU
WOMEN'S RIGHTS TO PROPERTY
(AMENDMENT ACT) 1938 (CENTRAL
ACT XI OF 1938)

AND

In the matter of A SPECIAL REFERENCE
UNDER SECTION 213 OF THE GOVERN-
MENT OF INDIA ACT, 1935

Hindu Women's Right to Property Act (XVIII of 1937)—Hindu Women's Rights to Property (Amendment) Act (XI of 1938)—Acts, whether operate to regulate succession to agricultural land in Governors' Provinces—Subject-matter of devolution by survivorship of non-agricultural property is included in entry No. 7 of List III, the Concurrent List, of Government of India Act, 1935, (25 & 26 Geo. V, Ch. 42).

The Hindu Women's Rights to Property Act XVIII of 1937, and the Hindu Women's Rights to Property (Amendment) Act XI of 1938, (a) do not operate to regulate succession to agricultural land in the Governors' Provinces; and (b) do operate to regulate devolution by survivorship of property other than agricultural land. [p. 363, col. 1.]

The subject of devolution by survivorship of property other than agricultural land is included in entry No. 7 of List III, the Concurrent List, Govt. of India Act, 1935. [*ibid.*]

Special Reference by the Governor-General under s. 213 of the Govt. of India Act, 1935, in the matter of the Hindu Women's Rights to Property Act, 1937.

Sir Brojendra Mitter, Advocate-General of India, (Mr. Asadulla Khan with him), instructed by Mr. K. Y. Bhāndarkar, Agent for the Govt. of India.

Sir Alladi Krishnaswami Aiyar, Advocate-General of Madras, (Mr. N. Rajagopala Iyengar with him), instructed by Ganpat Rai, Agent and Dr. Narain Prasad Ashtana, Advocate-General of the United Provinces, (Mr. Sri Narain Sahai with him), instructed by Gurudayal Sahay, Agent, ...
.....*amici curiæ.*

Gwyer, C. J.—This is a Special Reference which His Excellency the Governor-General has been pleased to make to the Court under s. 213 of the Constitution Act. The questions referred are :—

- (1) Does either the Hindu Women's Rights to Property Act, 1937 (Central Act XVIII of 1937), which was passed by the Legislative Assembly on February 4, 1937; and by the Council of State on April 6, 1937,

and which received the Governor-General's assent on April 14, 1937, or the Hindu Women's Rights to Property (Amendment) Act, 1938 (Central Act XI of 1938), which was passed in all its stages after April 1, 1937, operate to regulate

- (a) succession to agricultural land?
 - (b) devolution by survivorship of property other than agricultural land?
- (2) Is the subject of devolution by survivorship of property other than agricultural land included in any of the entries in the three Legislative Lists in the Seventh Schedule to the Govt. of India Act, 1935?

There being no "opposite party" properly so-called to this Reference, it was not considered necessary or useful to serve any parties with notice of the Reference. But, as the Court desired to hear the various possible viewpoints presented and argued, it suggested to the Advocate-General of India the desirability of inviting brief statements from the Advocates-General of the Provinces, containing the point of view that each of them wished to present and arguments in support thereof. The Advocate-General of India has filed a statement on behalf of the Govt. of India and he has also placed on the file statements from the Advocates-General of seven of the Provinces. As the Court further intimated that besides hearing the Advocate-General of India it would be prepared to hear two more Counsel, the Advocate-General of Madras and United Provinces appeared and took part in the argument. The Court is indebted to all the learned Counsel for the assistance which they have afforded it.

The doubts which have led to the Reference arise from the fact that the bill which became the Hindu Women's Rights to Property Act, 1937 (Act No. XVIII of 1937), which for convenience is hereafter referred to as Act No. XVIII, was passed by the Legislative Assembly of the Indian Legislature on February 4, 1937, that is, before Part III of the Constitution Act came into operation and at a time when the powers of the Legislature were plenary, but was passed by the Council of State only on April 6, 1937, that is, after Part III, had come into operation, and received the Governor-General's assent only on April 14, 1937. After April 1, 1937, the Central Legislature was precluded from dealing with the subjects enumerated in List II of the Seventh Schedule to the Constitution Act, so far as the Governors' Provinces were concerned. Laws with respect

to the "devolution of agricultural land" could be enacted only by the Provincial Legislatures (entry No. 21 of List II), and "wills, intestacy and succession, save as regards agricultural land" appeared as entry No. 7 of List III, the Concurrent List. Act No. XVIII, read with the amending Act of 1938, endeavoured to improve the position of Hindu widows in two classes of cases: (a) where by the operation of the principle of survivorship the widow is excluded from enjoyment of the share of her husband in property which he held jointly with other co-parceners, and (b) where, even apart from the rule of survivorship, the widow is excluded from claiming any share in her husband's estate by reason of the existence of sons, grandsons or great grandsons of the deceased who under the law take in preference to the widow. Provision is also made for securing a share to a widow even in cases where her husband had predeceased the last male owner (s. 3 (1), first proviso). The Act purports to deal in quite general terms with the "property" or "separate property" of a Hindu dying intestate, or his "interest in joint family property", it does not distinguish between agricultural land and other property and is therefore not limited in terms to the latter. It may be mentioned that some aspects of the questions now referred have already been discussed in one or two cases (see, for instance, *Janak Dulari v. Sri Gopal* (1), on the assumption that the Bill had been passed even by the Council of State before the new Constitution came into force. From the dates given in the present Reference it will be seen that this assumption is not correct. It may be added that the validity and operation of the amending Act of 1938 (Act No. XI of 1938) call for no separate discussion, since it does not enact any independent provisions, but merely makes some amendments in the Act of the previous year.

Of the questions referred, Question (2) will in effect be answered by the views to be expressed in the course of the discussion of Question (1); and it is therefore not separately considered. In the statements filed before the hearing and in the course of the arguments, the following contentions were raised with respect to Question (1):—

(i) That Act No. XVIII was never properly passed at all, in view of the stage at which it was taken up and dealt with by the Council of State and the Governor-General.

(ii) That the Act was in any view *ultra vires* the Indian Legislature, so far as its

operation might affect agricultural land in the Governors' Provinces.

(iii) That if the Act should be held to be only in part *ultra vires*, it would not on the authorities be permissible to sever the good from the bad, so as to allow it at any rate to operate in respect of property other than agricultural land in the Governors' Provinces.

(iv) That even if it were permissible to uphold the Act to a limited extent, the provision in s. 3 (2) relating to the interest of the deceased in Hindu joint family property would be *ultra vires* the Indian Legislature, on the ground that the mention of "succession" in entry No. 7 of List III of the Seventh Schedule does not include or authorize legislation in respect of the benefit which accrues to the members of a Mitakshara joint Hindu family under the rule of survivorship.

In addition to the constitutional points above summarized, a suggestion was made on the construction of the Act that it does not provide for the devolution of any property by survivorship nor confer on the widow a right by survivorship, though it gives her the same interest in the joint property as her deceased husband had. This does not seem to be tenable. It is true that s. 3 of the Act does not use the word "survivorship", and it may be that the widow taking a share under the Act does not become a co-parcener with the other sharers; but there can be no doubt that in the cases in which it gives to the widow of a deceased co-parcener a right to a share in the joint property which she did not possess under the pre-existing law, it takes away to that extent the benefit of the rule of survivorship which would have accrued to the remaining co-parceners. The Reference must therefore be dealt with on the footing that so far as its effect goes, the Act does legislate "with respect to" the law of survivorship. It can make no difference for this purpose whether the measure confers on one person a benefit by way of survivorship or takes away from another the benefit of survivorship.

On the first contention, the Court is satisfied that no objection can be taken to the validity of the Act, on the ground only that it was introduced into the Legislature and passed by the Legislative Assembly before Part III of the Constitution Act came into force. Part XIII of the Constitution Act contains certain provisions entitled "Transitional Provisions", which are to apply "with respect to the period elapsing between the commencement of Part III of this Act and the establishment of the Federation". It is then enacted by s. 317 that the

(1) I L R (1939) All. 912; 185 Ind. Cas. 420; A I R 1939 All. 706; (1939) A L J 875; 12 R A 326.

provisions of the Govt. of India Act, 1919, set out (with certain amendments consequential on the provisions of the Constitution Act) in the Ninth Schedule, are to continue to have effect, that is, during the transitional period, notwithstanding the repeal of the earlier Act by the Constitution Act. Among the provisions thus continued are the provisions of the earlier Act relating to the Indian Legislature; and it is clear that the Indian Legislature which was in existence immediately before the coming into force of Part III of the Act was continued in existence after that date, and was in all respects the same Legislature, though its legislative powers were no longer as extensive as they had previously been.

One of the provisions included in the Ninth Schedule is that a Bill shall not be deemed to have been passed by the Indian Legislature unless it has been agreed to by both Chambers either without amendment or with such amendments only as may be agreed to by both Chambers. It is common ground that the Hindu Women's Rights to Property Bill was agreed to without amendment by both Chambers of the Indian Legislature, and as soon as it received the Governor-General's assent, it became an Act [Ninth Schedule, para. 68 (2)]. Not until then had this or any other Court jurisdiction to determine whether it was a valid piece of legislation or not. It may sometimes become necessary for a Court to inquire into the proceedings of a Legislature, for the purpose of determining whether an Act was or was not validly passed; for example, whether it was in fact passed, as in the case of the Indian Legislature the law requires, by both Chambers of the Legislature before it received the Governor-General's assent. But it does not appear to the Court that the form, content or subject-matter of a Bill at the time of its introduction into, or of its consideration by, either Chamber of the Legislature is a matter with which a Court of law is concerned. The question whether either Chamber has the right to discuss a Bill laid before it is a domestic matter regulated by the rules of the Chamber, as interpreted by its Speaker, and is not a matter with which a Court can interfere, or indeed on which it is entitled to express any opinion. It is not to be supposed that a legislative body will waste its time by discussing a Bill which, even if it receives the Governor-General's assent, would obviously be beyond the competence of the Legislature to enact; but if it chooses to do so, that is its own affair, and the only function of a Court is to pronounce upon the Bill after it has become an Act.

In the opinion of this Court therefore it is immaterial that the powers of the Legislature changed during the passage of the Bill from the Legislative Assembly to the Council of State. The only date with which the Court is concerned is April 14, 1937, the date on which the Governor-General's assent was given; and the question whether the Act was or was not within the competence of the Legislature must be determined with reference to that date and to none other.

It is convenient to consider the second and third contentions together, *viz.* that the Act was beyond the competence of the Indian Legislature, so far as its operation might affect agricultural land in the Governors' Provinces; and that, if it were held to be in past beyond the competence of the Legislature, its provisions were not severable, so that it could not even affect property other than agricultural land. No doubt if the Act does affect agricultural land in the Governors' Provinces, it was beyond the competence of the Legislature to enact it; and whether or not it does so must depend upon the meaning which is to be given to the word "property" in the Act. If that word necessarily and inevitably comprises all forms of property, including agricultural land, then clearly the Act went beyond the powers of the Legislature; but when a Legislature with limited and restricted powers makes use of a word of such wide and general import, the presumption must surely be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other. The question is thus one of construction, and unless the Act is to be regarded as wholly meaningless and ineffective, the Court is bound to construe the word "property" as referring only to those forms of property with respect to which the Legislature which enacted the Act was competent to legislate; that is to say, property other than agricultural land. On this view of the matter, the so-called question of severability, on which a number of Dominion decisions, as well as decisions of the Judicial Committee, were cited in the course of the argument does not arise. The Court does not seek to divide the Act into two parts, *viz.* the part which the Legislature was competent, and the part which it was incompetent, to enact. It holds that, on the true construction of the Act and especially of the word "property" as used in it, no part of the Act was beyond the Legislature's powers.

There is a general presumption that a Legislature does not intend to exceed its jurisdiction: Maxwell on the Interpretation

of Statutes (8th Ed.) 126; and there is ample authority for the proposition that general words in a statute are to be construed with reference to the powers of the Legislature which enacts it. "It seems to me" said Lord Esher, M. R. in *Colquhoun v. Heddon* (2) at p. 134,

"that, unless Parliament expressly declares otherwise, in which case, even if it should go beyond its own rights as regards the comity of nations, the Courts of this country must obey the enactment, the proper construction to be put on general words used in an English Act of Parliament is, that Parliament was dealing only with such persons or things as are within the general words and also within its proper jurisdiction, and that we ought to assume that Parliament (unless it expressly declares otherwise), when it uses general words, is only dealing with persons or things over which it has properly jurisdiction."

Where the expression "personal estate" occurred in a Victorian Statute imposing duties on the estates of deceased persons, it was held by the Judicial Committee that it must be construed as referring only to such personal estate as the colonial grant of probate conferred jurisdiction on the personal representatives to administer, whatever the domicile of the testator might be; that is to say, personal estate situate within the Colony, in respect of which alone the Supreme Court of Victoria had power to grant probate:

"Their Lordships thought that in imposing a duty of this nature the Victorian Legislature also was contemplating the property which was under its own hand, and did not intend to levy a tax in respect of property beyond its jurisdiction. And they held that the general expressions which import the contrary ought to receive the qualification for which the appellant contends, and that the statement of personal property to be made by the executor under s. 7 (2) of the Act should be confined to that property which the probate enables him to administer."

Blackwood v. The Queen (3) at p. 98. In the well known case of *Macleod v. Attorney-General for New South Wales* (4) the Legislature of New South Wales had enacted a law providing that

'whosoever being married marries another person during the life of the former husband or wife, whosoever such second marriage takes place, shall be liable to penal servitude for seven years.'

The appellant, who had during the lifetime of his wife married another woman in the United States of America and had in a New South Wales Court been convicted of bigamy under the provisions of this law, contended that the Court had had no jurisdiction to try him for the alleged offence, since the Act under which he was tried, according

to its true construction, was limited to offences committed within the jurisdiction of the local Legislature by persons subject at the time of the offence to its jurisdiction; and that upon any other construction the Act would be *ultra vires*. Lord Halsbury, delivering the judgment of the Judicial Committee, observed that if their Lordships construed the statute as it stood and upon the bare words, any person, married to any other person, who married a second time anywhere in the habitable globe, was amenable to the criminal jurisdiction of New South Wales, if he could be caught in that Colony. "That seems to their Lordships", he continued,

"to be an impossible construction of the statutes; the Colony can have no such jurisdiction, and their Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a Colony, and indeed inconsistent with the most familiar principles of international law. It, therefore, becomes necessary to search for limitations, to see what would be the reasonable limitation to apply to words so general; and their Lordships take it that the words 'whosoever being married' mean 'whosoever being married, and who is amenable, at the time of the offence committed, to the jurisdiction of the Colony of New South Wales.'"

And again in a later passage:

"It appears to their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than Her Majesty's subjects; more than any persons who may be within the jurisdiction of the Colony by any means whatsoever; and that, therefore, if that construction were given to the statute, it would follow as a necessary result that the statute was *ultra vires* of the Colonial Legislature to pass. Their Lordships are far from suggesting that the Legislature of the Colony did mean to give to themselves so wide a jurisdiction. The more reasonable theory to adopt is that the language was used, subject to the well-known and well-considered limitation, that they were only legislating for those who were actually within their jurisdiction, and within the limits of the Colony."

The principle is the same for all law-making bodies with limited powers:

"Now it is true that a by-law must be, as a general rule, consistent with the principles of the Common Law; that if it violates those principles it is bad; and it follows that if it is capable of two constructions, one of which would make it bad and the other good, we must adopt that construction which will make it consonant with the principles of the Common Law."

Collman v. Mills (5), at p. 399. In *D'Emden v. Pedder* (6), the High Court of Australia held that they would not be justified in assuming that a State Parliament intended general words in an enactment to have an application which would conflict with the

(2) (1890) 25 Q B D 129, (134); 59 L J Q B 465; 62 L T 853; 38 W R 545.

(3) (1882) 8 App. Cas. 82, (98); 52 L J P C 10; 48 L T 441; 31 W R 645 (P C).

(4) (1891) A C 455; 60 L J P C 55; 65 L T 321; 17 Cox C C 341 (P C).

(5) (1897) 1 Q B 396, (399); 66 L J Q B 170; 75 L T 590; 18 Cox C C 481; 61 J P 102.

(6) (1904) 1 Com. L R 91.

constitution of the Commonwealth :

"It is in our opinion a sound principle of construction that Acts of a sovereign Legislature, and indeed of subordinate Legislatures such as a Municipal authority, should, if possible, receive such an interpretation as will make them operative and not inoperative.....It is a settled rule in the interpretation of statutes that general words will be taken to have been used in the wider or more restricted sense according to the general scope and object of the enactment." (at pp. 119, 120).

There is this also to be said. The underlying purpose of Act No. XVIII is plainly stated in its preamble: "Whereas it is expedient to amend the Hindu Law to give better rights to women in respect of property". It is therefore a remedial Act seeking to remove or to mitigate what the Legislature presumably regarded as a mischief; and as such it ought to receive a beneficial interpretation: "If the enactment be manifestly intended to be remedial, it must be so construed as to give the most complete remedy which the phraseology will permit". *Coal Economising Gas Co., In re Gover's Case* (7), at p. 198. It may well be that the Indian Legislature, if it had been able to pass the Act while it still possessed plenary powers, would have desired that the "better rights" which it sought to give to Hindu women should extend to agricultural land as well as to other property; but it cannot be supposed that when, after restriction of its powers, it passed, an Act with the above preamble, it did not intend to make the enactment as effective as it was within its power to make it. It was contended before the Court that the passing of the Act with a restricted effect might result in some cases in a widow being deprived of advantages which she possessed under the pre-existing law. The examples adduced by the Advocate-General of India were by no means conclusive, and it should not be assumed that the Court accepts the contention; but even if it were true that an Act intended to be remedial, though possibly limited in scope, was found in a small minority of cases to prejudice rather than to benefit those whom it was intended to help, this would be no reason why the Court should not adopt the construction which is on the whole best calculated to give effect to the manifest intention of the Legislature.

The Court has already pointed out that the question is one of the construction of the Act, that is to say, of ascertaining its true meaning, and that the construction which has commended itself to the Court leaves no room for the application of the principle of non-

severability of subject-matter. It should not however be thought that the Court has overlooked cases cited to it in which the same words have been applied in an Act to a number of purposes, some within and some without the power of the Legislature, and the whole Act has been held to be bad. If the restriction of the general words to purposes within the power of the Legislature would be to leave an Act with nothing or next to nothing in it, or an Act different in kind, and not merely in degree, from an Act in which the general words were given the wider meaning, then it is plain that the Act as a whole must be held invalid, because in such circumstances it is impossible to assert with any confidence that the Legislature intended the general words which it has used to be construed only in the narrower sense: *Owners of S. S. Kaltbia v. Wilson* (8), *Vacuum Oil Company Ltd. v. State of Queensland* (9), *R. v. Commonwealth Court of Conciliation and Arbitration* (10), *British Imperial Oil Co. Ltd. v. Federal Commissioner of Taxation* (11). If the Act is to be upheld, it must remain, even when a narrower meaning is given to the general words, "an Act which is complete, intelligible, and valid and which can be executed by itself"; *Wynes: Legislative and Executive Powers in Australia* 51, citing *Presser v. Illinois* (12). These words appear to the Court apt to describe Act No. XVIII, if construed as the Court has thought right to construe it, that is to say, even when a narrower meaning is given to the general words which the Legislature has used.

It remains to deal with the fourth contention, that is, with regard to the import of the term "succession" in entry No. 7 of List III and of the word "devolution" in entry No. 21 of List II. The question raised is whether these words which *prima facie* imply the passing of an interest from one person to another can include the change which takes place under the Mitaksharā Law in the extent of the interest possessed by the male members of a joint Hindu family in the joint property when one of these members dies. Borrowing a term from the English Law, this change has been described as the operation of the principle of survivorship. But the note of caution sounded by Lord Dunedin in

(8) (1910) 11 C L R 689.

(9) (1934) 51 C L R 677.

(10) (1910) 11 C L R 1.

(11) (1925) 35 C L R 422.

(12) (1886) 116 U S 252.

(7) (1875) 1 Ch. D 182, (198); 45 L J Ch. 83; 33 L T 619; 24 W R 125.

Bajjnath Prasad Singh v. Tej Bali Singh (13), as to the use of the terms "co-parceners" and "co-parceners" in relation to a Mitakshara joint family is equally applicable to the use of the terms "joint-tenancy" and "survivorship"; for the incidents associated with joint ownership under the Mitakshara Law are not identical with those known to the English Law of joint-tenancy. There is however this degree of resemblance between the *jus accrescendi* and the effect of the death of one of the owners of joint family property under the Mitakshara law, that in a sense there is only an extinction of the deceased person's interest, and the shares of the survivors, whose pre-existing interest extended over the whole property are increased only because of the diminution in the number of sharers. The argument therefore is that words like "devolution" and "succession" cannot be held to include cases where the deceased person's interest does not pass to another but is merely extinguished or lapses. There are at least two answers to this argument.

Whatever may be the position under the English Law, the theory of extinction does not exactly describe the position which arises on the death of a member of a Mitakshara joint family. The result of a long course of decisions is that certain legal acts continue to operate on the interest of the deceased member even when what is ordinarily spoken of as the rule of survivorship is taking effect. Thus, if a creditor obtains a decree against a member of a joint family and during the latter's life-time attaches his undivided interest in the family property, the creditor will be entitled to proceed against that interest to the extent necessary for the satisfaction of his claim even after the property has survived to the other members by reason of the death of the judgment-debtor. In some of the Provinces there have also been decisions recognising a right of voluntary alienation in each joint owner, in respect of his undivided share, when the alienation is for value; and, if in this part of the country a member creates a mortgage over his undivided share, such mortgage has been held to be operative even after the death of the mortgagor. According to several decisions of the Madras High Court, the alienation by a member of his undivided share does not disrupt the joint status and yet the rights of the purchaser have been held not to be defeated by the death of the alienor, though no

suit for partition be instituted during his lifetime. Results of this kind are wholly inconsistent with the theory of extinction or lapse, and even more so when the deceased happens to be the father of the survivors. It was recognised as early as *Nanomi Babuas-in v. Modhun Mohun* (14), that the application of the theory of the son's "pious obligation" to pay the father's debts has practically resulted in the *pro tanto* extinction of the son's independent rights in the family property; and s. 43 of the Civil P. C., provided that to the extent to which joint family property remained liable for the father's personal debts even after his death, it "shall be deemed to be property which has come to the hands of the son as his legal representative".

It is equally important to remember that neither in their ordinary grammatical significance nor by a long continued use in a technical sense have the words "devolution" and "succession" acquired a connotation that would preclude their application to describe the operation of the rule of survivorship as above explained. Eminent text-writers and Judges have used one or the other of these terms to include the accession of right which takes place on the death of one of the members of a Mitakshara joint family. Many enactments of Parliament and of the Indian Legislature have used the words "inheritance" and "succession" in juxtaposition, justifying the inference that succession is either another category from or a wider category than inheritance" (see some of these enactments referred to in Ilbert's Govt. of India, Chap. IV, and in Mulla's Hindu Law, p. 4). If in these enactments "succession" should be held not to include the principle of survivorship, it would be difficult to say what else that word is meant to refer to and in any other view the continued administration of that part of the Hindu Law by the British Indian Courts could not have been provided for, because there are no other appropriate words in those provisions. Such being the position as to the meaning of the words, it is permissible to add that it is difficult to conceive of any reason why in framing Lists II and III Parliament should have thought fit to take away the law of survivorship from the jurisdiction of the Indian Legislatures, and there is no justification for attributing oversight either, when, as above explained, the language employed may properly be held to comprehend the law of survivorship as well.

A line of cases in the High Courts dispensing with the production of a succession cer-

(13) 43 A 228; 60 Ind. Cas. 534; A I R 1921 P C 62; 19 A L J 317; 23 Bom. L R 654; 33 C L J 388; 25 C W N 564; 40 M L J 387; (1921) M W N 300; 2 P L T 257; 48 I A 195.

(14) 13 C 21; 13 I A 1; 4 Sar. 682; 10 Ind. Jur. 151 (P C).

tificate when title to a "debt" is claimed by survivorship may seem to support the restricted interpretation of the word "succession" (*cf.* at p. 16). But taking this class of decisions as a whole they must be understood to rest not so much on the connotation of the words "succession" as on the meaning of the expression "effects of the deceased person" and on the reason of the rule relating to the production of a succession certificate in support of the claim to a "debt" *prima facie* due to a deceased person. (See *Vairanán Chettiar v. Srinivasa Chettiar*) (15). In any event, the two enactments not being *in pari materia*, such observations as may be found in these cases in support of the limited interpretation of the word "succession" cannot be held to be sufficient to override the cumulative effect of the considerations referred to above.

In one or two instances, eminent writers have employed language suggesting that "devolution" may comprehend cases of survivorship but not the word "succession" (see Mayne's Hindu Law, para. 270), but it is difficult to find any basis for this distinction. "Devolution" may be wider in scope than "succession" in the sense that the former is not restricted to the result of a "death" (see O. XXII, r. 10, Civil P. C.), but that is immaterial for the present purpose; and, as already stated, eminent Judges have used both the terms in a sense that will include the operation of the principle of survivorship.

The Court is therefore of opinion that the answers to the questions comprised in the Special Reference are as follows:—

- (1) The Hindu Women's Rights to Property Act, 1937, and the Hindu Women's Rights to Property (Amendment) Act, 1938,—
 - (a) do not operate to regulate succession to agricultural land in the Governors' Provinces; and
 - (b) do operate to regulate devolution by survivorship of property other than agricultural land.
- (2) The subject of devolution by survivorship of property other than agricultural land is included in entry No. 7 of List III, the Concurrent List.

The Court will report to His Excellency accordingly.

Reference answered.

(15) 44 M 499; 62 Ind. Cas. 944; 40 M L J 481; 13 L W 475; 29 M L T 294; (1921) M W N 290 (F B).

ODDH CHIEF COURT

Second Rent Appeal No. 83 of 1937

March 31, 1941

GHULAM HASAN, J.

BHAGWAN DASS—DEFENDANT—

APPELLANT

versus

Mst. TAJUNNISA BIBI—PLAINTIFF

AND OTHERS—DEFENDANTS—

RESPONDENTS

Civil Procedure Code (Act V of 1908), O. II, r. 2—Plaintiff not aware of his right at date of former suit suing subsequently on such right—Second suit, if barred.

A right which a litigant possesses without knowing or ever having known that he possesses it, can hardly be regarded as a "portion of his claim" within the meaning of O. II, r. 2 (2), Civil P. C.

Where, therefore, the plaintiff at the date of the former suit was not aware of the right on which he claimed in a subsequent suit;

Held, that O. II, r. 2 did not apply to the case and the plaintiff was not precluded from suing in respect of that right. *Anant Bibi v. Imdad Husain* (1), 7 Ind. Cas. 289 (2) and 49 Ind. Cas. 54 (3), followed, 134 Ind. Cas. 654 (4) and *Kishen Narain v. Nizamuddin* (5), distinguished.

S. R. A. against the decree of the District Judge, Rae Bareilly, dated September 28, 1937.

Mr. Mohd Husain, for the Appellant.

Mr. Akhtar Husain, for Respondent No. 1.

Judgment.—This is a second rent appeal by the defendant arising out of a suit for recovery of land revenue under s. 108 (16) of the Oudh Rent Act.

Mst. Taj-un-nissa Bibi, the plaintiff-respondent, filed a suit to recover Rs. 361-3-11 with interest on account of arrears of the land revenue which she alleged to have paid for the years 1339 and 1340 *Fasli* on behalf of the defendants. The plaintiff is the *lambardariya* of Mahal Taj-un-nissa situate in village Kutra Bahadurganj. There are two *khata khewats* in this mahal, one of which *khata khewat* No. 1 stands in the name of Mst. Taj-un-nissa and the other *khata khewat* No. 2 stands in the names of the mortgagees who are defendants to the suit. This village was under attachment in 1339 and 1340 *Fasli* and the plaintiff's allegation was that the arrears of revenue due in respect of the *khata khewat* No. 2 had been realised by the Govt. from the plaintiff.

The material defence was that the revenue had been paid out of the realisations of *khata khewat* No. 2 when the mahal was under the direct management of the Govt. It was also pleaded that the suit was barred under the provisions of O. II, r. 2 of the Civil P. C.

The learned Assistant Collector held that the plaintiff had paid Rs. 353-2-10 as land

revenue for the share of the defendants and Rs. 9-0-9 for the expenses of the attachment. He further found that O. II, r. 2 of the Civil P. C. did not bar the present suit of the plaintiff because the plaintiff was not aware of the accounts in 1337 *Fasli*. He accordingly decreed the suit against all the defendants jointly.

The defendants appealed and the learned District Judge upheld the findings of the learned Assistant Collector on both the points but modified the decree by separating the liabilities of the defendants *inter se*.

Bhagwan Dass, defendant No. 5, who is the appellant before me, has alone appealed. The other defendants have acquiesced in the decree.

The only point that has been urged before me in support of the appeal is that decision of the lower Courts is erroneous and that it should have been held that the plaintiff's present suit was barred by the provisions of O. II, r. 2, of the Civil P. C. It is argued that the plaintiff brought a suit on June 12, 1933, (*vide* plaint Ex. A-1) in respect of the revenue for 1337 *Fasli* and obtained a decree (Ex. A-2) on October 9, 1933, against certain defendants including the present defendant-appellant, that the revenue for 1339 and 1340 *Fasli* had become due at the time of the institution of the suit and the plaintiff's omission to sue in respect of the revenue for 1339 and 1340 *Fasli* was a bar to the maintainability of the present suit. Reference is made in this connection to para. 5 of the plaint (Ex. A-1), which shows that the plaintiff in the previous suit alleged ignorance of the revenue having been realised from the plaintiff's share as the *mahal* was under attachment in 1339 *Fasli* and expressed her inability to sue for 1339 *Fasli* on that ground. She further stated in that paragraph that she would sue for the revenue after she had become aware of the fact that the revenue had been realised. It is further argued that the plaintiff became aware in September 1933, of the liabilities of the defendants to pay the arrears of revenue and that she should have sought an amendment of the plaint so as to include the claim for 1339 and 1340 *Fasli* or obtained leave from the Court under O. II, r. 3, of the Civil P. C.

I am of opinion that these contentions have no force.

There is a concurrent finding of both the Courts below that the plaintiff was not fully aware of the account on the date of the filing of her suit and that she had a reason not to be aware of the assets and liabilities in respect of 1339 and 1340 *Fasli* on June 12,

1933, when she instituted the previous suit. The finding that the plaintiff was not aware of her assets and liabilities in respect of 1339 and 1340 *Fasli* at the time of the institution of the previous suit is based on admissible evidence and is binding in second appeal. The only question, therefore, which remains for determination is whether in view of this finding the lower Courts were justified in arriving at the conclusion that the provisions of O. II, r. 2 of the Civil P. C. did not apply to the case. I do not see any legal flaw in the decision arrived at by the two Courts below. The said rule lays down—

"(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action.

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished."

In a case under s. 7 of Act VIII of 1859, which was substantially to the same effect as the present O. II, r. 2 of the Civil P. C., 1908. Their Lordships of the Judicial Committee held that a right which a litigant possesses without knowing or ever having known that he possesses it, can hardly be regarded as a "portion of his claim" within the meaning of the section in question. Their Lordships were further pleased to observe that upon the evidence in that case the plaintiff at the date of the former suit was not aware of the right on which he was not insisting. (*See Amanat Bibi v. Imdad Husain*, L. R. 15 I. A. 106) (1).

This decision was followed by the Allahabad High Court in *Batul Kunwar v. Munni Lal* (I. L. R. 32 All., 625) (2). In that case the plaintiff first obtained an *ex parte* decree against the mother of a deceased tenant for 1313 *Fasli* and he obtained another decree against the daughter of the deceased tenant for 1314 *Fasli*. The first decree was set aside and at the re-hearing the daughter was made a party. It was found that at the time the plaintiff brought the suit in respect of 1314 *Fasli* he was not aware that the daughter was the tenant in 1313 *Fasli* also. It was held, therefore, that the plaintiff having no knowledge when he had brought his suit in respect of 1314 *Fasli* that the daughter was the tenant in 1313 *Fasli*, could not be said to have omitted to sue in respect of that year, and the suit for 1314 *Fasli* was not barred by the provisions of s. 43 of the Civil P. C. of 1882 (corresponding to O. II, r. 2 of the Civil P. C. of 1908).

(1) 15 I A 106; 15 C 800; 5 Sar. 214; 12 Ind. Jur 255.

(2) 32 A 625; 7 Ind. Cas. 289; 7 A L J 738.

In *Ram Khelawan v. Jaskaran* (21 Oudh Cases 307) (3), Mr. L. Stuart, A. J. C., (afterwards Sir Louis Stuart) held that a person is not deleteriously affected by the provisions of O. II, r. 2 of the Civil P. C. if at the time he brought his former suit he was not in a position to know all his rights.

The case of *Naba Kumar Hazra v. Radhashyam Mahish* (A. I. R. 1931 P. C. 229) (4) is clearly distinguishable upon the facts. There it was held that the relief for rent and profits which could have been prayed for in a previous suit for conveyance of properties and arising out of the same cause of action cannot be prayed for in a subsequent suit. The precise question arising in the present case namely that the plaintiff was ignorant of her rights at the time when she brought the former suit did not arise in that case and was, therefore, rightly not considered.

The case of *Kishan Narain v. Nizamuddin*, (1937 O. W. N. 1146) (5), relied upon by learned Counsel for the defendant-appellant is equally inapplicable to the facts of the present case. No such question as is raised in the present case arose for decision in the above case. In the present case there is a concurrent finding of fact that the plaintiff was not aware at all of her assets and liabilities at the time of the previous suit. The statement of Mohammad Ahmad Khan, P. W. No. 2, general agent of the plaintiff, that he came to know about the payment of the revenue for 1339 and 1340 *Fasli* by the plaintiff for the shares of the defendants in September 1933, is not definite as it is qualified by the further statement that he could not include the amount in the previous suit as the accounts of Tahsil Kham were not ready. In view of this statement it was not possible for the plaintiff to have asked for amendment of the plaint in the previous suit. It is significant that the defendant-appellant did not raise the question of amendment of the plaint on the basis of the statement made by the general agent of the plaintiff either in the trial Court or before the lower Appellate Court. The decision relied upon has, therefore, no application to the present case.

The appeal fails and is dismissed with costs.

s.

Appeal dismissed.

(3) 21 O C 307; 1 U P L R (O) 19; 49 Ind. Cas. 54; A I R 1919 Oudh 262.

(4) A I R 1931 P C 229; 134 Ind. Cas. 654; 35 C W N 977; 61 M L J 294; (1931) A L J 797; 54 C L J 274; 34 L W 444; (1932) M W N 333; Ind. Rul. (1931) P C 302 (P C).

(5) (1937) O W N 1146.

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Civil Revision Petition No. 315 of 1939

January 21, 1941

MIR AHMAD AND SOOFI, JJ.

MASHAHUR AND OTHERS—PETITIONERS

versus

SUBHAN DIN AND OTHERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXII, rr. 3, 4, 11, O. XLI, r. 4—Lower Court's decision jointly affecting all appellants—Death of one—Legal representative not brought on record within time—Appeal, if abates.

A suit against several defendants for a declaration that the plaintiffs were entitled to water their lands from a particular stream at a specified point and for a perpetual injunction that the defendants should remove their dam in order to enable the plaintiffs to do so, was decreed :

Held, that the decision jointly affected all the defendants and if in appeal by them one of them died and his legal representative was not brought on record within time, the appeal did not abate against all the appellants. 157 Ind. Cas. 994 (1), distinguished, 46 Ind. Cas. 50 (2), 146 Ind. Cas. 511 (2) (3), 154 Ind. Cas. 147 (4) and 146 Ind. Cas. 26 (5), relied on.

C. R. P. from an order of the Additional Judge, Peshawar, dated July 11, 1939.

Mr. Gul Mohd. Khan, for the Petitioners.

Sardar Jaman Singh, for Respondents
Nos. 1 to 5.

Mir Ahmad, J.—Five persons, who are respondents Nos. 1 to 5 before us, brought a suit against 11 defendants for a declaration that the plaintiffs were entitled to water their lands from a particular stream at a specified point and for a perpetual injunction that the defendants should remove their dam shown in the plaint in order to enable the plaintiffs to do so, and that the defendants should not interfere with their enjoyment of those water rights in future. The trial Judge decreed the claim. Out of 11 defendants nine appealed to the District Judge, the remaining two having been made respondents along with the five plaintiffs. Of the nine appellants one Khada Mir died and his legal representatives were not brought on the record within 90 days. The Additional Judge following *Boota Mal v. Farid Khan* (1) held that the appeal abated so far as all the appellants were concerned. He dismissed the appeal. The eight persons who were appellants in the lower Appellate Court and also the legal representatives of Khada Mir have jointly presented this application for revision against the order of the Additional Judge. Order XXII, rr. 3, 4 and 11, Civil P. C., read thus :

“Rule (3). (1) Where one of two or more plaintiffs

(1) A I R 1935 Pesh. 126; 157 Ind. Cas. 994; 8 R Pesh. 45.

lies and the right to sue does survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. (2) Where within the time limited by law no application is made under sub-r. (1) the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

Rule 4. (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant. (3) Where within the time limited by law no application is made under sub-r. (1) the suit shall abate as against the deceased defendant.

Rule 11. In the application of this order to appeals, so far as may be the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal.

It is clear that if an appellant or a respondent dies and his legal representatives are not brought on the record within the limitation provided for the purpose, the appeal abates so far as that person is concerned. In case there are more than one appellant or respondent and the appeal has abated the question arises whether the appeal can be proceeded with by the other appellants or against the other respondents. In the case reported in *Boota Mal v. Farid Khan* (1) the plaintiff had appealed against several respondents. One of the respondents had died and his legal representatives were not brought on the record within 90 days. As the plaintiff wanted a decree against all the respondents jointly a Bench of this Court held that the appeal had abated against them all. This is a correct view. The judgment of the lower Court had become final so far as the respondent who had died was concerned. If the Appellate Court were to decide the case otherwise with regard to the other respondents there would have been two conflicting decrees in the same suit. The appeal could not therefore be carried on by the appellants against the other respondents and the appeal was consequently dismissed. Now the case where one of the appellants dies is different O. XLI, r. 4, Civil P. C., is in the following terms :

"Rule 4. Where there are more plaintiffs or more defendants than one in suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal . . . from the whole decree and thereupon the Appellate Court may reverse

or vary the decree in favour of all the plaintiffs or defendants, as the case may be."

It is obvious that where the decision of the lower Court jointly affects all the appellants the Appellate Court has the power to reverse the decision with regard to all the persons concerned even though one of them may have appealed against it. As this rule enables the Appellate Court to set aside the whole decree at the instance of one of the several persons affected by it, there can be no question of the case becoming *res judicata* so far as those appellants who have not appealed, are concerned. In other words, the Court when reversing the order can reverse it *in toto* and thus avoid the consequence of there being two contradictory decrees in the same suit. The corollary is apparent that the abatement of the appeal with respect to one of such appellants does not necessarily lead to the result that the whole of the appeal abates and should consequently be dismissed. It follows that in this case the Appellate Judge could hear the appeal and if he thought that the decree should be set aside he could set it aside in favour of all the defendants in the lower Court even though one of them was not a party to the appeal by reason of abatement. This view was taken in the following case: The Division Bench of the Lahore High Court had come to this conclusion in *Piyare Lal v. Chura Mani* (2). The head-note runs thus :

"During the pendency of an appeal one of the appellants died and no application was made to bring his legal representatives on the record till after the period of limitation had expired. It was contended that the appeal had abated *in toto*: Held, that the decree of the trial Court having been passed on a ground common to all the defendants the case was covered by O. XLI, r. 4 and the appeal could therefore proceed."

The Division Bench of the Allahabad High Court has taken a similar view in *Jamna Bhagat v. Oudh Behari Mal* (3). The head-note is as under :

"A sale deed purported to transfer the entire property jointly in favour of all the vendees for one consolidated amount and there was no specification of different interests of the various vendees in the sale deed. The trial Court also treated the purchases as a joint one and passed one joint decree for pre-emption against all the vendees. One of the vendees died pending appeal and his legal representative was not brought on record. Held, that the mere fact that one of the vendees had dropped out, would not prevent the other vendees from prosecuting their appeal, because they were interested in the entire property transferred and were entitled to press their appeal as against the plaintiff on a ground common to all the vendees and that the appeal did not abate as a whole."

A Division Bench of the Calcutta High

(2) A I R 1918 Lah. 227; 46 Ind. Cas. 50; 84 P R 1918.

(3) A I R 1933 All. 733; 146 Ind. Cas. 511 (2); (1933) A L J 1049; 6 R A 305.

Court has said the same in *Satulal Bhat-tacharjee v. Asiraddi* (4). The head-note is to the following effect :

"A suit was brought by the plaintiffs for a declaration of their title to certain lands and for recovery of *khas* possession in respect of the same. The first Court granted a declaration of the plaintiff's title to a fractional share in the lands in suit but dismissed the plaintiff's suit for *khas* possession. On appeal the lower Appellate Court set aside that decision and decreed the plaintiff's suit in full. Defendant No. 1 died during the pendency of the appeal in the lower Appellate Court and his two sons were substituted as his heirs in the record of the appeal. A second appeal was filed on behalf of both the sons. One of the sons died during the pendency of the second appeal and his heirs were not brought on the record within the time allowed by law. Held, that O. XLI, r. 4 enables one of the two heirs of the defendant to maintain the appeal from the whole decree, and it was competent to the Appellate Court to reverse or vary the decree in favour of all the plaintiffs or all the defendants as the case may be, although one of the defendants or one of the defendant's heirs did not join in the appeal."

A Division Bench of the Madras High Court has laid down this proposition in *Chenchuramayya v. Venkatasubhayya Chetty* (5). The head-note is in the following terms:

"During the pendency of an appeal, appellants Nos. 2 and 5 died: the legal representatives of appellant No. 2 were brought on the record, but an application by an alleged representative of appellant No. 5 was dismissed. Held, that the lower Court's decree could be dealt with as a whole as it stood against all the appellants under O. XLI, r. 4 even though the legal representative of appellant No. 5 was absent on the record."

The case before us is therefore distinguishable from *Boota Mal v. Farid Khan* (1) and the authorities quoted above apply to it. We consequently hold that the lower Appellate Court has committed a material irregularity in deciding the case on the strength of an authority which is not applicable to the case at all. The petition is accepted, the order of the lower Appellate Court set aside and the case remanded for decision on merits. Costs in this Court shall follow the event.

D. Case remanded.

(4) A I R 1934 Cal. 703; 154 Ind. Cas. 147; 61 C 879; 59 C L J 362; 38 O W N 743; 7 R C 438.

(5) A I R 1933 Mad. 655; 146 Ind. Cas. 26; 38 L W 278; 6 R M 203.

CALCUTTA HIGH COURT

Appeal No. 216 of 1939

July 11, 1940

EDGLEY, J.

HEMENDRA NATH ROY

CHOWDHURY—DECREE-HOLDER—

APPELLANT

versus

PURNA CHARAN HAULI AND OTHERS—

JUDGMENT-DEBTORS—RESPONDENTS

Bengal Agricultural Debtors Act (VII of 1936),

ss. 2, (8) (iii), 34, 2 (9) (a)—Decree passed for cash equivalent of *bhag* produce in suit for non-payment of share *bhag* produce by defendant, whether "debt" within meaning of Act—Execution proceedings in respect of such decree if can be stayed under s. 34—Bargadar, whether "debtor."

Where a decree is passed in a suit instituted by the decree-holder against the judgment-debtors for non-payment of their share of the *bhag* produce due in respect of a certain plot for a cash equivalent of the produce, such a decree is not a debt within the meaning of the Ben. Agri. Debtors Act and is, therefore, exempted from its operation. The execution proceedings in respect of such decree cannot, therefore, be stayed under s. 34.

The reference in sub-s. (9) (a), s. 2 to a person "who cultivates land himself" must mean a person other than a *raiyyat* or an under-*raiyyat* who has some interest in the land, which would entitle him to employ hired labourers, *adhiaars*, *bargadars* or *bhagdars* for the purpose of cultivating it, but such hired labourers and the other persons mentioned would not themselves be included within the definition of "debtor."

A. from appellate order of the District Judge, Khulna, dated May 19, 1939.

Messrs. *Rajendra Bhusan Bakhshi* and *Mati Lal Acharjee*, for the Appellant.

Mr. *Abdul Quasem* No. II, for the Respondents.

Judgment.—This appeal arises with reference to an application filed by the decree-holder under s. 47, Civil P. C., in which he asked that an order staying the execution proceedings under s. 34, Ben. Agri. Debtors Act, should be vacated. The application was rejected by the learned Munsif and the decision of the trial Court was affirmed on appeal by the learned District Judge of Khulna. It appears that the decree-holder had instituted a suit against the judgment-debtors for non-payment of their share of the *bhag* produce due in respect of a certain plot of land with an area of 40 *bighas*. His case was that the owner's share of the produce amounted to 160 maunds of paddy and a certain quantity of straw and he claimed Rs. 770 as the price of the produce, including interest. On contest he obtained a decree for Rs. 292-8-0 which, in the view of the Court which passed the decree, represented the proper price of the *bhag* produce due to the decree-holder. This decree was obtained on March 28, 1938 and the decree-holder applied for execution on June 17, 1938. Thereafter the judgment-debtors applied to the Debt Settlement Board and a notice was issued under s. 34, Ben. Agri. Debtors Act, on September 21, 1938, whereby further execution proceedings were stayed. It seems to have been urged before both the Courts below that the provisions of the Beng. Agri. Debtors Act had no application in respect of a liability of this sort, but this contention

was not accepted as it was held that the Act did not exclude a decretal debt although the claim in the original suit was for *bhag* produce.

The main point for consideration in connection with this appeal is whether or not a decree such as the decree-holder was seeking to execute is exempted from the operation of the Act by reason of the provisions of s. 2 (8) (iii) of the Act. This sub-section provides that

"debt includes all liabilities of a debtor in cash or in kind, secured or unsecured, whether payable under a decree or order of a Civil Court or otherwise, and whether payable presently or in future but does not include... (iii) any share of the produce of land payable on account of land cultivated under the system known as *adhi*, *barga* or *bhag*."

There can be no doubt that if, according to the terms of the decree, a certain share of the produce of the land had been made payable to the decree-holder, the liability thereunder would have been clearly exempted from the operation of the Act. It must however be remembered that the amount of money which was decreed was considered by the Court which passed the decree to be the cash equivalent of the share of the produce due to the decree-holder and it therefore follows that this cash liability is really a liability in respect of a share of the produce of the land, to which reference is expressly made in s. 2 (8) (iii) of the Act. It is argued that the decree which the appellant was seeking to execute must be regarded as a debt within the meaning of the Act in view of the proviso to s. 18 which is in the following terms :

"Provided that a decree of a Civil Court relating to a debt shall be conclusive evidence as to the existence and amount of the debt as between the parties to the decree."

Admittedly a Debt Settlement Board has exclusive jurisdiction to decide a question with regard to the existence of the amount of a debt which falls within the scope of the Ben. Agri. Debtors Act, but it was pointed out by this Court in *Nur Mia v. Noakhali Nath Bank Ltd.* (1) that :

"The Civil Court after receipt of notice under s. 34, Ben. Agri. Debtors Act, has jurisdiction to enter into the question whether the debt, in respect of which the proceeding is pending before it, is a debt within the meaning of cl. (8) of s. 2 and, if it finds that it does not come within that definition, it should not stay proceedings in pursuance of the notice."

In my view, the liability of the judgment-debtors under the decree dated March 28, 1938, did not represent a debt within the purview of the Ben. Agri. Debtors Act and it

therefore, follows that the provisions of s. 18 of the Act can have no application to a debt of this nature. It is also argued on behalf of the respondent in this case that the language of s. 2 (9) of the Act may be taken to indicate that a *bargadar* comes within its scope. I am not prepared to accept this argument. According to the Preamble of the Act the intention of the Legislature was to provide for the relief of indebtedness of agricultural debtors and from the general scheme of the Act one of the main intentions seems to be to protect the *raiyyats*, under-*raiyyats* and other cultivators who have an interest in land from becoming indebted to such an extent that their holdings or interest in the land may have to be sold for the purpose of liquidating the debts which they have incurred. Sub-section (9) states that

"'debtor' means a debtor whose primary means of livelihood is agricultural and who (a) is a *raiyyat* or an under-*raiyyat*, or (b) cultivates land himself or by members of his family or by hired labourers or by *adhiars*, *bargadars* or *bhagdars*."

If this sub-section be read together with sub-s. (8) (iii) of the Act it would appear to have been the intention of the Legislature to exclude from the operation of the Act *adhiars*, *bargadars* or *bhagdars* presumably because these people have no interest in the land, which it was necessary to protect by means of special legislation. From the provisions of s. 3 (17), Ben. Ten. Act, it would appear that these people are persons who cultivate the land of another person on condition of delivering a share of the produce to that person. It would, therefore, appear that the reference in sub-s. (9) (a) to a person "who cultivates land himself" must mean a person other than a *raiyyat* or an under-*raiyyat* who has some interest in the land, which would entitle him to employ hired labourers, *adhiars*, *bargadars* or *bhagdars* for the purpose of cultivating it, but such hired labourers and the other persons mentioned would not themselves be included within the definition of "debtor." Having regard to the considerations mentioned above, I am of opinion, that the respondents do not come within the scope of the Ben. Agri. Debtors Act of 1935 and in these circumstances the learned Munsif should not have stayed proceedings on receipt of the stay order, dated September 21, 1938, from the Debt Settlement Board of Kailasgunge. This appeal, must, therefore, be allowed with costs throughout. The decision of the lower Appellate Court affirming that of the first Court is set aside and it is directed that execution do proceed. The hearing-fee in this appeal

(1) 43 C W N 322; 184 Ind. Cas. 118; A I R 1939 Cal. 298; I L R (1939) 1 Cal. 437; 69 C L J 126; 12 R O 204.

is assessed at two gold *mohurs*. Leave to appeal under cl. 15 of the Letters Patent is refused.

D. Appeal allowed.

PATNA HIGH COURT

Appeal from Appellate Order No. 313

of 1940

April 23, 1941

DHAVLE, J.

SARWAN CHAUDHURY AND OTHERS

—APPELLANTS

versus

CHANARPAT THAKUR AND OTHERS—

RESPONDENTS

Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939), s. 15—Exemption under—Whether available where judgment-debtor's usufructuary mortgagee is in possession of holding.

Section 15 does not speak of land in the possession of the judgment-debtor. What it does is to exempt from sale "one acre of the land comprised in the holding." Hence it cannot be said that the whole of the holding can be brought to sale in execution of a mortgage decree obtained by a prior mortgagee, because it is in possession not of the judgment-debtor but of his subsequent *sudbarnadar* (usufructuary mortgagee).

A. from an order of the District Judge Muzaffarpur, dated September 4, 1940.

Mr. G. P. Shahi, for the Appellants.

Messrs. Jharkhandi Rai and Kailash Rai, for the Respondents.

Judgment.—This is an appeal by the decree-holder. It arises out of an application made by the judgment-debtor under s. 15 of the Bihar Money-lenders (Regulation of Transactions) Act, 1939. The decree was obtained on a mortgage of the judgment-debtor's *kasht* land with an area of 11 *kathas* and odd. Under cl. (1) (i) of s. 15 of the Act the Court executing the decree

"shall exempt from sale one acre of the land comprised in the holding or holdings of the judgment-debtors, if the area of such land does not exceed three acres."

In the lower Courts the decree-holder sought to defeat the judgment-debtor's objection to the sale of his 11 *kathas* and odd by urging that he was not an agricultural debtor, and this contention was based on the fact that the judgment-debtor admittedly had some *zerait* land with an area of $5\frac{1}{2}$ or $7\frac{1}{2}$ *kathas*, on which stands his house along with his *bari*. The lower Courts came to the conclusion that as the judgment-debtor received no *naqdi* or other income from his *zerait* and as the evidence showed that he earned his livelihood by cultivation and not, as alleged by the decree-holder, by service,

the judgment-debtor was an agricultural debtor and as such entitled to the benefit of s. 15 as claimed by him (actually there was a body of judgment-debtors, but I have referred to them in the singular as the judgment-debtor).

The learned Advocate for the appellant has not assailed the view of the lower Courts that the judgment-debtor is an agricultural debtor, but he has argued that having regard to the object of the Act, s. 15 should be taken to exempt from execution sales, land in the possession of the judgment-debtor and not land which, as in the present case, has been parted with by him to a usufructuary mortgagee (*sudbarnadar*). But the section does not speak of land in the possession of the judgment-debtor. What it does is to exempt from sale "one acre of the land comprised in the holding". Mr. Shahi has suggested that the policy of the Act was to save a minimum quantity of land for the livelihood of the agricultural debtor and that this object would be defeated and a prior mortgagee left without a practical remedy if holdings of one acre or less which have been already given away in *sudbarna* by agricultural debtors are exempted. The *sudbarna* in the present case is admitted, and I understand it was subsequent to the mortgage on which the appellant obtained his decree. It is quite clear that if the holding had not been given away in *sudbarna*, the appellant could not have been allowed under s. 15 to bring the holding to sale. It is also clear that the acts of the debtor after the execution of the mortgage in favour of the appellant cannot, without the appellant's consent, affect his rights, and Mr. Shahi has not been able to suggest why the appellant's right should be enlarged merely because the debtor chose after the appellant's mortgage to give his small holding in *sudbarna*. After all is said and done, the *sudbarna* cannot have been without consideration, and if the debtor had a right to execute the *sudbarna*, it has not been suggested on what principle the exercise of that right should enlarge the rights of the prior mortgagee. I am accordingly unable to accept the contention that the holding should be brought to sale in execution of the appellant's decree because it is in the possession not of the debtor but of his *sudbarnadar*. The appeal fails and is dismissed with costs. Hearing fee one gold *mohur*.

s.

Appeal dismissed.

RANGOON HIGH COURT

Criminal Revisions Nos. 640 A,
642A, 643A, 644A, 645A and 646A
of 1940

November 14, 1940

DUNKLEY, J.

THE KING—PROSECUTOR

versus

MAUNG PO THAING AND OTHERS—

RESPONDENTS

Criminal Procedure Code (Act V of 1896), ss. 435, 439, 17 (1)—Order calling for proceedings signed and issued by Head-quarters Assistant for District Magistrate, legality of—Power of District Magistrate to stay proceedings in Criminal Court subordinate to him—Burma Courts Manual, Para. 102—Discretion of District Magistrate under, exercise of.

Under s. 435, Criminal P. C., the District Magistrate undoubtedly has power to call for the records of proceedings before any Magistrate of the District, even when those proceedings are pending; but it is the District Magistrate who has that power, and an order signed by another person "for" the District Magistrate, calling for a proceeding, is an order without authority. Therefore, the order issued by the Head-quarters Assistant and signed by him for District Magistrate is void. [p. 371, col. 2.]

There is no provision of the Criminal P. C., authorising the District Magistrate to stay proceedings in a Criminal Court subordinate to him, and it is only the High Court, which has power to do so, that power being conferred by s. 439 of the Code and s. 85 (1), Govt. of Burma Act. When a case is once made over for disposal to a Subordinate Magistrate, the District Magistrate is not competent to pass any order relating to it other than an order such as might be made by him under Chap. XXXII, Criminal P. C., i. e., ss. 435, 436 and 437. *Radhabullav Roy v. Benode Behari* (1), relied on. [p. 371, col. 2.]

The instruction in the Burma Courts Manual (Para. 102) which is based on the provisions of s. 17 (1), Criminal P. C., no doubt applies to pending as well as to completed proceedings; but the discretion which has to be exercised is the discretion of the District Magistrate, unfettered by influences and pressure which may weigh with the Deputy Commissioner, and it can very rarely be a proper exercise of such discretion to remove a pending proceeding from the Court of a Magistrate and forward it to an executive officer, and even in the rare cases when such a course might be justifiable it would be essential for the District Magistrate to take adequate steps to see that the record must be returned within a reasonable time so that the trial could proceed. [p. 372, col. 1.]

Cr. Rev. to review proceedings of Township and Additional Magistrate, Pyawbwe, in Criminal Summary Trial No. 113 and Criminal Regular Trial Nos. 50 to 53 and 74 of 1939.

Mr. U E Maung, Govt. Advocate, for the Crown.

Mr. Tan Po Aye, for the Respondents.

Order.—This Court has been compelled to take up these six revision matters on its own motion by reason of an abuse of judicial procedure occasioned by the action of the Govt.

of Burma in the department of forests. Eight cases under the Forest Act were instituted through the Police by the Deputy Conservator of Forests of the Yamethin division. Two of these were sent to the Township Magistrate of Pyawbwe, who is a First Class Magistrate, for trial, and the other six were sent for trial to the Additional Magistrate of Pyawbwe, who is a Second Class Magistrate. With two of these cases I am not now concerned, because in one the accused has been acquitted by the Township Magistrate and in the other the accused has since died. The six with which I am now concerned are Criminal Regular Trial No. 113 of 1939 of the Township Magistrate of Pyawbwe and Nos. 50, 51, 52, 53 and 74 of 1939 of the Additional Magistrate of Pyawbwe. Criminal Regular Trial No. 113 of 1939 of the Township Magistrate of Pyawbwe was instituted on May 30, 1939. There is only a single diary entry in the case. It states that the accused and the prosecution witnesses were present on May 30, but owing to want of time the case was adjourned for trial to June 14. There is nothing else on this record and nothing further has been done in the case. Nos. 50, 51, 52 and 53 of the Additional Magistrate of Pyawbwe were instituted on May 5, 1939 and they had reached the stage of the defence. The same diary entry appears in each of these cases under the date June 9, 1939. It states that the accused was present but the defence witnesses were absent and that by order of the District Magistrate the case was to remain pending until further orders and was submitted to the District Magistrate for his perusal. No. 74 of 1939 of the Additional Magistrate was instituted on June 3, 1939, and was fixed for hearing on June 9. On that date the accused and the prosecution witnesses were present, but as recorded in the diary the Magistrate did not proceed with the trial because he had been ordered by the District Magistrate to postpone the trial *sine die* and to submit the proceedings to the District Magistrate. All these six cases therefore, still remain pending, although the last action which was taken in regard to any of them was at the beginning of June 1939. After a lapse of more than one year, the records were recovered by this Court from the Secretariat of the Ministry of Forests with considerable difficulty. It remains to be seen how the records of these pending criminal cases reached the Ministry of Forests.

On June 3, 1939 the Deputy Conservator of Forests, Yamethin division, wrote to the

District Magistrate of Yamethin District stating that he had been ordered by the Ministry of Forests to request the District Magistrate to stay further proceedings in the eight cases to which I have referred and further as the Ministry of Forests desired to see the proceedings he requested the District Magistrate to send the proceedings to him. On the reverse of this letter the District Magistrate recorded the following note :

"H. J. C., call for the trial records of these cases and order the Magistrate concerned to stay the cases pending further orders."

This note is signed by the District Magistrate himself and by "H. J. C.", I presume, is meant the District Magistrate's head judicial clerk. How the head judicial clerk could call for proceedings or issue any order to a Magistrate, I am unable to understand. The order which was actually issued to the Magistrate is dated June 7, and was addressed to the Township Magistrate, Pyawbwe. It reads as follows :

"Please stay the cases under the Forest Act pending further orders of the following accused of Gwezi village. The trial records of these cases may be submitted for my perusal. The cases are being tried by you and in the Court of the Additional Magistrate, Pyawbwe."

The order is signed "Po Lat H. Q. A.; for District Magistrate, Yamethin." By some manner which has not been disclosed, this order was also communicated to the Additional Magistrate of Pyawbwe, although being addressed only to the Township Magistrate of Pyawbwe, it did not concern him, for orders to a Magistrate cannot be issued by proxy and the Additional Magistrate is not subordinate to the Township Magistrate. The cases were on June 9, 1939 submitted by these Magistrates to the District Magistrate and they were then forwarded to the Deputy Conservator of Forests, Yamethin division, on June 13, the letter forwarding them also being signed by the "H. Q. A." for the District Magistrate. It appears that the Deputy Conservator in his turn transmitted the records of these pending criminal trials to the Ministry of Forests and for over a year they have lain in the Secretariat of the Ministry without any action of any kind being taken. This Court obtained them from the Ministry on July 20, 1940. By "H. Q. A.", I understand is meant "Headquarters Assistant," that is to say, the Headquarters Assistant of Deputy Commissioner. As such, he exercises no magisterial powers whatever and he certainly has no authority to act on behalf of the District Magistrate. This matter appears to have been at its outset one more of the unfortunately all too fre-

quent instances of the failure of an official, who functions both as Deputy Commissioner and District Magistrate, to differentiate between his duty as Deputy Commissioner and his duty as District Magistrate. Under s. 435, Criminal P. C., the District Magistrate undoubtedly has power to call for the records of proceedings before any Magistrate of the District, even when those proceedings are pending ; but it is the District Magistrate who has that power, and an order signed by another person "for" the District Magistrate, calling for a proceeding, is an order without authority. Therefore the order issued by the Headquarters Assistant to the Township Magistrate of Pyawbwe on June 7, 1939, was a void order on which neither the Township Magistrate nor the Additional Magistrate ought to have taken any action. I have noticed that in many districts it is common for Headquarters Assistants to sign orders on behalf of District Magistrate; it must now be realized that they have no authority to do so and this illegal practice must cease forthwith in all districts.

However it was perhaps too much to expect that two subordinate Magistrates would ignore such an order, and, so far as the order requiring that the proceedings should be submitted to him was concerned, it was an order which the District Magistrate himself could have made. But that part of the order which directed the two Magistrates to stay their proceedings was an order entirely without jurisdiction and not within the competence of the District Magistrate. There is no provision of the Criminal P. C. authorising the District Magistrate to stay proceedings in a Criminal Court subordinate to him, and it is only the High Court which has power to do so, that power being conferred by s. 439 of the Code and s. 85 (1), Govt. of Burma Act. When a case is once made over for disposal to a Subordinate Magistrate, the District Magistrate is not competent to pass any order relating to it other than an order such as might be made by him under Chap. XXXII, Criminal P. C., i. e., ss. 435, 436 and 437 : see *Radhabullav Roy v. Benode Behari* (1). Hence the order made by the Headquarters Assistant, purporting to act for the District Magistrate, directing that these cases should be stayed pending further orders, was not an order which the District Magistrate was competent to make. The Magistrates themselves were competent to adjourn the trials by orders in writing for any reasonable cause, under s. 344, Criminal P. C., and it may perhaps be considered that, in the

case of a Subordinate Magistrate, the fact that the District Magistrate has called for the record is a reasonable cause, although I think that a Magistrate of courage and independence would have proceeded with the trials, so far as he was able to do so, on the day on which the order of the District Magistrate was received before submitting the proceedings. The Township Magistrate, being a First Class Magistrate, could also have stopped the proceedings in the trial before him under the provisions of s. 349, Criminal P. C., and if the District Magistrate had desired to stop these proceedings (although apparently all that he wished to do was to obey the order received from the Ministry of Forests through the Deputy Conservator of Forests) he might have accomplished this by transferring the trials to himself and then stopping the proceedings under the provisions of s. 249.

I am aware that there is an instruction in the Burma Courts Manual (para. 102) which says that, in the event of a gazetted Govt. Officer desiring to inspect any record of a Subordinate Magistrate's Court, on his application to the District Magistrate the latter, after inspecting the record, shall decide, in the exercise of his discretion, whether it should be forwarded to such officer or not. This instruction, which is based on the provisions of s. 17 (1), Criminal P. C., no doubt applies to pending as well as to completed proceedings; but the discretion which has to be exercised is the discretion of the District Magistrate, unfettered by influences and pressure which may weigh with the Deputy Commissioner, and it can very rarely be a proper exercise of such discretion to remove a pending proceeding from the Court of a Magistrate and forward it to an executive officer, and even in the rare cases when such a course might be justifiable it would be essential for the District Magistrate to take adequate steps to see that the record must be returned within a reasonable time so that the trial could proceed. In the present instance the District Magistrate never exercised his discretion at all, and it would seem that he never even inspected the records after they had been received from the Magistrates, but that they were forwarded as a matter of course by Headquarters Assistant to the Deputy Conservator of Forests. This action was not in accordance with either the letter or the spirit of the instruction contained in the Courts Manual.

This matter was brought to the notice of this Court by the successor-in-office of the District Magistrate who originally directed his head judicial clerk to call for these records,

and he has stated that frequent reminders and letters for the return of the record were sent to the Deputy Conservator of Forests, who, in reply, had stated that he was unable to obtain any answer to his requests to the Ministry of Forests for the return of the records. This statement, to my mind discloses a serious state of affairs, and shows how very hazardous it is for a District Magistrate to remove the record of a pending trial from a Subordinate Magistrate and forward it for perusal to an executive authority, and confirms what I have already stated, that it is only on the rarest occasion that it can be a proper exercise of the District Magistrate's discretion to do so. The action of the Ministry of Forests in calling for the records of these pending cases was, an unwarranted interference with the course of justice, and their retention for over a year heightened the gravity of the matter. The respondents have been called upon to show cause why the trials should not proceed to a conclusion, but it would not, in my opinion, now be in accordance with the principles of natural justice to bring the respondents again before the Criminal Courts to answer for these petty offences after such gross delay. I therefore suggest to the present District Magistrate that he should instruct the Public Prosecutor to apply under the provisions of s. 494, Criminal P. C., to the Magistrate concerned for permission to withdraw from the prosecution of the respondents, or, if he prefers to adopt this course, transfer these pending cases to his own file and put an end to the proceedings under the provisions of s. 249 of the Code. The records of the trials will now be returned to the Magistrates concerned and a copy of this judgment will be forwarded to the District Magistrate of Yamethin for his information.

D.

Order accordingly.

PATNA HIGH COURT

Letters Patent Appeal No. 17 of 1940

April 18, 1941

HARRIES, C. J. AND FAZL ALI, J.

DURGA SINGH AND OTHERS—DEFENDANTS—

APPELLANT

versus

SUGAMBAR SINGH—PLAINTIFF—

RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXI, rr. 22, 30—Notice issued under r. 22 but not served on recipient of notice—Sale held in execution is nullity—Proper recipient of notice can maintain suit for declaration that sale was not binding on him.

Where no notice under O. XXI, r. 22, Civil P. C.,

has been issued, a sale in execution is wholly without jurisdiction. Mere issuing a notice is not, however, sufficient. The Court must be satisfied that the notice has been served on the person whom the Court regards as the proper recipient of the notice. Hence where notice is issued but not served at all, the sale held subsequently is wholly ineffective against the person against whom the notice under O. XXI, r. 22 was issued and this is not a case of irregularity or fraud in the publication or conduct of a sale so as to attract r. 90 but rather a case where no sale at all has been held. In the eye of the law the sale in such a case is a nullity and the person on whom the notice ought to have been served is entitled to maintain a suit for a declaration that the sale of property in execution was not binding on him and for recovery of possession of the same together with mesne profits. 24 Ind. Cas. 304 (1), relied on, *Malkarjun v. Narhari* (2); distinguished.

L. P. A. from a decision of Mr. Justice Wort, dated March 19, 1940.

Mr. P. B. Ganguly, for the Appellants.

Mr. G. P. Das, for the Respondent.

Harries, C. J.—This is a defendants' appeal from a decision of Wort, J. in second appeal affirming the decision of the lower Appellate Court.

The plaintiff brought a suit out of which these proceedings arise for a declaration that the sale of certain property in execution was not binding on him and for recovery of possession of the same together with mesne profits. The trial Court dismissed the suit, but on appeal the learned Subordinate Judge reversed the decree and decreed the plaintiff's claim. In second appeal this decision was affirmed.

The plaintiff claimed that the execution was not binding on him by reason of the fact that it was a sale wholly without jurisdiction. According to the plaintiff, no notice under O. XXI, r. 22, Civil P. C. was served upon him, and that being so, the executing Court had no jurisdiction whatsoever to proceed with the sale.

The lower Appellate Court has held as a fact that the executing Court issued notice, but it was an improper one. Further, it was found that such notice was never served upon the plaintiff. The latter is a finding of fact which cannot be challenged in this Court. Counsel for the appellants tried to persuade us to reject this finding on the ground that the order sheet of the executing Court showed that notice had been served. What weight is to be attached to the evidence is a matter for the lower Court, and that Court has found that no notice under O. XXI, r. 22 was ever served and that concludes the matter.

There is no doubt whatsoever that where no notice under O. XXI, r. 22 has been issued a sale in execution is wholly without

jurisdiction. That was decided by their Lordships of the Privy Council in *Raghunath Das v. Sundar Das Khetri* (1). Counsel for the appellants has attempted to distinguish this case from the Privy Council case. In the latter no notice was issued, whereas in the case before us notice was issued but was not served. The appellants rely on the case of *Malkarjun v. Narhari* (2). In that case the Court issued notice, and it was served. The recipient of the notice protested that he was not the legal representative of the deceased judgment-debtor, but the Court wrongly held that he was and ordered the sale to proceed. In those circumstances, their Lordships of the Privy Council held that the sale was with jurisdiction as notice had not only been issued but served and the Court had jurisdiction to decide who was the legal representative, though as a matter of fact it decided that question wrongly. In my view mere issuing a notice is not sufficient. The Court must be satisfied that the notice has been served on the person whom the Court regards as the proper recipient of the notice. In the present case as no notice was served at all, the case clearly comes within the decision in *Raghunath Das v. Sundar Das Khetri* (1) to which I have already made reference, and, therefore the sale was wholly ineffective against the plaintiff.

It has been contended that the plaintiff should have moved to set aside the sale under the provisions of O. XXI, r. 90. It was contended that the failure to serve notice under O. XXI, r. 22 was a material irregularity or fraud in the publication or conduct of the sale. In my view there can be no sale at all unless the notice under O. XXI, r. 22 is served, and this is not a case of irregularity or fraud in the publication or conduct of a sale but rather a case where no sale at all has been held. In the eye of the law the sale in this case was a nullity, and in my judgment the plaintiff was clearly entitled to the relief claimed.

In the result, therefore, I would dismiss this appeal with costs.

Fazi Ali, J.—I agree.

s.

Appeal dismissed.

(1) 42 C 72; 24 Ind. Cas. 304; 18 C W N 1058; 1 L W 567; 27 M L J 150; 16 M L T 353; (1914) M W N 747; 16 Bom. L R 814; 20 C L J 555; 13 A L J 154; 41 I A 251 (P O).

(2) 27 I A 216; 25 B 337; 5 C W N 10; 2 Bom. L R 927; 10 M L J 268; 7 Sar. 739 (P O).

CALCUTTA HIGH COURT

Suit No. 367 of 1938

June 17, 1940

PANCKRIDGE, J.

JATINDRA MOHAN BANERJEE

—PLAINTIFF

versus

CORPORATION OF CALCUTTA—

DEFENDANT

Malicious prosecution—Suit for damages—Essentials—Municipal Corporation prosecuting Pleader in spite of his paying requisite licence-fee—Pleader discharged on his producing requisite licence—Pleader's suit against Corporation for damages for malicious prosecution—Pleader held had no cause of action—Corporation, if can rely on entries or absence thereof in their books—Corporation Officer responsible for prosecution knowing that Pleader had paid licence-fee—Malice or reasonable and probable cause for prosecution.

There are three sorts of damage, any one of which is sufficient to support an action for malicious prosecution. First, damage to a man's fame, as if the matter whereof he is accused be scandalous. Secondly, damage to his person, as where a man is put in danger to lose his life, limb or liberty. Thirdly, damage to his property, as where he is forced to expend money in necessary charges to acquit himself of the crime of which he is accused. It is no answer to an action for malicious prosecution to show simply that the offence, which was the subject-matter of the prosecution, is punishable with fine only. [p. 376, col. 1.]

A Pleader was prosecuted by the Municipal Corporation for practising without licence in spite of his having paid the requisite licence-fee. He was, however, discharged on his production of the licence. The Pleader thereupon instituted a suit for malicious prosecution:

Held, that there was no danger to life, limb or liberty in the case, because failure to take out a licence when practising a profession was punishable with fine only. Similarly the matter of which the plaintiff was accused could not be described as scandalous. The charges incurred by the plaintiff in engaging the Pleader could not also be said to be justified. If there had been witnesses to be cross-examined, it might have been different, but as it was the plaintiff, who himself was a professional man, had a complete answer to the charges in the form of the licence granted by the Corporation, the plaintiff had no cause of action. [p. 376, col. 1.]

Held, further that the Corporation could not rely on the entries or the absence of the entries in their books or the absence of corrections in their books which were due solely to their own failure to maintain proper supervision. If any Corporation Official who was responsible for the prosecution knew that the plaintiff had paid his licence-fee there was no reasonable and probable cause and equally there must have been malice.

Messrs. S. B. Sinha and A. K. Bhat-tacharjee, for the Plaintiff.

Messrs. S. R. Das and J. C. Sett, for the Defendant.

Judgment.—The plaintiff in this case claims Rs. 5,100 as damages for malicious prosecution. The circumstances are as follows: The plaintiff is a Pleader of 19 years

standing. He originally practised in the District of Jessore, but since 1928 he has been practising in Calcutta. To obtain his annual license under the Legal Practitioners' Act he has to apply to one of the Courts that grant such licenses, and in fact he is in the habit of obtaining this license from the Calcutta Small Cause Court, and he is shown on that Court's roll of practitioners. He does not however practise in the Small Cause Court. His evidence is that he practises exclusively before the income-tax authorities who, until the *pujahs* of 1937, had their offices in Hare Street, but now have their offices in Govt place. In addition to his professional license he has to obtain a Municipal license under s. 175, Cal. Municipal Act of 1923. The license is an annual one, and as a Pleader the plaintiff is required by the Act to pay a yearly fee of Rs. 25. The financial year of the Corporation as every one knows begins on April 1, and terminates on March 31, following. The penalty for failing to take out a Municipal license is provided by s. 492, Municipal Act, which enacts that if any person exercises on or after the first day of July in any year any profession, trade or calling referred to in Chap. XII without having the license prescribed by that Chapter, he shall be punished with fine which may extend to three times the amount payable in respect of such license. On March 14, 1936, the plaintiff paid for and obtained his license in respect of the year 1935-1936. In the license he is described as "carrying on business at No. 3, Bankshall Street."

In spite of this, however, the Corporation License Inspector instituted proceedings against him on June 13, 1936 for having practised without a license during the period concerned. A summons was issued, and before the day fixed in the summons for appearance the plaintiff filed a petition before the Magistrate in which he stated that he had already paid for his license and held a receipt for it. He gave his private address as 28/3, Jamapur Lane, Calcutta and described himself as "a Pleader practising in the Income-tax offices." In para. 3 of the petition he stated that he was enrolled in the Small Cause Court, but practised exclusively in the Police Court, and he added that the license receipt gave as the address of the plaintiff No. 3, Bankshall Street. When the case came up on August 25, 1936, the License Inspector, H. D. Sen, who is defendant No. 2 in this suit, admitted that the license-fee had been paid and the plaintiff was accordingly discharged.

The plaintiff's story is that at the termi-

nation of the proceedings he had an altercation with defendant No. 2, in the course of which he remarked that this was the sort of thing that happened under what he described as "this Swarajist Corporation." According to the plaintiff defendant No. 2 indicated that the "Swarajist Corporation" would make the plaintiff regret the observations he had made. I find it difficult to accept the plaintiff's evidence as to this altercation. The Corporation has been Swarajist since 1923, if by that is meant that since that date it has been presided over by the Mayor of Calcutta assisted by the Chief Executive Officer and his subordinates instead of having a Chairman nominated by Govt. as was the case prior to that date. The Chairman of the Corporation prior to 1923 was invariably, as far as I know, a member of the Indian Civil Service. The taunt that the Corporation is a Swarajist Corporation seems to me to be somewhat out of date in 1936. I may also add that the letter of demand which the plaintiff wrote to the Corporation before the present proceedings were initiated, contains no reference to the altercation. This is of considerable importance because save for this altercation there is no incident alleged or suggested which could have aroused the anger of the license authorities. The fact that summons was taken out although the license had already been paid appears to have been due to the fact that the responsibility for collecting license fees and prosecuting defaulters is allocated among a considerable body of License Inspectors.

Up to the year 1935-36 license fees had been collected from the plaintiff without trouble by the Inspector who was responsible for collecting license fees from Pleaders practising in the Income-tax offices in Hare Street. Apparently, in the assessment which took place early in 1936, the License Inspector responsible for the fees of Small Cause Court practitioners looked at the roll of legal practitioners maintained in that Court, and found the plaintiff's name on it, and a demand was accordingly made for the license fee which the plaintiff paid, as I have said, on March 14, 1936. Meanwhile no correction had been made in the assessment list of the Income-tax office practitioners, with the result that the plaintiff was shown as a defaulter in that list, and proceedings were started against him. On March 30, 1937, the plaintiff paid his license fee in respect of the year 1936-37. The plaintiff said that both this fee and the one for the preceding year were collected from him at his residence by a Corporation official. The evidence given by the

Corporation officials and the form of the two licenses would certainly lead one to suppose that the licenses were obtained direct from the Corporation office by the plaintiff or some one acting upon his behalf. There is however no particular reason why, if this was so, the plaintiff should set up the story about the official calling at his residence, and the question where the money was actually paid, is of no importance in the case.

The next incident which is common ground is that on June 25, 1937 defendant No. 2 filed a complaint before the Municipal Magistrate charging the plaintiff, whose address was given as 17, Guru Prosad Chowdhury Lane, with carrying on the profession of a Pleader at 1, Hare Street without a license during the year 1936-37. A summons was issued and came back with an endorsement indicating that it had been served on the plaintiff. The bailiff alleged to have served the summons was at a later stage examined by the Magistrate who thereupon, as the plaintiff did not appear, issued a warrant for the plaintiff's arrest. The plaintiff was arrested on April 21, 1938 and furnished bail. When the case came up for disposal the plaintiff produced his license and was discharged. The Magistrate called upon the License Inspector concerned, Dharendra Nath Banerjee, for an explanation which was furnished, and accepted by the Magistrate. This suit was instituted on July 20, 1938, the date of the plaintiff's discharge being May 7, 1938.

Two points of law are submitted by Mr. S. R. Das on behalf of the defendants. He first submits that this is not a case in which an action for malicious prosecution can lie, and for this he relies on *Wiffen v. Bailey and Romford Urban District Council* (1). In that case a complaint had been made under s. 95, Public Health Act, against the occupier of a house for non-compliance with a notice stating that a nuisance existed at the house arising from the want of cleansing of certain rooms, and requiring him to abate the same by stripping the paper off the walls, and doing other repairs. The Justices dismissed the complaint and awarded costs to the plaintiff. The plaintiff thereupon instituted proceedings for malicious prosecution and was awarded £250 by way of damages. Horridge, J., as Judge of first instance ruled that the complaint was a proceeding involving damage to the plaintiff's fair fame within the first three heads

(1) (1915) 1 K B 600; 84 L J K B 688; 112 L T 274; 79 J P 145; 13 L G R 121; 59 S J 176; 31 T L R 64.

of damage stated by Lord Holt, C. J., in the old case in *Savile v. Roberts* (2). The Court of Appeal set aside the verdict of the jury, holding that the ruling of Horridge, J., to which I have referred, was erroneous. Buckley, L. J., in his judgment quoting Lord Holt, observes:

"There are three sorts of damage, any one of which is sufficient to support this action. First, damage to a man's fame, as if the matter whereof he is accused be scandalous. Secondly, damage to his person, as where a man is put in danger to lose his life, limb or liberty. Thirdly, damage to his property, as where he is forced to expend money in necessary charges to acquit himself of the crime of which he is accused."

Admittedly there was no danger to life, limb or liberty in the case I am considering, because failure to take out a license when practising a profession is punishable with fine only. In *Wiffen v. Bailey and Romford Urban District Council* (1), the plaintiff had been awarded costs against the complainant, but he had his costs, as between Solicitor and client which amounted to more than the sum awarded. It was held that this did not bring the case within the third head of damage mentioned by Lord Holt. In the present case the plaintiff has given some evidence that he engaged a Pleader and paid him a fee. Accepting the story that he did so, in my opinion, the circumstances were not such as would justify such a course. If there had been witnesses to be cross-examined, it might have been different, but as it was the plaintiff, who himself is a professional man, had a complete answer to the charge in the form of the license granted by the Corporation. I am also inclined to think that in the present case the matter of which the plaintiff was accused cannot be described as scandalous. Taking *Wiffer v. Bailey and Romford Urban District Council* (1), as a guide, in my opinion, the commission of an offence under the Public Health Act involving an alleged nuisance would, by most people, be regarded as more culpable than a practising profession without having taken out a Municipal license. I agree that it is nowhere laid down that it is an answer to an action for malicious prosecution to show simply that the offence, which was the subject-matter of the prosecution, is punishable with fine only, yet I should be inclined to hold on the authority of the English case that the plaintiff has no cause of action. However I do not expressly decide so, as I consider the plaintiff fails on another ground.

Another point is made by Mr. Das to the effect that it can hardly be said there was

no reasonable and probable cause in this case because having regard to the admitted facts the plaintiff's case was clearly covered by s. 492. Section 534 of the Act limits the period in which proceedings may be brought against persons for offences under the Act, to three months. Sub-section (2) of s. 534 provides that failure to take out a license under this Act shall be deemed for the purpose of sub-s. (1) to be a continuing offence until the expiration of the period for which the license is required to be taken out. In my opinion, on the true construction of s. 492 the plaintiff was guilty of an offence by practising on and after July 1, 1936, and that was an offence continuing certainly upto March 30, when he paid the fee, and I think upto March 31, when the period for which the license required to be taken out expired.

However, there are various other considerations to be taken into account. Generally speaking, it is not open for a defendant in an action for malicious prosecution to question the correctness of the plaintiff's acquittal, and secondly this point has never been taken by the Corporation or any of their officers, who have throughout agreed with the plaintiff in this, that if he paid his professional license at any time during the Municipal year 1936-37 he could not thereafter be charged with having committed the offence mentioned in s. 492 in respect of that year. This again is a point I expressly decline to decide. That leaves me to deal with the facts, and the question I have to decide is whether the Corporation had reasonable and probable cause for the prosecution and whether if they had no reasonable and probable cause the defendants or either of them were actuated by malice. Now, it is obvious that a repetition in successive years of the prosecution of a man who has already paid his licence fee for not having paid it ought to be impossible, and I have come to the conclusion that there is a considerable lack of co-ordination in the Corporation's license department. It appears that when the earlier prosecution terminated, although the matter was brought to the notice of the Corporation authorities, the only material entry made in the books was by showing the plaintiff's assessment at the income-tax office as cancelled in the defaulter's list, that is to say, a list compiled after the expiry of the year. Apparently when the new assessment is made the demand entry of last year is used which, in this case, had not been corrected. The consequence is that for the second year in succession the plaintiff's name appeared upon two lists for the same ward,

(2) 1 Ld. Raym. 374.

which appears to be inexcusable. I should be inclined to hold that the Corporation cannot rely on entries or the absence of entries in their books or the absence of corrections in their books which are due solely to their own failure to maintain proper supervision. This is not one of those cases where a reckless though honest inference is drawn from facts furnished by a third party, and the cases which deal with that state of things appear to me not to cover circumstances like these, where the defendant Corporation is responsible itself for the reason of the error that has been made. In this case, however, the question of reasonable and probable cause is to a large extent bound up with the issue of malice. Of course, if any Corporation official who was responsible for the prosecution knew that the plaintiff had paid his licence fee there was no reasonable and probable cause, and equally there must have been malice.

Now, although the plaintiff has spoken to an altercation with defendant No. 2, I have not accepted his story, and even if I did accept it, I should equally accept defendant No. 2's evidence that when he instituted the proceedings the plaintiff's name meant nothing to him. He says he was responsible for forty thousand prosecutions a year, and it appears from the written complaint in this case that it was not signed by him, but by the Licence Inspector, the other witness, Dharendra Nath Banerjee, I see no reason why when he filed the petition of complaint before the Magistrate the proceedings of the previous year should have occurred to his mind. With regard to Dharendra Nath Banerjee no reason for malice on his part is alleged, and the only possible theory on which malice can be attributed to him is that defendant No. 2 in his anger at the plaintiff's tone enlisted sympathy of his fellow official; but I have pointed out the difficulties about accepting the plaintiff's version on this part of the story, and if it is not accepted there is no reason to attribute malice to Dharendra Nath Banerjee. It is true that the fate of the first prosecution was directly brought to his notice and he made a report thereon, and he admits that he realised that the person who had paid the licence fee as being on the Small Causes Court assessment was the same person as was on the income-tax assessment. But I cannot find it proved that this fact was present in his mind when he signed the petition of complaint, which formed the basis of the second set of proceedings.

It is admitted that Dharendra Nath Banerjee on one occasion met the plaintiff at the

Income-tax office. According to the plaintiff that was after he had paid the income-tax fee, and on Dharendra's questioning about it, he says, he explained, the payment had already been made. Dharendra said that in the ordinary course of his routine he went to the Income-tax office towards the end of the financial year and asked the plaintiff if he had paid his tax, and he said that the plaintiff gave him no reply—a course of conduct which appears strange to me—but which Dhiren says is not uncommon. If Dhiren was a party to a plot to have the plaintiff improperly prosecuted, I think it most unlikely that he would have approached him. If he had wanted to find out whether or not he had paid through the Small Cause Court he would have consulted the appropriate records, and I do not see what motive he could have after the close of the year for putting the plaintiff on his guard by asking him if he had paid. The plaintiff, having regard to what had happened in the previous year, might very well have called up by-stander and explained that for the second time in two years doubts were being thrown upon his having paid his licence fee punctually. I may also add that the plaintiff's version of the conversation between himself and Dharendra Nath Banerjee finds no place in the letter of demand written to the Corporation. In these circumstances I am of opinion that the plaintiff has failed to prove malice against the other defendant, and it is an essential part of his cause of action.

The plaintiff also attaches some importance to the course of the proceedings before the Municipal Magistrate. The summons was returned, endorsed as having been served upon the plaintiff, but the plaintiff swears that he was never served, and it is suggested that the service was what is generally called suppressed. The bailiff and the alleged identifier have not been called, and it is stated that the bailiff is no longer serving the Municipal Magistrate's Court. One knows that identification by a by-stander, as is usual in cases like this, is of very little value, and Court peons are often careless in the discharge of this particular duty. Further, the address given in the summons is not the plaintiff's present address. In these circumstances I am fully prepared to accept the plaintiff's statement that the summons was not served upon him, for I do not think that if it had been served he would have endeavoured to aggravate his grievances by courting arrest. At the same time I do not feel justified in coming to a conclusion that

the alleged service was a sham and that the fact that the plaintiff did not receive notice of the proceedings against him can be attributed to the defendant Corporation or to the Corporation servants. I have some sympathy with the plaintiff, and I think that the Corporation should certainly take steps to overhaul the organisation of their licence department, but that does not entitle me to give him any relief when, in my opinion, he has not established his claim. The suit is dismissed with one set of costs. As it is an unimportant and simple case I certify for one Counsel.

D.

*Suit dismissed.***PATNA HIGH COURT**

Civil Revision No. 281 of 1940

April 2, 1941

MEREDITH AND SHEARER, JJ.
RAI BAGESHWARI PRASAD
AND ANOTHER—PETITIONERS

versus

TULSI GARAIN—OPPOSITE PARTY

Court Fees Act (VII of 1870), Sch. II, Art. 17 (iii)—Suit for declaration that order of Revenue Officer fixing reduced rent under s. 112, Bihar Tenancy Act (VIII of 1885), was illegal and of no effect and for enhancement of rent to original one—Suit does not fall under s. 104-H, Bihar Tenancy Act (VIII of 1885), but is for declaration pure and simple—Court-fee payable is under Sch. II, Art. 17 (iii).

A suit was brought for the following reliefs. (1) A declaration that an order of the Revenue Officer fixing a reduced rent roll under s. 112 of the Bihar Ten. Act, was wrong, illegal, without jurisdiction, unenforceable, and not binding on the plaintiffs. (2) For enhancement of the reduced rent to the rent formerly paid :

Held, that the suit was not one under s. 104-H, Bihar Ten. Act. The declaration sought was necessary in view of s. 15 of the Bihar Restoration of Baksht Lands and Reduction of Arrears of Rent Act. The only relief however, which the plaintiff could ask the Court to grant, was a declaration that the proceedings were illegal and without effect. The Court could not be asked, to cancel the proceedings of the Revenue Officer. Once that declaration was given, there could be no need for any additional relief in the shape of restoration of the old rates of rent, or an enhancement of the rent to the old rates. Once it was declared that the alteration in the rates was illegal and of no effect, the old rates of rent would be restored automatically. Therefore, the second prayer for restoration of the original rate of rent by enhancement, was in fact quite unnecessary, and should be disregarded as surplusage. The Court must in such cases go by the substance rather than the wording of the plaint and substantially the suit was for a declaration, pure and simple and there was clearly a court-fee payable for the declaration under Sch. II, Art. 17 (iii), Court Fees Act.

Held, further that the Civil Court was not sitting in appeal or revision from the orders of the Revenue Officer, and if those were voidable orders, it was not for the Civil Court to cancel them.

C. R. from an order of the Munsif, Jehanabad, dated April 26, 1940.

Mr. Sarju Prasad, for the Petitioners.
No one for the Opposite Party.

The Advocate-General, for the Crown.

Meredith, J.—This is an application by plaintiffs for revision of an order of the learned Munsif of Jehanabad, calling upon the petitioners to pay deficit court-fees:

The suit was one of a number brought for the following reliefs:—

- (1) A declaration that an order of the Revenue Officer fixing a reduced rent roll under s. 112 of the Bihar Ten. Act was wrong, illegal, without jurisdiction, unenforceable, and not binding on the plaintiffs,
- (2) for enhancement of the reduced rent to the rent formerly paid, and
- (3) for arrears of rent said to be due for certain years.

The petitioners paid *ad valorem* court-fees as regards the third prayer, namely, for a decree for arrears of rent, and there is no question before us with regard to the correctness of that. In regard to the first two prayers, however, the court-fee paid by the petitioners was *ad valorem* upon the basis of one year's rental. It is contended that the first two prayers were treated as being for a declaration and consequential relief, and that the court-fee paid under this head was paid under s. 7 (iv) (c) of the Court Fees Act, the plaintiffs having valued their consequential relief at the amount of one year's rental. It seems, however, more probable that the court-fee on the basis of one year's rental was really paid under s. 7 (vi) (b). However, that may be, the learned Munsif held that the suit was one for a declaration, without further consequential relief, and a necessary declaration, and the proper court-fee payable was Rs. 15 under Sch. II, Art. 17 (iii) of the Court Fees Act.

As the question of Govt. Revenue is involved, we have had notice served on the Advocate-General, who has appeared, and we have had the benefit of his assistance. There is no appearance on behalf of the opposite party.

It has been argued before us that the suit is really a suit under s. 104-H of the Bihar Ten. Act, and it is pointed out that it has been held judicially that certain suits under s. 104-H are for declaration and consequential relief, and governed as regards court-fees by s. 7 (iv) (c). These rulings are *Pajiruddin v. The Secretary of State for*

India (1) and *Trailokya Nath Pal v. The Secretary of State for India in Council* (2).

There are two answers to this argument. In the first place, these rulings do not lay down any general rule with regard to suits under s. 104-H. They relate only to the particular case where in addition to the prayer for declaration there is a prayer for settlement of fair rent, and in those two cases it was because of the existence of the prayer for settlement of fair rents that it was held that consequential relief was an ingredient in the suits. Mr. Sarju Prasad for the petitioners frankly concedes that there may well be suits under some of the provisions of s. 104-H, for example, s. 104-H (3) (a) or (c), which are plainly purely declaratory suits.

In the second place, it is quite clear that the present suit is in no sense a suit under s. 104-H. Section 104-H (3) enumerates certain grounds, and provides that the suit may be instituted on any of these grounds, and on no others. The scope of a suit under s. 104-H is, therefore, limited, and Mr. Sarju Prasad is unable to say that the present suit falls under any of the grounds (a) to (g) specified in s. 104-H. It is indeed obvious that a suit for a declaration that the proceedings of the Revenue Officer are *ultra vires* and illegal, is not at all the sort of suit contemplated by s. 104-H. The decisions cited have, therefore, no relevance.

Mr. Sarju Prasad argues, however, on general principles, that this is a case where, if they had to pray for a declaration at all, the plaintiffs had to pray for something more by way of consequential relief, while if the proceedings of the Revenue Officer were wholly void *ab initio*, they could be ignored without any declaration; the prayer for declaration was unnecessary, and the suit could be treated purely as a suit for rent. On the other hand, if the proceedings were merely voidable, then the prayer to restore the old rates of rent was in no sense a surplusage, but was a necessary consequential relief.

In my view, these arguments are not correct. The necessity of a declaration is clear from the provisions of s. 15 of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act (Act IX of 1938), since the effect of this section is that the landlord cannot sue for recovery of rent at a rate in excess of the reduced rate fixed by the Revenue Officer.

On the other hand, it appears to me that

all that it was necessary for the plaintiffs to ask for in this case, and indeed the only relief they could ask the Court to grant, was a declaration that the proceedings were illegal and without effect. This was not a case comparable to a case for a declaration of the invalidity of a document and for its cancellation. The Court cannot be asked, and was not asked, to cancel the proceedings of the Revenue Officer. The Civil Court is not sitting in appeal or revision from the orders of the Revenue Officer, and, if those are voidable orders, it is not for the Civil Court to cancel them. In fact, as I have said, all that need be asked for, and all the Court could do, is to give a declaration that the proceedings of the Revenue Officer were illegal, and so of no effect. Once that declaration was given, there could be no need for any additional relief in the shape of restoration of the old rates of rent, or an enhancement of the rent to the old rates. Once it was declared that the alteration in the rates was illegal and of no effect, the old rates of rent would be restored automatically.

It seems to me, therefore, that the second prayer in this case, for restoration of the original rate of rent by enhancement, was in fact quite unnecessary, and should be disregarded as surplusage. Substantially and we must in these cases go by the substance rather than the wording of the plaint—the suit was for a declaration, pure and simple, a necessary declaration, coupled with a prayer for a decrees for arrears of rent. That prayer was in no sense consequential relief and it has not been argued that it was. It was a quite independent prayer for relief. Separate court-fees were, therefore, quite rightly paid and accepted for that relief. But apart from that, there was clearly a court-fee payable for the declaration under Sch. II, Art. 17 (iii). The Munsif was, in my view, quite right in demanding that court-fee.

I would, therefore, dismiss this application. There will be no order for costs. It will be open to the petitioners to apply to the learned Munsif for reasonable time in order to make up the deficiency in court-fees.

Shearer, J.—I agree. What the plaintiffs in substance asked for was a declaration that, in spite of the proceedings in the Revenue Courts, they were entitled to recover rent from the defendants at the same rate as they had been entitled to recover it before these proceedings commenced. Such a suit is, in my opinion, a suit under s. 42 of the

(1) 16 C L J 383; 17 Ind. Cas. 919.

(2) 17 C L J 426; 18 Ind. Cas. 188.

Specific Relief Act for a declaration and for nothing more.

s. Order accordingly.

SIND CHIEF COURT

Second Appeals Nos. 14 and 15 of 1938

May 24, 1940

DAVIS, C. J. AND LOBO, J.

MULCHAND TAGIOMAL AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

SHAMDAS JETHANAND AND OTHERS

—DEFENDANTS—RESPONDENTS

Partnership Act (IX of 1932), ss. 9, 29—S. 9, construction of—Subsequent sections are mere amplifications and illustrations of principles embodied in s. 9—Assignment by ex-partner in firm after dissolution—Suit by transferee for accounts of dissolved partnership as whole and not for accounts after dissolution only—Assignors, if necessary parties—Transfer of Property Act (IV of 1882), s. 130 (2), effect of—Partners' position—His rights and obligations, if chose in action—Right to recover share in partnership property, whether assignable—Practice—Appeal—New plea—Legality of partnership as regards constitution, is mixed question of law and fact.

All the subsequent sections to s. 9 of the Partnership Act dealing with the relations of partners to one another are no more than amplifications and illustrations of the principles contained in s. 9. [p. 382, col. 1.]

In a suit by a transferee or an assignee from an ex-partner in a firm after the dissolution of the partnership, for accounts of the dissolved partnership as a whole and not for accounts after the date of the dissolution only, the assignors are necessary parties. Hence, when they are not joined either as plaintiffs or defendants till more than three years after the dissolution of the partnership the entire suit must stand dismissed. Section 130 (2), T. P. Act, does not obviate the necessity of impleading the assignor in such a suit. *Public Trustee v. Elder* (1), followed.

The position and rights and obligations of one partner in a partnership in relation to the other partners is clearly not a chose in action and cannot be assigned. But the share of a partner in a partnership is property and may be assigned. The right to recover it is a chose in action. *In re Bainbridge, Ex parte Fletcher* (5), *Cassels v. Stewart* (6), 75 Ind. Cas. 817 (7) and 80 Ind. Cas. 642 (8), explained. [p. 384, col. 2.]

The question as to the legality of the constitution of a partnership is clearly a mixed question of law and fact and the Appellate Court cannot, for the first time raise such a question and decide it.

S. As. against the judgment and decrees of the First Class, Sub-Judge, Shikarpur, exercising appellate powers.

Mr. Fatehchand Asudamal, for the Appellants.

Mr. Srikishindas H. Lulla, for the Respondents.

Lobo, J.—The facts which have led up to these two second appeals are somewhat involved and need to be set out in considerable detail for a proper understanding of this

judgment. Suit No 7 of 1926 in the Subordinate Civil Court of Jacobabad was filed by the firm of Mulchand Tagiomal of Shikarpur, the appellants in these appeals for the settlement of accounts of the partnership firm of Chellaram Tharumal which had been dissolved on October 31, 1923. The constitution of this firm of Chellaram Tharumal was peculiar, for the firm consisted of five individuals: Tharumal, Shamdass, Hotumal, Gunomal, Gellomal, defendants Nos. 1 to 5 in the suit, and two firms: Chellaram Bhojraj and Mulchand Tagiomal of Jacobabad, the latter being defendant No. 6 in the suit. The firm of Chellaram Bhojraj again, was composed of an individual Mathuradas Lekhraj and two firms: Kishindas Kimatram and Nandumal Mulchand. The partners in the firm of Kishindas Kimatram were Sobhraj, Kishindas, Rijharam and Kimatram, defendants Nos. 7 to 10 in the suit. Nandumal Mulchand, again, consisted of two firms, Nandumal Tarachand, the partners in which were Tarachand and Jethanand, defendants Nos. 11-a and 11-b in the suit; Mulchand Shambumal, the partners in which were Tagiomal, Kachumal, Khanchand, Parmanand, Lilomal and Chuharmal, defendants Nos. 12 to 17 in the suit, and two individuals, Chellaram and Hundraj, defendants Nos. 18 and 19 in the suit. Defendant No. 20 in the suit is the son of Mathradas Lekhraj, deceased. Defendants Nos. 11 to 20 were not originally impleaded in the suit; they were brought on the record only in 1931, a great deal more than three years after the dissolution of the firm of Chellaram Tharumal.

The plaintiffs in the suit, the firm of Mulchand Tagiomal of Shikarpur, were thus not originally partners in the firm of Chellaram Tharumal, but under certain documents which are Exs. 100, 215 and 228 in the case, they became the assignees of the firm of Nandumal Mulchand and of Mathradas Lekhraj, two of the partners in the dissolved firm of Chellaram Tharumal. In the trial Court the suit was contested by defendant No. 2 Shamdass, respondent No. 1 in these appeals and by defendants Nos. 7 to 10, the partners in the firm of Kishindas Kimatram, respondents Nos. 2 to 5 in these appeals. Defendants Nos. 1, 4, 5 and 6 and 11 to 20 raised no contest; defendant No. 3 Hotumal denied he was a partner.

The suit was in the first instance dismissed by the trial Court, the learned Judge holding that the plaintiffs' assignors were necessary parties to a suit for settlement of accounts of the partnership carried on in the

name and style of Chellaram Tharumal, and as these assignors had not been joined as parties for much more than three years after the dissolution of the firm, the accounts of which were sought to be settled, the entire suit was barred by limitation. The plaintiffs went on appeal, and the Appellate Court ordered that the assignors referred to should be joined as parties to the suit and the trial Court should decide the question of limitation after such joinder had been effected. If the plaintiffs, however, refused to join the assignors the suit should stand dismissed. This order of the Appellate Court is not on the paper books of these appeals but is referred to in the judgment of the learned Judge of the trial Court. In the trial Court after this appeal the plaintiffs joined the assignors in the suit as defendants Nos. 11 to 20. The suit then proceeded to trial and the learned Subordinate Judge, Mr. Hardasnal Banasing, decreed the plaintiffs' suit holding that the assignments in favour of plaintiffs were valid and legal, that defendants Nos. 11 to 20 were proper but not necessary parties to the suit, and that therefore the suit for settlement of partnership accounts was not barred by limitation; the learned Judge then disposed of certain minor issues in the case and ordered that a preliminary decree be framed on the basis of his findings. Against this preliminary decree, an appeal was preferred to the Court of the First Class Subordinate Judge of Shikarpur with appellate powers being Civil Appeal No. 98 of 1932.

The learned First Class Subordinate Judge reversed the judgment and decree of the trial Court and allowed the appeal. He agreed with the learned Judge of the trial Court that defendants Nos. 11 to 20, the assignors of the plaintiffs, were not necessary parties to the suit and that their non-joinder in the first instance therefore did not result in the suit being barred by limitation. He held, however, that the assignments in favour of the plaintiffs were illegal and invalid, and he further held that the entire proceedings were bad as the firm of Chellaram Tharumal consisted of more than 20 members and not having been registered under the provisions of the Companies Act the partnership was invalid according to law and the suit should have been dismissed. During the pendency of the appeal Hundraj and Bhojraj, defendants Nos. 19 and 20, had died and their legal representatives had not been brought on the record. The learned Judge of the Appellate Court held that the appeal had not abated by reason of the non-joinder

of these legal representatives. Another respondent, Tharumal, original defendant No. 1, also died during the pendency of the appeal and his legal representatives had also not been brought on the record. The learned Judge rejected the contention that the non-joinder of the legal representatives of Tharumal resulted in the abatement of the appeal as a whole.

This judgment of the learned Appellate Judge was delivered on March 26, 1938. In the meanwhile a final decree in the suit had been passed by the learned Judge of the trial Court on September 30, 1932 and an appeal had been presented against that final decree being Civil Appeal No. 17 of 1932 of the Court of the First Class Subordinate Judge of Shikarpur with appellate powers. While dismissing the suit in appeal from the preliminary decree the learned Judge also dismissed this appeal from the final decree by a judgment dated March 31, 1938. It is against these two judgments of the learned Appellate Judge that these Second Appeals Nos. 14 and 15 of 1938 have been preferred to this Court. The learned Advocate who appeared for the appellants to argue these matters before us took four points. He contended: (1) that the appeal had abated by reason of the non-joinder of the legal representatives of Hundraj and Bhojraj and should therefore have been dismissed; (2) that the appeal had also abated because of the non-joinder of the legal representatives of Tharumal and should on this ground as well have been dismissed; (3) that the learned Judge had erred in raising on appeal for the first time the question of the legality of the constitution of the firm of Chellaram Tharumal and in deciding this issue against the appellant; (4) that the learned Judge erred in holding that the assignments in favour of the plaintiffs, the appellants in these appeals, were invalid and illegal.

We have heard long and interesting arguments in support of and against these contentions of the learned Advocate for the appellants, but it appears to us unnecessary to decide the points debated, because we feel that these appeals can well be disposed of on one single point of law which both the lower Court decided in favour of the appellants, both which has been reargued before us by the learned Advocate for the respondent Shamdass, the only respondent represented before us in these appeals, and on which the learned Advocate contended he was entitled to support the judgment of the lower Court dismissing the suit of the appellants with costs, although the learned Judge

of the appellate Court had decided the point against him. That the learned Advocate for respondent Shamdas was entitled to do this is perfectly clear from r. 22 of O. XLI, Civil P. C., which provides that

"any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal."

The learned Judge of the trial Court held that the assignors of the plaintiffs, the present appellants, were not necessary parties to the suit and that their non-joinder, till more than three years after the dissolution of the firm of Chellaram Tharumal, did not result in the entire suit being barred by limitation. The learned Judge of the Appellate Court upheld this finding of the trial Court. The learned Advocate for respondent Shamdas before us has contended that both the learned Judges were in error in arriving at this conclusion, that defendants Nos. 11 to 20, the assignors of the plaintiffs, the present appellants, were necessary parties to a suit for the taking of accounts of the partnership of Chellaram Tharumal, and they admittedly not having been joined either as plaintiffs or as defendants till more than three years had elapsed after the dissolution of the firm of Chellaram Tharumal, the entire suit was liable to be dismissed. After having heard the learned Advocate for respondent Shamdas, and the learned Advocate for the appellants on this point at very great length, we are of the opinion that this contention is sound and must succeed and that these second appeals must be dismissed. The contract of partnership is a contract *uberrimae fidei*. Section 9, Partnership Act, which materially reproduces s. 257, Contract Act, thus defines the relations between the partners in a partnership:

"Partners are bound to carry on the business of the firm to the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner or his legal representatives."

All the subsequent sections of the Partnership Act dealing with the relations of partners to one another are no more than amplifications and illustrations of the principles contained in s. 9. The assignment of his rights in a partnership by a partner is clearly contemplated in the Partnership Act. Section 29 of the Act provides:

"(1) A transfer by a partner of his interest in the firm, either absolute or by mortgage, or by the creation by him of a charge on such interest, does not entitle the transferee, during the continuance of the firm, to interfere in the conduct of the business, or to require accounts, or to inspect the books of the firm, but entitles the

transferee only to receive the share of profits of the transferring partner, and the transferee shall accept the account of profits agreed to by the partners.

(2) If the firm is dissolved or if the transferring partner ceases to be a partner, the transferee is entitled as against the remaining partners, to receive the share of the assets of the firm to which the transferring partner is entitled, and for the purpose of ascertaining that share, to an account as from the date of the dissolution."

It would appear then that where a partner transfers or assigns his share in a partnership to a third party, that third party has no right to call for an account of the partnership business from the other partners, and even when the transfer results in or is followed by a dissolution of the partnership such transferee or assignee can claim an account only from the date of dissolution. The Partnership Act does not deal with the case of a transfer or assignment by an ex-partner in a firm after the dissolution of the partnership, but we can see no reason why the right of such a transferee or assignee to claim an account of the partnership from the other ex-partners should be any larger than the right of a transferee or assignee under s. 29.

In the case before us the firm of Chellaram Tharumal was dissolved on October 31, 1923 and the plaintiffs in the suit, the present appellants, became transferees or assignees of two of the late partners after dissolution. They filed a suit for accounts of the dissolved partnership as a whole and not for accounts after the date of dissolution only. The question is could they do so in their own right or were the late partners necessary parties to such a suit by the plaintiffs.

The answer to this question is furnished by a consideration of the general law of partnership and the relations between partners and their mutual obligations to which we have referred above, and in the provisions of the Civil P. C., relating to necessary and proper parties to a suit. But, in our opinion, a clear exposition of the law on this point can be found in *Public Trustee v. Elder* (1) a decision of Eve, J. in the Chancery Division of the High Court of England which was affirmed by the Court of appeal in separate judgments delivered by Lord Hanworth, Master of the Rolls, Warrington and Sargant, L. JJ. The facts in that case were these: At the outbreak of war on August 4, 1914 three German subjects were carrying on in partnership with an English partner F, the business of merchants in London under the style of Arnold Otto

Meyer & Co. F was the managing partner in London and on the dissolution by the declaration of war he carried on the business and collected assets with a view to liquidation. No accounts had been taken between partners since December 31, 1913. F died in 1920 and the defendant was his legal personal representative. By an order of the Board of Trade dated April 1, 1924 it was ordered that all the property rights and interests of the three German partners in the assets of the firm in respect of any claim against the English partner or his estate should vest in the plaintiff who should take all necessary proceedings to collect what would be due to the German partners. In an action by the plaintiff as custodian of enemy property with the object of winding up the partnership he claimed an account against the defendant of all dealings between the German partners and the English partners including all dealings with the partnership assets since its dissolution, payment of what should be found due and inquiry of what the partnership property consisted. The German partners were not added as plaintiffs in the action. It was held by Eve, J. that in the absence of the German partners as parties to the action no such relief as was asked could be granted and that the action failed. The learned Judge stated :

"The plaintiff in my opinion is in no better position than any other assignee of the interests of the Germans and his claim to be treated as a creditor of the defendant's testator is a misconception. I conceive the following to be a correct summary of the legal relations of partners in a dissolved partnership. Where assets are collected and got in, no partner has any definite share or interest therein, his right is merely to have the assets so collected applied in discharging the liability of the partnership firm and to receive his share of any surplus there may be when the liquidation has been completed ; and further there can be no relationship of debtor and creditor between partners unless and until the accounts have been finally taken and a balance has been ascertained to be due from each one to the others. Nor is any partner entitled to an account from his co-partners except upon the footing that in accordance with the implied obligation arising under the contract of partnership he will himself account and submit to be charged with any balance found to be due from him.

Such being the legal position of the parties, the defendant, subject to the determination of certain other defences with which I do not propose to deal, would not resist—indeed, having regard to the fact that his interest in the whole matter is that of a trustee only, would welcome an order for the usual partnership decree on the terms that the plaintiff is willing to submit to be charged with all sums properly chargeable against the assignors, or, alternatively, to amend the record by adding the German partners as co-plaintiffs. But the plaintiff declines to accept either alternative, and insists on his right to have the accounts taken in circumstances calculated to inflict grievous injustice upon the defendant. I do not think he has any such right, and therefore I cannot give him the relief claimed in the action.

At the trial the plaintiff asked, as an alternative, for an account under sub-s. (2) of s. 31, Partnership Act. I am not prepared to hold that in no case, and more particularly in a case where some of the partners are out of the jurisdiction, can the Court make an order for such account of the partnership dealings and transactions prior to the dissolution, I think the Court would be slow to make the order until all the accounting partners were parties."

Sub-section (2) of s. 31, English Partnership Act, is substantially reproduced in s. 29 (2), Indian Partnership Act, and relates to a claim for accounts after the date of the dissolution of a partnership. The plaintiffs in the matter before us were in the position of the public trustee in this Chancery case. Defendants Nos. 11 to 20 who were joined only in 1931 were in the position of the German partners in the Chancery case. As in the Chancery case the assignment had taken place after the dissolution of the partnership between the English partner and his German colleagues, so in the case before us the firm of Chellaram Tharumal had been dissolved before the assignments in favour of the plaintiffs. As in the Chancery case, so in the case before us, the account claimed by the plaintiff was not an account merely after the dissolution of the firm but an account of the entire period of the partnership. The decision of Eve, J. in *Public Trustee v. Elder* (1) and in the same volume at p. 776 *Public Trustee v. Elder* (2) is the decision of the appellate Court. The head note to the decision of the appeal Court reads thus :

"Held that it was necessary for the proper liquidation of the firm's affairs and the ascertainment of the amounts divisible or payable by the partners *inter se*; that each partner should personally account to the others for his receipts and transactions in the winding up; that reciprocity of personal obligation for that purpose was as complete as it was under ss. 28 and 29, Partnership Act, 1890, during the continuance of the partnership; that, that being so the assignee of the share of a partner in a dissolved partnership, when requiring an account, as from the date of dissolution, could not substitute for the reciprocal personal obligation of the assignee himself to account, while still requiring the other partners to discharge as towards him their personal obligations :

Held, therefore, that the German partners were necessary parties to the action, and accordingly that the action was defective for want of parties and must be dismissed."

The question involved has been dealt with in greatest detail in the judgment of Sargant, L. J., thus :

"The whole difference between the parties is as to the results of an absolute assignment after the dissolution of a partnership of the shares of some of the partners. But for that assignment the shares of the assigning partners would obviously have been ascertainable only in proceedings to which those partners were parties, and in which they would have been under reciprocal personal obligations to the other partners to render full

(2) (1926) 1 Ch. 776; 95 L. J. Ch. 519; 135 L. T. 580.

and just accounts. What then is the effect of these obligations on the assignment? Is it to substitute for the personal obligations of the assigning partners to account; a corresponding personal obligation of the assignee to account, so that on performing this obligation to the best of his personal ability he can call on the other partner for the full benefit of his personal accountability? Or is it merely to substitute the assignee as the ultimate recipient of the value of the share, as ultimately ascertained in the same manner as it would have been ascertained apart from the assignment, that is to say after the assigning partners had themselves performed their reciprocal personal obligations to account?.....

The contract of partnership is essentially one involving in the highest degree reciprocity of personal obligation and trust. In the words of James, L. J. in *Baird's case (In re Agriculturist Cattle Insurance Co.)* (3) at p. 733, 'ordinary partnerships are by the law assumed and presumed to be based on the mutual trust and confidence of each partner in the skill, knowledge, and integrity of every other partner'. And under ss. 28 and 29, Partnership Act, 1890, partners are under mutual personal liability to render true accounts and full information of all things affecting the partnership, and to account for any benefits derived from any transaction concerning the partnership or from any use by any of them of the partnership property, name or business connection. And the position and rights of a partner as towards the other partners are recognized by the law as being so personal and individual that, under s. 31, sub-s. 1, Partnership Act, 1890 an assignment by a partner of his share in a partnership does not entitle the assignee to interfere in the partnership or to require accounts or to inspect the books, but entitles him solely to receive the shares of the profits as ascertained by the partners to which the assigning partners would otherwise be entitled. It would hardly be possible to express more clearly the essential non-assignability in a subsisting partnership of the position and rights of one partner in relation to the other partners.

On the dissolution of a partnership however there is no occasion to limit quite so strictly the right of an assignee as regards transactions occurring after the dissolution. And accordingly under sub-s. 2 of s. 31 it is provided that the assignee is not only entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, but is also entitled for the purpose of ascertaining that share to an account as from the date of dissolution. The result seems to be that down to the date of dissolution the accounts have to be agreed to personally by the partners and the assignee is bound to accept the accounts as so agreed; and that the sole account the assignee is entitled to have taken in his presence or to question is an account from the date of dissolution.

What then are the rights of the original partners as regards the taking of the accounts on a dissolution? Are there rights still reciprocal, personal rights involving mutual, personal trust and confidence? In my judgment, the only possible answer to this question is an affirmative one. The dissolution of the bond between them is as to new enterprises and transaction only. For the winding up of affairs of the partnership, the authority of each partner to bind the firm and the other rights and obligations of the partners continue, as expressly recognized and enacted by s. 38 of the Act of 1890. It is accordingly necessary for the proper liquidation of the firm's affairs and the ascertainment of the amounts divisible amongst or payable by the partners *inter se*, that each partner should personally account to

the others for his receipts and transactions in the winding up. The reciprocity of personal obligation for this purpose is as complete as it was under ss. 28 and 29 during the continuance of the partnership. This being so, can an assignee of the share of a partner in a dissolved partnership when requiring an account as from the date of dissolution, substitute for the reciprocal personal obligation of the assigning partner to account to the other partners a mere personal obligation of the assignee himself to account, while still requiring the other partners to discharge as towards him their personal obligation? Such a claim in my judgment involves a violation of the fundamental conditions of reciprocity and personal confidence involved in the partnership contract and it is directly negated by the reasoning in the unanimous judgment of the Court of appeal, as delivered by the then Master of the Rolls, in *Tolhurst v. Associated Portland Cement Manufacturers Ltd.* (4)."

It must be remembered that s. 31 of the English Partnership Act of 1890 finds its counterpart in s. 29 of the Indian Partnership Act of 1932 and the provisions of ss. 28 and 29 of the English Partnership Act, relating to the duty of partners to render accounts and to the accountability of partners for private profit are to be found in ss. 9, 13, 15 and 16 of Indian Partnership Act of 1932. We can see no material point of distinction between the case before us and this case in *Public Trustee v. Elder* (2) and we can therefore have no hesitation in following it. It has been argued that the share of a partner in a partnership concern is his own private property, that it is assignable under the provisions of the T. P. Act and that s. 130 (2), T. P. Act, gives the transferee of such a share a statutory right to

"sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings, and without making him a party hereto."

We have no quarrel with this line of argument; but a suit by an assignee for recovery of the share of one partner in a partnership is one thing and a suit for rendering of accounts of a partnership as a preliminary to ascertaining the value of that share is quite another thing; and while s. 130 (2), T. P. Act, confers on an assignee the right to sue for such a share without impleading his assignor, it cannot in reason be read as conferring on him the right to sue for the accounts of a partnership without his assignor being a party to the suit so as to enable all the partners in the partnership to fulfil their mutual and personal obligations to account. Section 130 (2), T. P. Act, neither expressly nor impliedly abrogates the provisions of the Partnership Act. The position and rights and obligations of one partner in a partnership in relation to the other partners is clearly not a chose in action and cannot be assigned; the share of a partner in a partnership (4) (1902) 2 K B 660.

is equally clearly property and may be assigned. Reliance has been placed by the learned Advocate for the appellants on the case in *In re Bainbridge; Ex parte Fletcher* (5), on the case in *Cassels v. Stewart* (6), on the case in *Shrinath v. Kanhaiyalal*, 75 Ind. Cas. 817 (7), the judgment of a Single Judge of the Nagpur Judicial Commissioner's Court and on the case in *Vishindas Nihalchand v. Thawerdas* (8). But none of these cases goes further than laying down a proposition we admit, that the share of a partner in a partnership is property and the right to recover it is a chose in action assignable under the T. P. Act.

In our view therefore the assignors of the plaintiffs in Suit No. 7 of 1926, the present appellants were necessary parties to the suit and not having been joined till a suit for taking partnership accounts as against them was time-barred the entire suit was barred by limitation and should have been dismissed. These second appeals therefore fail and must be dismissed with costs and we order accordingly. We have in the course of this judgment made reference to the peculiar constitution of the firm of Chellaram Tharumal, a peculiarity which attracted the attention of the learned Judge of the lower Appellate Court and induced him to raise and decide in appeal for the first time an issue as to the legality of such a partnership in view of the provisions of the Companies Act. We are informed, however, that such firms are quite common in Sind and are by no means peculiar. While we think that this learned Judge could not in appeal for the first time raise such a point, clearly a mixed question of law and fact, we would invite the attention of subordinate Judges to the necessity of raising the point which could no doubt with advantage be raised and decided in other cases by a Civil Court at the appropriate time.

D. *Appeal dismissed.*

(5) (1878) 8 Ch. D 218; 47 L J B K 70; 38 L T 229; 26 W R 439.

(6) (1881) 6 A C 64; 29 W R 636.

(7) 75 Ind. Cas. 817; A I R 1924 Nag. 145.

(8) 17 S L R 334; 80 Ind. Cas. 642; A I R 1925 Sind 18.

PATNA HIGH COURT

Letters Patent Appeal No. 34 of 1940

April 29, 1941

HARRIES, C. J. AND FAZL ALI, J.

FIRM BHIMRAJ-DEBI BAKSH—

DEFENDANT—APPELLANT

versus

GAYA PRASAD SAHU AND OTHERS—

PLAINTIFFS—RESPONDENTS

Suits Valuation Act (VII of 1887), s. 11 (2) (3)—Appellate Court coming to conclusion that lower Court had no jurisdiction—He should not straight way dismiss the appeal and direct the lower Court to send case to proper Court—He should consider the question whether under or over-valuation has prejudiced the party, otherwise in case the objection was taken at earliest opportunity, consider the appeal on merits.

Sub-sections (2) and (3) of s. 11, Suits Valuation Act make it clear that the matter has not to be disposed of summarily merely on the ground that the Court of first instance or lower Appellate Court had no jurisdiction. Even in cases where the point as to under-valuation is properly taken, the Court can deal with the appeal provided the provisions of sub-s. (2) are complied with. If the objection is properly taken but the Appellate Court is not satisfied as to both the matters mentioned in cl. (b), that is over or under-valuation and prejudice, the Court, if it has the materials before it, can proceed to determine the appeal. However, it cannot act under sub-s. (2) if it is satisfied that the question of under-valuation has prejudicially affected the disposal of the suit on its merits. Before the Court disposes of the case, he should be satisfied himself one way or another on this question of prejudice.

L. P. A. from a decision of Mr. Justice S. C. Chatterji, dated September 6, 1940.

Mr. G. P. Das, for the Appellant.

Messrs. S. K. Mitra and G. N. Mukharji, for the Respondents.

Harries, C. J.—This is a Letters Patent Appeal from a decision of Chatterji, J., setting aside a decision of the learned Subordinate Judge and remanding a case to the Court of the learned Munsif.

The suit giving rise to these proceedings was brought by the plaintiff for a declaration that a certain *ex parte* decree and a sale in execution thereof were not binding upon the plaintiff as it was alleged that the *ex parte* decree had been obtained by fraud. The suit was valued at Rs. 516 which was the price paid by the decree-holder for the property in the execution sale.

The suit was instituted in the Court of the Third Munsif at Arrah, who had jurisdiction to hear suits up to Rs. 2,000 in value. However, before the suit was read for hearing it was transferred to the Court of the Second Munsif who had only jurisdiction to try suits up to Rs. 1,000 in value. Up to the stage of trial no objection had been taken that the plaintiff's suit was under-valued. During the trial, however, evidence was given

which went to show that the property in question was worth at least Rs. 1,500 if not considerably more. When this evidence was adduced, the defendants immediately took objection that the trial Court had no jurisdiction to hear the suit. The learned Munsif, however, held that the proper valuation was Rs. 516 and that he had jurisdiction to dispose of the matter. Eventually he decreed the plaintiff's claim.

On appeal it was contended before the learned Subordinate Judge that the evidence clearly showed that the value of the property was over Rs. 1,500 and that, therefore, the suit was under-valued. As the Munsif's jurisdiction did not extend beyond Rs. 1,000, it was contended that he had no jurisdiction whatsoever to hear the suit. The learned Subordinate Judge acceded to this contention, set aside the order of the Munsif and remanded the case to him with the direction that if he still had no jurisdiction to try suits exceeding the valuation of Rs. 1,000, he should return the plaint to the plaintiff for presentation in the proper Court.

The plaintiff preferred a second appeal, and the learned Single Judge held that the decision of the lower Appellate Court was manifestly wrong. The moment the learned Subordinate Judge came to the conclusion that the real value of the suit was over Rs. 1,000 he held that the Court below had no jurisdiction whatsoever to hear it and, therefore, the plaint would have to be returned for presentation in the proper Court. The learned Single Judge points out that the lower Appellate Court had not considered the provisions of s. 11, Suits Valuation Act, (Act VII of 1887). The material portions of that section are as follows :—

"11 (1) Notwithstanding anything in s. 578 of the Civil P. C., an objection that by reason of the over-valuation or under-valuation of a suit or appeal a Court of first instance or lower Appellate Court which had not jurisdiction with respect to the suit or appeal exercised jurisdiction with respect thereto shall not be entertained by an Appellate Court unless—

(a) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded or in the lower Appellate Court in the memorandum of appeal to that Court, or

(b) the Appellate Court is satisfied, for reasons to be recorded by it in writing, that the suit or appeal was over-valued or under-valued, and that the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits.

(2) If the objection was taken in the manner mentioned in cl. (a) of sub-s. (1), but the Appellate Court is not satisfied as to both the matters mentioned in cl. (b) of that sub-section and has before it the materials necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeal as if there had been no defect of jurisdiction in the Court of first instance or lower Appellate Court.

(3) If the objection was taken in that manner and the Appellate Court is satisfied as to both those matters, and has not those materials before it, it shall proceed to deal with the appeal under the rules applicable to the Court with respect to the hearing of appeals; but, if it remands the suit or appeal, or frames and refers issues for trial, or requires additional evidence to be taken, it shall direct its order to a Court competent to entertain the suit or appeal."

It is clear that objection to valuation was not taken in the trial Court before the issues were framed, but the learned Single Judge was satisfied that it was taken at the first possible opportunity. In any event, the point was taken in the memorandum of appeal to the lower Appellate Court. Sub-ss. (2) and (3) of this section however, make it clear that the matter has not to be disposed of summarily merely on the ground that the Court of first instance or lower Appellate Court had no jurisdiction. Even in cases where the point as to under-valuation is properly taken, the Court can deal with the appeal provided the provisions of sub-s. (2) are complied with. That sub-section expressly provides that if the objection was properly taken but the Appellate Court is not satisfied as to both the matters mentioned in cl. (b), that is over or under-valuation and prejudice, the Court, if it has the materials before it, can proceed to determine the appeal. However, it cannot act under sub-s. (2) if it is satisfied that the question of under-valuation has prejudicially affected the disposal of the suit on its merits.

Before the learned Subordinate Judge could have disposed of the case, he should have satisfied himself one way or another on this question of prejudice. The learned Single Judge has rightly pointed out that the learned Subordinate Judge never addressed himself to this question at all, and that being so, his decision could not be sustained. All that the learned Single Judge has done is to point out that the provisions of sub-ss. (2) and (3) of s. 11, Suits Valuation Act, must be considered by the lower Appellate Court and after consideration that Court must proceed according to law. It appears to me that on the plain words of the section the learned Single Judge was bound to set aside the decision of the Court below and to make the order which he did.

In the result, therefore, this appeal fails and I would dismiss it with costs.

Fazl Ali, J.—I agree.

D.

Appeal dismissed.

ODUH CHIEF COURT

Full Bench

Second Rent Appeal No. 37 of 1937

March 18, 1941

YORKE BENNETT AND GHULAM HASAN, JJ.

Mahant HARI SARAN DAS—PLAINTIFF

—APPELLANT

versus

DHANI RAM AND OTHERS—DEFENDANTS.—

RESPONDENTS

U. P. Stayed Arrears of Rent (Remission) Act (XVIII of 1939)—Act not ultra vires—S. 3—U. P. Stay of Proceedings (Revenue Courts) Act (IV of 1937), s. 2—Appeal pending when Act IV of 1937 came into force—If liable to be dismissed under s. 3 of Act XVIII of 1939—Suit or appeal liable to be stayed under s. 2 of Act IV of 1937—No stay order passed—Whether can be dismissed under s. 3 of Act XVIII of 1939.

The U. P. Stayed Arrears of Rent (Remission) Act XVIII of 1939, is not *ultra vires* of the Provincial Legislature. [p. 388, col. 1.]

Section 3 of the U. P. Stayed Arrears of Rent (Remission) Act operates to dismiss all suits for arrears of rent stayed under Act IV of 1937, or which if instituted, would have been stayed, that is to say all suits for arrears of rent prior to *Rabi 1344 F.* It also operates to dismiss all applications for the recovery of arrears of rent, that is, so far as the Oudh Rent Act is concerned, all applications for execution of decrees for arrears of rent already instituted or which might have been instituted relating to the same instalments prior to the instalments for *Rabi 1344 F.* Where the suit relates to the arrears of rent prior to *Rabi 1344 F.* an appeal pending when the U. P. Stay of Proceedings (Revenue Courts) Act IV of 1937, came into force is liable to be dismissed because even if the appeal be allowed to proceed and the plaintiff-appellant be successful in his appeal he will be unable to institute or prosecute any application for execution of his decree since that decree relates to arrears of rent and to instalments prior to *Rabi 1344 F.* [p. 389, col. 2: p. 390, col. 1.]

Where it is provided by the U. P. Stay of Proceedings (Revenue Courts) Act that all suits shall be stayed, all such suits are stayed automatically, and no order of the Court is necessary. Where, therefore, a suit or an appeal is liable to be stayed under the Stay of Proceedings Act 1937, it is liable to be dismissed under s. 3 of the Stayed Arrears of Rent (Remission) Act, 1939, even if no stay order has been passed under s. 2 of the former Act. [*ibid.*]

S. Rent Ap. against the order of the District Judge of Unao, dated February 3, 1937.

Mr. B. P. Misra for the Appellant.

Mr. S. N. Srivastava, for the Respondents Nos. 2 and 3.

Opinion

Yorke, Bennett and Ghulam Hasan, JJ.—(March 5, 1941).—This is a Full Bench reference on a point of law made by a Bench of this Court to which Second Rent Appeal No. 37 of 1937 was referred by the Hon'ble Chief Judge sitting singly for decision under s. 14 (2) of the Oudh Courts Act.

The matter arises out of a suit under the provisions of s. 108 (2) of the Oudh Rent Act for arrears of rent for *Rabi 1340 to 1343 F.* The defendants pleaded payment and claimed certain remission. This defence was upheld by the trial Court, which on October 26, 1936, decreed the plaintiff's claim for only Rs. 14-2-0, out of Rs. 158, and odd. The plaintiff went in appeal to the District Judge. On February 3, 1937, the District Judge upheld the trial Court's decision in the matter of remissions, but held that the plea of payment had not been substantiated and he, therefore, decreed the claim for a considerably larger sum than that decreed by the trial Court.

In a second appeal before the Hon'ble Chief Judge it was contended that the appeal was liable to dismissal under the provisions of s. 3 of the U. P. Stayed Arrears of Rent (Remission) Act XVIII of 1939. The appeal was instituted in this Court on May 4, 1937, and during the subsistence of the U. P. Stay of Proceedings (Revenue Courts) Act IV of 1937, the appeal was treated as stayed. The contention put forward before the Bench on behalf of the respondents was that the effect of s. 2 of that Act was to stay the appeal, and that in consequence the effect of the provisions of s. 3 of Act XVIII of 1939 was to dismiss the suit *in toto*. For the opposite party it was contended that the sections did not have this effect and that Act IV of 1937 did not affect appeals but only suits and those proceedings (in execution) which are specifically mentioned in the section, and in consequence s. 3 of Act XVIII of 1939 could not operate to bring about a dismissal of the suit *in toto*. It was further contended that in any case Act XVIII of 1939 was *ultra vires* of the Provincial Legislature.

The following two questions of law were, therefore, referred for decision to this Full Bench namely :

(1) Whether in the circumstances of the present case the appeal filed by the plaintiff-appellant is liable to dismissal in view of the provisions of s. 3 of the U. P. Act No. XVIII of 1939 read with s. 2 of the U. P. Act No. IV of 1937?

(2) Whether the U. P. Act No. XVIII of 1939 is or is not *ultra vires* of the Provincial Legislature?

As regards the second of the two questions raised, no arguments have been addressed to us, it being conceded that in the light of a decision of the Federal Court reported in *The United Provinces v. Atiqa Begum*,

(1941 O. A. p. 159) (1), there can be no room for doubt as to the powers of the Provincial Legislature to legislate on the subject. We may quote from the head-note of this decision in this connection. It runs as follows:—

(Per Gwyer, C. J.)

"The general descriptive words in item No. 21, List II of Seventh Schedule to Govt. of India Act, include the collection of rents; and if a Provincial Legislature can legislate with respect to the collection of rents, it must also have power to legislate with respect to any limitation on the power of a landlord to collect rents, that is to say, with respect to the remission of rents as well as to their collection. Legislation with respect to the remission of rents is legislation with respect to a matter included in item No. 21. The U. P. Regularisation of Remissions Act, 1938, is an Act with respect to the remission of rent and it was within the competence of the U. P. Legislature to enact it."

(Per Varadachariar, J.)

"The U. P. Regularisation of Remissions Act, 1938, intended to deal and does deal with the subject of remission of rent made under orders of the Provincial Govt., and was *intra vires* of the U. P. Legislature."

(Per Sulaiman, J.)

"When the question is whether any impugned Act is within any of the three Lists, or in none at all, it is the duty of Courts to consider the Act as a whole, and decide whether in pith and substance the Act is with respect to particular categories or not. This can be inferred only from the design and purport of the Act as disclosed by its language and the effect which it would have in its actual operation. In pith and substance the U. P. Regularisation of Remissions Act is an Act not only with respect to 'the relation of landlord and tenant' or the 'collection of rents', but is also with respect to conferring on the Provincial Govt. very extensive powers of interference with the legal rights of landholders in their lands."

It may be said that in pith and substance Act XVIII of 1939 relates to depriving the landholders of their rights to collect arrears of rent relating to all the years prior to *Rabi 1344 F.* We can see no ground on which it can be held, if the U. P. Regularisation of Remissions Act, 1938, is not *ultra vires*, that nonetheless Act XVIII of 1939 is *ultra vires* of the Provincial Legislature. We would, therefore, answer this question by saying that in our opinion the U. P. Stayed Arrears of Rent (Remission) Act, XVIII of 1939, is not *ultra vires* of the Provincial Legislature.

As regards the first question, the first point for consideration is whether the words "proceedings in suits" in s. 2 of the U. P. Stay of Proceedings (Revenue Courts) Act, IV of 1937 include appeals. This section runs as follows:—

"Notwithstanding anything contained in the Agra Ten. Act, 1926, or the Oudh Rent Act, 1886, or the (1) 1941 O A 159; 192 Ind. Cas. 138; 7 B R 433; 13 R F C 15; A I R 1941 F C 16; 1941 O W N 297; 72 C L J 550; 1941 O L R 121; 45 C W N F C 27; (1941) A L J 170; 53 L W 397; 1941 R D 121; (1941) 1 M L J (F C) 65 Sup. (F C).

Civil P. C., 1908, all proceedings in suits and applications of the classes specified in the schedule to this Act, pending on the date when this Act comes into force (September 25, 1937), or instituted during the period this section remains in force, shall be stayed for such period as this section shall remain in force, all attachments of movable property made in connection with such suits and applications shall be withdrawn, all judgment-debtors detained in prison in execution of decrees and orders passed in such suits and applications shall be released, and all sales of immovable property in connection with such suits and applications shall be stayed."

Suits and applications under the Oudh Rent Act referred to in the Schedule of this Act are suits and applications under ss. 52, 53-A, 54, 60 (1), 61 (1), 62 (1), 62-A (1) and 108, sub-s. 2 (with some exceptions), (3), (3-a), (4), (5-a), and (8). Matters which fall under s. 108 are suits, while the rest relate almost entirely to ejectment. So far as the Oudh Rent Act is concerned, the word 'applications' could only refer to applications in connection with ejectment. It clearly does not refer to applications in execution cases. Those are dealt with separately under the references to attachments of movable property, detention of judgment-debtors in prison and sales of immovable property made in connection with 'such' suits, that is, suits of the classes specified in the Schedule. Section 2 has three provisos, and roughly speaking it may be said that the effect of the first proviso is that the section does not apply to suits in respect of rents for *Rabi 1344 F.* or subsequent years. It follows that the section operates to stay all proceedings in suits and execution of decrees in respect of all instalments prior to *Rabi 1344 F.* It would seem that unless the words 'proceedings in suits' are sufficiently comprehensive to cover appeals, the section as it stands does not interfere with the disposal of appeals arising out of decrees in suits of the classes specified in the Schedule.

On behalf of the respondent contending that the appeal has been stayed under Act IV of 1937 and must, therefore, fail on account of the provisions of the subsequent Act reference has been made to some cases in which it has been held that "suits" include appeals. It is pointed out that it has been held in connection with s. 10 of the Civil P. C. that the word "suit" includes "appeals". Section 10 of the Civil P. C. provides that

"no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties....."

It has been held that where there has been a previously instituted suit and that suit is pending disposal even in second appeal, an

application for stay under s. 10, Civil P. C. may be made, that is, the word "suit" has not been interpreted strictly as referring only to a suit in the course of its trial in the original Court. We do not think that any very sound inference can be drawn from the wider meaning of the word "suit" in this particular instance because obviously the decision in such a suit, if that suit were not treated as still pending while it was in the course of appeal, would have to operate as *res judicata* for a subsequent suit and thus be equally a bar to the trial of the same matter in the subsequent suit. In this connection reference has been made to a case reported in *Chaudhury Jamini Nath Mallick v. Midnapur Zemindary Co.*, (A. I. R. 1923 Cal., p. 716) (2), where, according to the head-note, it was held that "suits" in s. 10 include 'appeals', but that the section is not applicable where the suits are for distinct and different debts. In that case Rankin, J. remarked

"I think that the reference at the end of the section to 'His Majesty in Council' shows that for this purpose 'suits' include appeals."

The learned Judge, however, went on to hold that s. 10 had no application to that case so that the remark was in a sense *obiter*.

In the same way, however, and for the same reasons it has been held in a decision of the Chief Court of Sind reported in *Badaldas Jethmal Firm v. Gurdinomal Narumal Firm*, (A. I. R. 1939 Sind, p. 329) (3), that in s. 10, which is closely connected with s. 11, 'suits' must include appeals, but the foundation for this view is that the section itself refers to suits pending before His Majesty in Council and such suits could not be other than appeals. It does not appear to us in any way to follow that because for the purposes of s. 10 of the Civil P. C. 'suits' include appeals, the words 'proceedings in suits' in s. 2 of the U. P. Stay of Proceedings (Revenue Courts) Act, IV of 1937, also include appeals.

Prima facie there are two grounds on which it can be argued that these words "proceedings in suits" in s. 2 of Act IV of 1937 do not include appeals. First this is a special Act depriving plaintiffs in suits, both pending and decreed, of their legal rights under the ordinary law of the land and it may be said that the expressions used in such an Act must be construed strictly. Secondly, it is to be noticed that the Legis-

lature was not content to rely on the words "all proceedings in suits" as wide enough to cover proceedings in execution, and it has gone on to define separately those proceedings subsequent to decrees in suits of the classes mentioned, which were to be stayed during the period while the section remained in force.

Coming to s. 3 of Act XVIII of 1939 we have to note that the wording of this section differs very considerably from the wording of s. 2 of Act IV of 1937. This section provides that

"notwithstanding anything contained in the Agra. Ten. Act, 1926, or the Oudh Rent Act, 1886, or any other Act for the time being in force, but subject to the provisions of s. 5 (which section excludes from the application of the Act tenants liable to pay more than Rs. 500 as rent per annum, or assessed to income-tax in the year 1937, or to a local rate in excess of Rs. 25 in the year 1344 F.) all suits or applications for the recovery of arrears of rent which have been stayed under the provisions of the U. P. Stay of Proceedings (Revenue Courts) Act, IV of 1937, shall be dismissed and no Court shall entertain any suit or application for the recovery of arrears of rent which, if instituted or made during the period in which the U. P. Stay of Proceedings (Revenue Courts) Act IV of 1937, is in force, would have been stayed under the provisions of that Act."

This section does not affect suits for ejectment, possibly because nothing of the kind was necessary in view of the provisions of the U. P. Ten. Act. It operates to dismiss all suits for arrears of rent stayed under Act IV of 1937, or which if instituted, would have been stayed, that is to say all suits for arrears of rent prior to *Rabi 1344 F.* It also operates to dismiss all applications for the recovery of arrears of rent, that is, so far as the Oudh Rent Act is concerned, all applications for execution of decrees for arrears of rent already instituted or which might have been instituted relating to the same instalments prior to the instalment for *Rabi 1344 F.* As regards this only the first of the two arguments available with reference to Act IV can be adduced for favour of a strict interpretation of the word "suits."

In this connection we are unable to accede to the argument which found favour with Agarwal, J. in a case reported in *Daya Shankar v. Badri Prasad*, (1941 O. A., p. 218) (4). In that case it was held "that under s. 3 of Act XVIII of 1939 only those suits or applications will be dismissed which have been stayed under the provisions of Act IV of 1937," and that as those particular suits or appeals had never been stayed by any order of the Court they were not affected by s. 3 of Act XVIII of 1939. We are of opinion that

(2) A I R 1923 Cal. 716; 75 Ind. Cas. 231; 27 C W N 772.

(3) A I R 1939 Sind 329; 186 Ind. Cas. 533; (1940) Kar. 15; 12 R S 203.

(4) 1941 O A 218.

where it is provided by the Act that all suits shall be stayed, all such suits are stayed automatically, and no order of the Court is necessary.

On the other hand the effect of this section seems to us to be such that the question put must be answered affirmatively and the appeal held liable to dismissal. The suit relates to arrears of rent for the years *Rabi* 1340 to 1343 *F.* and even should the appeal be allowed to proceed and the plaintiff-appellant be successful in his appeal the position will arise, that in view of the provisions of these two Acts and particularly of Act XVIII of 1939, he will be unable to institute or prosecute any application for execution of his decree since that decree relates to arrears of rent and to instalments prior to *Rabi* 1344 *F.* All suits and proceedings in execution by attachment of movable property and arrest of judgment-debtors as well as sales of immovable property in respect of such instalments of arrears of rent were stayed and have been dismissed and can no longer be instituted.

It follows that although in express terms the prosecution of such an appeal has not been prohibited by the earlier act, by the later act it is rendered infructuous and by implication therefore is to be taken to be liable to dismissal.

Our answer to the first question is therefore that the appeal is liable to dismissal.

Final Judgment.

Bennett and Ghulam Hasan, JJ.—In view of the decision by the Full Bench that the appeal is liable to dismissal, we dismiss the appeal with costs.

s. *Appeal dismissed.*

NAGPUR HIGH COURT

Civil Revision Application No. 463
of 1938

November, 27, 1939

POLLOCK AND GRUER, JJ.

GANPATRAO AND OTHERS—DEFENDANTS

Nos. 3 AND 4—APPLICANTS

versus

SHAMRAO AND OTHERS—

NON-APPLICANTS

Court-fees—Mortgage suit—Subsequent mortgagee added wanting determination of his rights—Valuation of suit for purposes of jurisdiction—Amount claimed on prior and subsequent mortgages exceeding pecuniary jurisdiction of Court—Court's jurisdiction, if lost—Court-fees, if payable on claim on subsequent mortgage.

When in a mortgage suit a subsequent mortgagee is added who wants his rights to be investigated and decided the suit is to be valued for purposes of jurisdiction, *ad valorem* on the amount due on the plaintiff's prior mortgage and jurisdiction is not lost if the amounts claimed on the prior and subsequent mortgages taken together exceed the pecuniary jurisdiction of the Court.

The claim under the subsequent mortgage is neither a set-off nor a counter-claim on which court-fees should be paid. Where the puisne mortgagees ask for this relief in their written statement, it does not require to be stamped at all. It is no doubt advantageous to puisne mortgagees to obtain a decree on their mortgages without paying any court-fees and it would be especially so where the later mortgages happen to be for very large sums. The Legislature no doubt could have provided for payment of court-fees by the puisne mortgagees when they claimed a determination, or recourse perhaps might have been had to s. 9 of the Suits Valuation Act. But in the absence of any such provision or rule no court-fees are payable on the claim under the subsequent mortgages.

C. R. App. of the order of the Court of the Fourth Sub-Judge, Second Class; Nagpur, dated July 5, 1938.

Order of Reference

Gruer, J.—(October 3, 1939).—In this mortgage suit the applicants (defendants Nos. 3 and 4) were subsequent mortgagees. Defendant No. 1 was the original mortgagor and the plaintiffs (non-applicants Nos. 1 and 2) were the prior mortgagees. These applicants, subsequent mortgagees, claimed to be allowed to pay off the prior mortgage and to have a decree in their favour for the combined amounts of the two mortgages in Form No. 9 of Appendix D read with O. XXXIV, r. 4, Civil P. C. The lower Court, Fourth Sub-Judge, Second Class, Nagpur, points out that the total claim on the subsequent mortgages is Rs. 2,557 plus Rs. 4,502-Rs. 7,059 which is beyond the inherent jurisdiction of a Second Class Sub-Judge. It therefore, holds that these mortgages of defendants Nos. 3 and 4 cannot be enquired into in the present suit.

The present application against that finding is not opposed by the plaintiffs who say that they have nothing to urge. It is opposed by defendant (No. 2) who points out that O. XXXIV, r. 4, Civil P. C. provides for the case of subsequent mortgagees and "for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9, Form No. 10 or Form No. 11, as the case may be, of Appendix D with such variations as the circumstances of the case may require."

Now Form No. 9 provides for a statement of the amount due on the subsequent mortgage so that evidently that amount would have to be determined in the suit and all

objections to the mortgage would have to be decided. It is said however, that though this no doubt would have to be done if the Court had jurisdiction to entertain the total claim it cannot be done where the pecuniary jurisdiction of the Court has been exceeded as is the case here.

Section 6 of the Civil P. C., says :

"Save is so far as is otherwise expressly provided, nothing herein contained shall operate to give any Court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction."

The valuation of a suit for purposes of jurisdiction is determined by the valuation in the plaint. That is the general rule, but here by reason of O. XXXIV, r. 1, Civil P. C., the subsequent mortgagees having a right of redemption had to be joined as parties, and by reason of r. 4, sub-s. 4, their rights and liabilities had to be determined in the manner and form set forth in Form No. 9 seeing that they themselves wished to redeem. The Court, therefore, apparently has no option but to investigate the validity of the mortgages and the amount due not only on the mortgage primarily in suit dated December 22, 1925, but the two subsequent mortgages of 1931 and 1933 of which the principal sums are Rs. 4,000 and Rs. 3,000 respectively. I doubt therefore, whether the lower Court's order refusing to consider these mortgages can stand. It seems to me that if it had jurisdiction it was bound to go on with the suit as a whole, otherwise to return the plaint to be presented to the Court having jurisdiction.

The question whether jurisdiction has been exceeded in such a case is somewhat puzzling, and I have not been able to find any authority bearing directly on the point. There are of course cases in which it has been held that the Court has power to pass a decree in excess of its pecuniary jurisdiction: for instance where mesne profits accruing *pendente lite* are concerned (*Hemanga Bhooshan Ray Chaudhuri v. Bheem Gharmi* (1)) and where the amount finally due on accounts exceeds jurisdiction (*Olpherts v. Arjundass* (2) and *Kalooram v. Ramkshen* (3)). I doubt, however, whether the analogy of these cases is a good one. In *Sarada Sundari Basu v. Akramannessa Khatun* (4) the suit brought was one for redemption and it was held that jurisdic-

tion depended on the amount ultimately found to be due. That case turned on s. 8 of the Suits Valuation Act, and is of course distinguishable from one like the present where the suit as brought is for sale on the mortgage. At p. 743* of that ruling it is said.

"*Prima facie* it is the plaintiff's claim which determines jurisdiction, and the jurisdiction continues whatever the event unless a different principle comes into operation to prevent such a result or to make the proceedings from the first abortive."

It may well be argued that here the investigation of the subsequent mortgages is implicit in the case from the beginning, and will really be part of the subject-matter of the suit unless the defendants decline to redeem.

It is also contended that the subsequent mortgagees' demand for investigation of their mortgages is in the nature of a counter-claim and that court-fees should be paid. That question does not arise directly in this revision application, but it is important that the proper procedure in such cases should be clearly laid down. The question in my opinion is one of some difficulty and should be decided by a Bench. I should refer it as follows :

"(1) When in a mortgage suit a subsequent mortgagee is added who wants his rights to be investigated and decided how is the suit to be valued for purposes of jurisdiction, and is jurisdiction lost if the amounts claimed on the prior and subsequent mortgages taken together exceed the pecuniary jurisdiction of the Court ?

(2) If the Court cannot deal with the whole claim should it dispose of the suit without enquiring into the subsequent mortgages or should it return the plaint for presentation to the proper Court ?

(3) Should court-fees be payable also on the claim under the subsequent mortgages and if so, by whom ?"

This reference be submitted to my Lord the Chief Justice for passing orders about a Bench.

Mr. P. B. Deo, for the Applicants.

Mr. G. R. Pradhan, for Non-Applicants Nos. 1 and 2.

Mr. S. C. Dutt Choudhary, for Non-Applicant No. 4.

Opinion.—The facts leading up this reference and the points to be decided are set out in the order of reference itself. The position is briefly that in a mortgage suit in which a decree for sale is sought defendants Nos. 3 and 4 have been joined as subsequent mortgagees. Plaintiffs' mortgage involved a sum of Rs. 1,330-8-11 only, and so was within the pecuniary jurisdiction of the Court of Sub-Judge, Second Class, in which it was brought, but the claim on the two subsequent mortgages comes to Rs. 7,059, which is beyond the pecuniary

(1) I L R (1937) 2 Cal. 176; 172 Ind. Cas. 591; A I R 1937 Cal. 761; 10 R C 402.

(2) 9 N L R 112; 20 Ind. Cas. 928.

(3) 8 C P L R 86.

(4) 51 C 737; 78 Ind. Cas. 747; A I R 1924 Cal. 783; 28 C W N 710.

*Page of 51 C.—[Ed.]

jurisdiction (Rs. 5,000) of a Second Class Sub-Judge. These subsequent mortgagees went to pay-off the prior mortgage and have a decree on the foot of their mortgages in Form No. 9, Appendix D, Civil P. C., read with O. XXXIV, r. 4 of the Code. On objection raised by defendant No. 2, who is the legal representative of the purchaser of the mortgaged property from defendant No. 1 the lower Court framed a preliminary issue whether the subsequent mortgages of defendants Nos. 3 and 4 could be enquired into in this suit and has held that it cannot as it would thereby be acting beyond its jurisdiction.

The suit was rightly valued for purposes of court-fee on the amount due on plaintiffs' mortgage. Under s. 7 (ixA) of the Court Fees Act that is also now the valuation for court-fees in the Central Provinces in suits to foreclose a mortgage or, where the mortgage is made by conditional sale, to have the sale declared absolute. The plaintiffs' mortgage is a simple one not falling under s. 7 (ixA), but it has to be valued on the amount claimed, and according to s. 8 of the Suits Valuation Act the value for purposes of jurisdiction would be the same: *Shailendrakumar Palit v. Haricharan Sadhukhan* (5). Learned Counsel for defendant No. 2 relies on s. 6 of the Civil P. C., and says that the amount or value of the subject-matter of the suit includes the amounts due on the subsequent mortgages and therefore the pecuniary limits are exceeded. In our opinion the subject-matter of the suit is plaintiffs' mortgage as stated by them, and this is not altered by the obligation to join subsequent mortgagees or by the possibility that such subsequent mortgagees may in their defence claim to redeem and to have their own mortgages investigated. Our answer to the first question is that the suit for purposes of jurisdiction has to be valued *ad valorem* on the amount due on the plaintiffs' prior mortgage, and jurisdiction is not lost if the amounts claimed on the prior and subsequent mortgages taken together exceed Rs. 5,000, the pecuniary jurisdiction of the Court.

On this finding the second point does not arise. So we refrain from answering it. The third point is: "Should court-fees be payable also on the claim under the subsequent mortgage, and if so, by whom?" This is neither a set-off nor a counter-claim on which court-fees would have to be paid. These puisne mortgagees ask for this relief

(5) 58 C 829; 130 Ind. Cas. 176; A I R 1931 Cal. 159; 52 O L J 589; Ind. Rul. (1931) Cal. 396.

in their written statement, which does not require to be stamped at all. It is no doubt advantageous to puisne mortgagees to obtain a decree on their mortgages without paying any court-fees and it would be especially so where the later mortgages happen to be for very large sums. The Legislature no doubt could have provided for payment of court-fees by the puisne mortgagees when they claimed a determination, or recourse perhaps might have been had to s. 9 of the Suits Valuation Act. But in the absence of any such provision or rule we find that no court-fees are payable on the claim under the subsequent mortgages. We answer the reference accordingly.

D.

Reference answered.

PATNA HIGH COURT

Letters Patent Appeal No. 18 of 1940

April 24, 1941

HARRIES, C. J. AND FAZL ALI, J.
JAMUNA SINGH AND OTHERS—DEFENDANTS
—APPELLANTS

versus

SHEONANDAN SINGH—PLAINTIFF AND
Mst. RAMPAYARI KUAR—DEFENDANT—
RESPONDENTS

Transfer of Property Act (IV of 1882), s. 68 (a)
—Mortgage—Construction—Usufructuary mortgage—
Held on construction that there was no covenant by
mortgagor to pay, within meaning of s. 68 (a).

A usufructuary mortgage for a term of five years contained the following term "when the term of this deed will expire in the month of *Bhado* 1338 *Fasli*, then at that time the executant on paying the entire mortgage money will get back the deed and the *rehan* will be redeemed. In case of non-payment, this deed with all the above conditions will precisely remain intact and hold good till the payment of the said *rehan* money, that is, for nine years from 1334 to 1342. When we shall pay the said *rehan* money we shall pay it towards the end of *Bhado* of any year."

Held, on construction that there was no covenant by the mortgagor to pay within the meaning of cl. (a) of s. 68, T. P. Act. There was merely a provision that the bond might be redeemed at the end of *Bhado* 1338; but if it was not, the term of the bond was extended. There was no promise by the mortgagor to repay the amount, and hence the suit to recover the amount of money advanced could not succeed.

[Case-law referred to.]

L. P. A. from a decision of the Hon'ble Mr. Justice Wort, dated April 17, 1940.

Messrs. Mahabir Prasad and Girijanandan Prasad, for the Appellants.

Messrs. Lalnarayan Sinha and G. P. Singh, for the Respondents.

Harries, C. J.—This is a Letters Patent Appeal from a decision of Wort, J. allowing a second appeal and decreeing the plaintiffs' suit.

The suit out of which these proceedings arise was brought by the plaintiff to recover a sum of money said to be due on a mortgage bond. The claim was based upon a covenant to pay which was said to be in the bond. The learned Munsif who tried the case at first instance substantially decreed the claim, but on appeal the learned Subordinate Judge reversed the decision of the trial Court and dismissed the claim. In the view of the learned Subordinate Judge there was no covenant to pay in the mortgage bond in question. In second appeal Wort, J. was of opinion that there was a covenant by the mortgagor to pay within the meaning of cl. (a) of s. 68, T. P. Act, and he accordingly reversed the decision of the lower Court and restored the decree of the learned Munsif.

The only question to be decided in this appeal is whether the mortgage contains a covenant by the mortgagor to repay the sum advanced. The material portions of the mortgage are as follows:—

"We have, on taking Rs. 425 by way of *rehan* money paying no interest, let out in *rehan* and pledged the whole and entire one *bigha* of *kaimi raigati nakdi kasht* land lying in *mauza* Aunta, which is owned and possessed by us, together with all the rights and interest appertaining thereto for a term of five years from *Asin* 1334 to *Bhado* 1338 *Fasli* to *Mst.* Chahautra Kuari.....

Now, we have on receipt of the said whole and entire *rehan* money put the said *rehandar* in possession and occupation of the property let out in *rehan* hereunder. It is desired that the *rehandar* should enter into possession and occupation of the property let out in *rehan* hereunder, cultivate or get it cultivated and appropriate the entire produce of the property covered hereby as profit of her *rehan* money and remuneration for labour and her right as *rehandar*.

Then follows the most important term:—

"When the term of this deed will expire in the month of *Bhado* 1338 *Fasli*, then at that time the executant on paying the entire mortgage money will get back the deed and the *rehan* will be redeemed. In case of non-payment, this deed with all the above conditions will precisely remain intact and hold good till the payment of the said *rehan* money, that is, for nine years from 1334 to 1342. When we shall pay the said *rehan* money we shall pay it towards the end of *Bhado* of any year."

The learned Single Judge was of opinion that the term as to redeeming the mortgage contained a personal covenant by the mortgagor to repay as contemplated in s. 68 (I) (a), T. P. Act, which provides that a mortgagee has a right to sue for the mortgage money where the mortgagor binds himself to repay the same. In my view there is no covenant by the mortgagor in this mortgage to repay the money. All that is provided is that at the expiry of the term in the month of *Bhado* 1338 the mortgagor, if he pays the

money, will be entitled to the return of the deed in other words, he may, if he chooses, redeem the mortgage at the end of *Bhado* 1338. He, however, need not do so, and if he does not repay the money the term of the mortgage is extended. Nowhere does he personally bind himself to pay the money at the end of *Bhado* 1348 or at any other time.

The decision of this case must depend upon the construction which this Court places upon the particular words of this deed; but there are a number of decisions which afford some assistance. A Bench decision of this Court, *Kamal Nayan Prasad Sinha v. Ram Nayan Prasad Sinha* (1) was referred to by Wort, J. in the Court below and distinguished. In my judgment, however, the covenant in that case was very similar to the covenant in the present case, and the learned Judges declined to hold that there was in that particular mortgage a covenant to pay the mortgage money. At p. 75* Das, J. observed:—

"An absolute covenant cannot be coupled with a condition that if the money be not paid within the time fixed the mortgagee would continue to be in possession and the mortgage bond will remain in force."

A case in which the term was very similar to the term in the present case is *Luchmeshwar Singh v. Dookh Mochan Jha* (2). In that case the term was "and having paid the principal money in the month of *Chait* 1297 we shall take back the document and the land. In case we fail to repay the principal money at due date the *sudbharna* bond shall remain in force." It was held that there was no personal covenant to repay the mortgage money in that mortgage.

A recent case of this Court relied upon by Wort, J. is the case of *Raj Kumar Bharthi v. Surajdeo Sahi* (3). It is to be observed, however, that in that case there was no provision as to what was to happen if payment was not made on due date. At p. 749† Manohar Lall, J. referring to *Kamal Nayan's case* (1) and the provision in the bond in that case that if the *zarpushgi* was not paid in due time by the executant in one lump sum then the *patta* would remain in force and intact until the repayment of the *zarpushgi* money, stated that the presence of such a term meant "that the parties con-

(1) 11 P L T 74; 120 Ind. Cas. 308; Ind. Rul. (1930). Pat. 20; A I R 1930 Pat. 152.

(2) 24 C 677.

(3) 17 Pat. 737; 177 Ind. Cas. 533; 19 P L T 737; 11 R P 154; 4 B R 834; A I R 1938 Pat. 585.

* Page of 11 P L T.—[Ed.]

† Page of 17 Pat.—[Ed.]

templated that on the expiry of the due date if the money had not been paid by the mortgagor the result would be exactly as if a new *zarpeshgi* had been executed on the same terms as before". It appears to have been Mr. Justice Manohar Lal's view that if there had been a term dealing with what was to happen if the mortgage money was not paid on due date, he would have held that there was no covenant to repay.

Mr. Lal Narain Sinha who has appeared for the respondent has referred us to the case of *Jag Sahu v. Mst. Ram Sakhi Kuar* (4) but that case cannot assist us because the precise terms of the covenant in question are not set out.

He also relied upon the case of *Pargan Pandey v. Mahatam Mahto* (5) in which a Bench held that there was a promise to repay. It is to be observed, however, that in that case there was a most explicit promise, the words actually used being "I shall repay the principal amount on the full moon day of the end of *Jaith* 1287 *Falsi* and take back the bond."

As I have stated earlier, each case must depend upon the particular terms of the bond. In the present case there is merely a provision that the bond may be redeemed at the end of *Bhado* 1338; but if it is not, the term of the bond is extended. There is no promise by the mortgagor to repay the amount, and that being so, a suit to recover the amount of money advanced cannot succeed.

In my judgment the decision of the learned Single Judge cannot be sustained and must be set aside.

In the result, therefore, this appeal is allowed, the decision of the learned Single Judge is set aside and the plaintiff's suit dismissed with costs here and in the Courts below.

Fazi Ali, J.—I agree.

S. *Appeal allowed.*

(4) 1 Pat. 350; 65 Ind. Cas. 666; (1922) Pat. 58; 3 P. L. T. 332; A. I. R. 1922 Pat. 167.
(5) 6 C. L. J. 143.

ODDH CHIEF COURT

Second Civil Appeal No. 53 of 1938

March 17, 1941

BENNETT, J.

HARUN RASHID—DEFENDANT—

APPELLANT

versus

Mst. KANIZ FATIMA—PLAINTIFF AND

OTHERS—DEFENDANTS—RESPONDENTS

Custom—Proof of — *Wajib-ul-arz*—*Wajib-ul-araiz*

*furnishing clear and definite evidence of certain custom—Discrepancies on other points of custom—If can be rejected—Second appeal—Custom—Wrong inference drawn by lower Courts from *wajib-ul-arz*—Question can be gone into in second appeal.*

Where *wajib-ul-araiz* furnish clear and definite evidence of a particular custom, they cannot be rejected as unreliable because they are discrepant on other points of custom as the differences in the record of these customs must be attributed to the idiosyncracies of the recording official s. 192 Ind. Cas. 420 (4), followed. 73 Ind. Cas. 244 (2) (1), 52 Ind. Cas. 851 (2) and 3 O. W. N. 77 (84) notes, referred to. [p. 397, col. 2.]

Where the Courts below have drawn an inference as to existence of certain custom from the *wajib-ul-araiz* which cannot be upheld the High Court can go into the question in second appeal. [p. 398, col. 2.]

[Case-law referred to.]

S. C. A. against the order of the Civil Judge of Gonda, dated December 10, 1937:

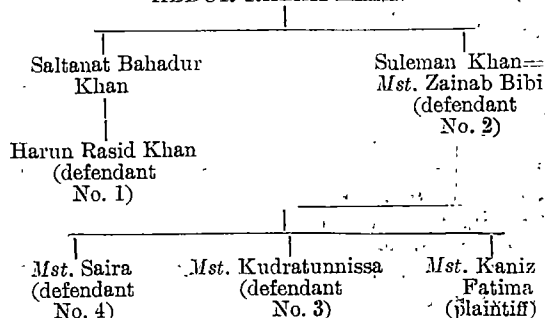
Messrs. H. Husain and H. H. Zaidi, for the Appellant.

Mr. Siraj Husain, holding brief of Mr. Mohd. Ayub, for Respondent No. 1.

Judgment.—This second civil appeal arises out of a suit brought by one Mst. Kaniz Fatima to obtain a share in the property of her father, Suleman Khan according to Muhammadan Law. The suit was brought against her cousin Harun Rashid Khan, and the plaintiff's mother and two sisters were also made defendants. The defence was that daughters were excluded from inheritance by a family custom. This defence was not accepted either by the learned Munsif who tried the suit or by the learned Civil Judge of Gonda who dismissed the first appeal preferred by Harun Rashid Khan. The latter is the sole appellant also in this second appeal.

The relationship between the parties is shown in the following short pedigree:—

ABDUR RAZAK KHAN



The principal questions for consideration were whether the custom set up by Harun Rashid Khan excluding daughters from inheritance was proved and whether the suit was within limitation.

Suleman Khan died in 1921 and in January 1922 mutation in respect of his property was effected by a compromise between his widow, *Mst. Zainab Bibi* and her brother-in-law, *Saltanat Bahadur Khan*. The deed of compromise Ex. A-6 has been proved. It shows that *Mst. Zainab Bibi* was allowed to remain in possession of her husband's share in three out of four villages during her lifetime on the basis of custom, *Saltanat Bahadur* obtaining possession of the fourth village, *Khaprail*. It was agreed that *Saltanat Bahadur Khan* should become absolute owner of the share in the other three villages also on the death of the widow. It was further stated that no heir of *Mst. Zainab Bibi* nor any member of her family should have any interest in the property.

The defence of the defendant *Harun Rashid Khan* was based on the *wajib-ul-araz* of three out of the four villages. They are *Pihar* (Ex. A-1), of *Jafarabad* (Ex. 8) and *Khaprail* (Ex. 3). The *wajib-ul-arz* of the fourth village, *Mohammad Nagargrant alias Bhalwar*, has not been produced, but the *wajib-ul-arz* (Ex. 11) of another village, *Budhia Bakri*, has been produced apparently because it was dictated by the same ancestors of the parties. Presumably, though this is not clearly shown, this other village was at one time in the family.

Both the Courts below held that the evidence of these *wajib-ul-araz* was not sufficient to establish the custom. They both held on the point of limitation that the suit was not barred, because under Muhammadan Law, which in their view applied, *Mst. Kaniz Fatima* was a co-sharer with the defendants, and there was, therefore, no question of the possession of the latter being adverse to her.

The learned Civil Judge conceded that the *wajib-ul-arz* of *Pihar* (Ex. A-1) recorded the exclusion of daughters from inheritance, and he also conceded that the *wajib-ul-araz* of two of the other three villages, *Jafarabad* and *Budhia Bakri* (Exs. 8 and 11), excluded daughters by implication without expressly referring to them. But he agreed with the *Munsif* that these *wajib-ul-araz* could not be relied upon as a correct record of custom. He might also have said that the *wajib-ul-arz* of *Khaprail* (Ex. 3) also indirectly supports the exclusion of daughters, since it only makes provision for inheritance by male issue.

The Civil Judge considered that there were glaring contradictions in the *wajib-ul-araz*. There was first of all discrepancy in the *wajib-ul-arz* of *Pihar* (Ex. A-1) in regard to the share owned by a man named *Bhagga Singh*,

(with whom the case is in no way concerned), and the entries in the *wajib-ul-arz* relating to *Bhagga Singh* are not in accord with a *khevat* (Ex. A-3). These discrepancies have not been explained by Counsel, and there is no material on the record by which they might be explained: but the question whether they could be reconciled was never gone into because it was of no direct relevance in the case. I think that had the question been examined it is quite possible that these discrepancies might have been cleared up.

The Civil Judge then referred to two other matters dealt with in the *wajib-ul-araz*, which he thought indicated that the latter were not to be relied upon. He remarked as follows:—

"I. *Position of issueless widow.* Exhibit A-1 says that if she is one of two widows she would hold half of the estate for life. But Exs. 3 and 11 say that she would hold the entire estate. And Ex. 8 allowed her maintenance only.

II. *Adoption.* Exhibit A-1 allows it; and Exs. 8 and 11 disallow it; and Ex. 3 is silent."

A close examination of the *wajib-ul-araz* discloses that the contradictions in respect of the issueless widow are not very serious. Exhibit A-1, the *wajib-ul-arz* of *Pihar*, shows that on the death of a co-sharer who has different issue by two wives or more his share shall be divided according to the number of wives: if one wife has got issue while the other is issueless, then the latter shall enjoy half the share without power of transfer during her lifetime: if there is only one wife and she is issueless she shall enjoy the entire share for her lifetime and after her death the nearest relations of her husband shall obtain the property. Daughters and daughters' sons are excluded from inheritance.

The *wajib-ul-arz* of *Khaprail* (Ex. 3) shows that on the death of a co-sharer his male issue inherits the property: if the co-sharer left two wives, one of whom has only one son and the other has more than one, the property shall be divided according to *stribhag* system, that is *per stirpes*. If one of the wives has got issue and the other is issueless then the issueless wife shall remain in possession of her husband's share without power of transfer during her lifetime, and on her death that share shall devolve on the wife who has issue.

Exhibit 11, the *wajib-ul-arz* of *Budhia Bakri*, also shows that only males can inherit and that on the death of a co-sharer who leaves more than one wife the property is divided according to their number, the male issue of

each wife inheriting *per stirpes*. If some of the widows have issue and others are issueless the issueless wife shall continue to hold possession of her share during her lifetime and after her death her share shall be divided among the remaining issues of other widows *per stirpes*.

Exhibit 8, the *wajib-ul-arz* of Jafarabad, makes similar provisions, except that it refers to the portion of the issueless wife as a *guzara* (according to her status) and not as a share. But she is to get such *guzara* only where there is another wife who has issue. If a co-sharer dies issueless it is provided that his widow shall continue to hold possession of her husband's share during her lifetime without power of transfer.

As regards adoption Ex. A-1 says that a widow cannot make any adoption, that any co-sharer who has no issue and who wants to adopt a son can adopt from among the minor collaterals up to the age of 12 years.

Exhibit 8, says that the custom of adopting a son is not prevalent among the *birtdars*, and Ex. 11 says that there is no custom of adoption in the family.

Exhibit 3, does not refer to adoption.

It is true, therefore that there is some conflict between the various *wajib-ul-araz* on the point of adoption. But whatever the explanation may be, I doubt whether it justifies the conclusion of the Courts below that these records of custom are unreliable as a whole, and that therefore they cannot be regarded as establishing the custom which was set up by the defendants, although with regard to that custom they are in accord.

I have been referred to various authorities on both sides on the point whether a *wajib-ul-arz* should be rejected as unreliable as a whole because it is found to be unreliable in some respect or respects, and also on the question whether a Court in second appeal would be justified in reversing the concurrent finding of the Courts below on the question of the existence of a custom, in which connection it has to be considered whether that finding is a pure finding of fact or a finding of mixed fact and law.

On the first point I was referred by the learned Counsel for the appellant firstly to certain notes and comments in 3 O. W. N. 77 (at 84) where it is said:

"It is to be seen in the first place that one of the stock arguments based on certain discrepancies in the various *wajib-ul-araz* on matters irrelevant to the enquiry which used to be advanced by the older class of lawyers does not appear to remain open now in view of the recent pronouncement of their Lordships of the Privy Council in *Biswa Nath Singh v.*

Jugal Kishore, (50 I. A. 179=26 O. C. 228) (1) by which their Lordships reversed the decision of the late Court of the Judicial Commissioner reported in 6 O. L. J. 637 [*Balmakund v. Bishwa Nath Singh*]."

The reference should have been to 6 O. L. J. 337, *Balmakund v. Bishwa Nath Singh* (2). The case is that of *Balmukund* (dead and on his death *Jugal Kishore*) v. *Bishwa Nath Singh* (2). The case related to adoption and it was held by the learned Judicial Commissioners that where a *wajib-ul-arz* simply state that a Hindu widow has power to adopt and states nothing about any authority of her husband, it must be construed to mean that it gives the widow the ordinary power of adoption. They said (at p. 345*) :—

"The learned Subordinate Judge has also stated that the divergence in these *wajib-ul-arzes* on many other questions of family custom will not affect their validity as records of the peculiar custom of adoption set up. We are unable to agree with this finding. If the *wajib-ul-arzes* are not consistent, they cannot be relied on as correctly stating the custom of the family."

And they went on to show that the variation in that particular case was very great.

In appeal by *Bishwa Nath Singh* their Lordships of the Privy Council held that where in some *wajib-ul-araz* it was stated that widows could adopt without any authority from their husband and in other *wajib-ul-araz* it was simply stated that widows could adopt, the statements meant the same thing, that is, that they could adopt, although they had no authority from their husbands.

Their Lordships did not expressly refer to the view of the learned Judicial Commissioners that the *wajib-ul-araz* were unreliable because there was much divergence in them on other points of family custom, but it is clear that it did not appeal to them. It may be said that they impliedly rejected it since notwithstanding the variations on other points they accepted what they held to be an unambiguous statement on the point of adoption.

It is also clear that their Lordships of the Privy Council considered a single unambiguous statement in one *wajib-ul-arz* sufficient to prove a custom. In another case of the late Judicial Commissioner's Court *Balگو*

(1) 50 I A 179; 73 Ind. Cas. 241 (2); A I R 1923 P C 90; 26 O C 228; 18 L W 88; 45 M L J 215; 9 O & A L R 563; (1923) M W N 620; 38 O L J 299; 33 M L T 269; 10 O L J 379; 28 C W N 790 (P C).

(2) 6 O L J 337; 52 Ind. Cas. 851; A I R 1919 Oudh 386.

bind v. Badri Prasad (3), the question under consideration was the same as in the present case, whether a daughter and her issue were excluded from inheritance. There was an entry in a single *wajib-ul-arz* :—

"*Dukhter ko waristan hissa nahin milta.*"

The learned Judicial Commissioners said :—

"The question is whether on the strength of this single entry in the *wajib-ul-arz* it can be held that the alleged custom is proved.....Though there is nothing illegal in holding a family custom to be proved by a mere entry in the *wajib-ul-arz* yet we think that before accepting such an entry as sufficient proof of the alleged custom the Court should be satisfied that the entry is free from ambiguity and that it is in reality a record of a custom and not merely of the wishes of the proprietors at the time when the *wajib-ul-arz* was prepared. In the present case we are of opinion that the entry is in itself not altogether free from ambiguity. Coming as it does immediately after the statement that on the death of a proprietor his sons become owners of his property in equal shares, the entry with regard to daughters might be construed as meaning that in the presence of sons daughters do not get any share in the inheritance."

And the learned Judicial Commissioners went on to show from other sentences in the *wajib-ul-arz* that this might in their opinion be the meaning.

There was an appeal to the Privy Council and their Lordships allowing the appeal observed as follows :

"The learned Judicial Commissioners who heard the appeal apparently did not doubt that the entry of the custom in the *wajib-ul-arz* of the village Binduli was evidence of the custom which governed the right to inherit in the village Aunian Durga, but they were of opinion that para. 4 of the *wajib-ul-arz* of Binduli has ambiguous and that owing to that ambiguity the custom was not proved. It is quite true that a custom is not established by an ambiguous statement of it in a *wajib-ul-arz*.

In their Lordships' opinion there is no ambiguity in the statement as to the custom. The only construction to which it is open is in their Lordships' opinion that on the death of an owner of the village no daughter of his is under any circumstances entitled to a share in the property by right of inheritance, whether he had left sons or not."

The question whether *wajib-ul-araz* should be rejected as unreliable on one point of custom because they are discrepant on other points of custom was recently considered by this Court in *Mohammad Jafar v. Lal Bahadur* (192 Ind. Cas. 420) (4). The case was not however, referred to by Counsel in the present appeal. The following passages from the judgment of Yorke, J. are rele-

vant :—

"The two *wajib-ul-araz* on the record...are certainly curious documents.....It is certainly remarkable that in one village the family should record a custom that a widow will get nothing more than maintenance, while in another village the same family records a custom that the widow will have a life estate ever half of her husband's property. Similarly it is remarkable that in one village the co-sharer is given a non-Muhammadan right of adoption, while in the other nothing is said about the existence of such a right.

On the other hand it seems to me to be quite unsound to suggest as an explanation of such differences that the differences have arisen because the *wajib-ul-araz* represent only the wishes of the co-sharers. The co-sharers were in both cases the members of the same family and one should expect that they would dictate the *wajib-ul-arz* of each village in the same terms, even if they were only seeking to make a statement of their wishes in the matter of inheritance. It seems to me therefore that it is not sound reasoning to say that these discrepancies lead to the conclusion that these documents represent rather the wishes of the parties who had them recorded than a declaration of an old established and binding custom. It appears to me rather that the differences are the result of the different mentalities of the officers who were, making the enquiries, or more probably of the clerks of those officers, who were under the direction of the Settlement Officers, recording the result of the enquiries. It seems to me to follow that where as in both these documents we find it recorded in clear terms in the one case that a daughter who has got a real brother will be excluded from inheritance, and in the other case that in case there is no male issue the daughter will be entitled to a share, we have a clear record of custom that daughters are excluded by sons."

In the present case the *wajib-ul-araz* considered together, furnish clear and definite evidence in my opinion of the intention to exclude daughters from inheritance altogether and I see no reason to reject this evidence. I entirely agree, if I may say so with the view of Yorke, J. that the differences in the record of these customs must be attributed to the idiosyncracies of the recording officials.

It was contended for the respondents that this Court would not be justified in interfering in second appeal with a concurrent finding of fact in the two Courts below. In *Narain Singh v. Net Ram* (1940 O. W. N., 1136) (5), it was no doubt said by the Allahabad High Court that the question whether the custom exists or not is one of fact and in support of this statement reference was made to the following Privy Council cases :—

Raja of Ramnad v. Mangalam (I. L. R. 53 Mad. 597 P. C.) (6), *Anant Singh v. Durga*

(5) 1940 O W N 1136; 192 Ind. Cas. 570; A I R 1940 All. 535; 1940 R D 545; (1940) A L J 650; I L R (1940) All. 726; 13 R. A 335.

(6) 53 M 597; 126 Ind. Cas. 84; A I R 1930 P C 234; Ind. Rul. (1930) P C 308; (1930) M W N 885; 59 M L J 289; 52 C L J 265; 32 L W 548 (P O).

(3) 50 I A 196 (201); 74 Ind. Cas. 449; 21 A L J 578; A I R 1923 P C 70; 9 O & A L R 581; 26 O C 217; 45 M L J 289; 45 A 413; 38 C L J 302; (1923) M W N 799; 33 M L T 317; 10 O L J 368; 29 C W N 465 (P C).

(4) 192 Ind. Cas. 420; 1940 O W N 1352; 13 R O 356; 1941 O L R 179; 1941 R D 11.

Singh (I. L. R. 32 All. 363) (7) and *Muhammad Kamil v. Imtiaz Fatima* (I. L. R. 31 All. 457) (8).

The last case is to be found in I. L. R. 31 All. 457 (8). The case at I. L. R. 31 All. 457 (8) is that of *Parbati Kunwar v. Chandarpal Kunwar* (9). It was said in *Muhammad Kamil v. Imtiaz Fatima* (8), that the existence of a custom excluding female heirs was a question of fact. As the Courts in India had concurred on this question their Lordships saw no reason why they should not follow their usual practice of accepting concurrent findings of fact.

In *Munna Lal v. Jai Indar Bahadur Singh* (26 O. C. 386) (10), it was held by the Judicial Commissioner of Oudh that a question of custom is one of mixed fact and law. The point whether the facts found in any given instance prove the existence of the essential attributes of a custom or usage is a question of law, and in second appeal an enquiry must be made whether all the attributes of a local custom have been established or not by evidence which is accepted by the lower Courts.

In the case of *Palaniappa Chetty v. Deivasikamony Pandara* (44 I. A. 147 at 158) (11) it was said by their Lordships of the Judicial Committee :—

"Questions of the existence of an ancient custom are generally questions of mixed law and fact, the Judge first finding what were the things actually done in alleged pursuance of custom and then determining whether these facts so found satisfy the requirements of the law. This latter is a question of law—not fact."

In *Raza Husain Khan v. Subhani* (2 O. W. N., 838) (12), it was held by the Court of the Judicial Commissioner that the question whether in any given instance the evidence led to prove the existence of the attributes essential for a valid custom is adequate or inadequate proof of what the law requires is a question of law which can be discussed in second appeal.

(7) 32 A 363; 6 Ind. Cas. 787; 37 I A 191; 13 O C 163; 20 M L J 604; 8 M L T 79; 12 Bom. L R 504; 7 A L J 704; 12 C L J 36; 14 O W N 770; (1910) M W N 324 (P O).

(8) 31 A 557; 4 Ind. Cas. 457; 10 O L J 297; 11 Bom. L R 1210; 14 C W N 59; 19 M L J 697; 36 I A 210; 13 O C 183 (P O).

(9) 31 A 457; 4 Ind. Cas. 25; 36 I A 125; 6 A L J 767; 11 Bom. L R 890; 10 C L J 216; 13 O W N 1073; 12 O C 304; 19 M L J 605 (P O).

(10) 26 O C 386; 76 Ind. Cas. 774; A I R 1924 Oudh 157.

(11) 44 I A 147 (158); 39 Ind. Cas. 722; A I R 1917 P O 33; 40 M 709; 15 A L J 485; 19 Bom. L R 567; 26 C L J 153; 21 C W N 729; 33 M L J 1; 22 M L T 1; 16 L W 222; (1917) M W N 507; 1 P L W 697 (P O).

(12) 2 O W N 838; 90 Ind. Cas. 525; A I R 1926 Oudh 53 (2).

In *Ram Din v. Balbhaddar Singh* (1939 O. W. N. 372) (13), reference was made to *Palaniappa Chetty v. Deivasikamony Pandara* (11), and it was added :—

"What has to be seen is not merely whether the decision arrived at by a Court is one of fact but whether in arriving at that decision the Court has committed an error in law or not: for instance if the decision of a Court that a certain custom existed was based on the acceptance of evidence which was inadmissible there can be no doubt that that decision could be questioned in second appeal."

Conversely it may be said that if the decision of the lower Court that a certain custom did not exist was based on the rejection of evidence which should not have been rejected, the decision can be questioned in second appeal. That is the position in the present case for in my opinion the Courts below were not justified in rejecting the evidence of the *wajib-ul-araiz* on the question of inheritance merely because there are some apparently conflicting statements in regard to other customs.

The question of the value to be attached to the record of a custom in a *waji-ul-arz* is no longer in dispute. As mentioned above their Lordships of the Privy Council accepted as sufficient proof the unambiguous statement in a *wajib-ul-arz* as to the custom of inheritance in *Balgobind v. Badri Prasad* (50 I. A. 196) (3).

In *Abdul Wahab v. Tahira Bano* (2 O. W. N., 357) (14), it was held by the Court of the Judicial Commissioner of Oudh that where the language of an entry of a custom in a *wajib-ul-arz* is perfectly unambiguous and definite and there is no suggestion that in making the entry the Settlement Officer was guilty of any dereliction in the discharge of his official duties, the entry proves the custom.

I am of opinion, therefore, that the evidence of these *wajib-ul-araiz* clearly indicates that a daughter is excluded from inheritance and that this is a question which can be gone into in second appeal where the Courts below have drawn an inference from the *wajib-ul-araiz* which cannot be upheld.

It is unnecessary on this view to discuss the question of limitation. While on the case brought by the plaintiff, *Mst. Kaniz Fatima*, that she was a co-sharer in the property, the suit was not time-barred, it may be said that on the finding that she was not a co-sharer it was time-barred. It can also be said that if

(13) 1939 O W N 372; 181 Ind. Cas. 70; A I R 1939 Oudh 210; 1939 O L R 235; 1939 R D-250; 14 Luck. 515; 11 R O 280.

(14) 2 O W N 357; 89 Ind. Cas. 51; A I R 1925 Oudh. 377; 12 O L J 167.

the compromise was valid in so far as it conferred on her mother a life-interest in three villages the suit was premature so far as those villages were concerned, though not premature as regards the fourth village.

I accordingly allow this appeal, set aside the decrees awarded by the lower Courts and dismiss the plaintiff's suit. I allow the appellant his costs in all Courts.

s.

Appeal allowed.

PATNA HIGH COURT

Criminal Revision No. 221 of 1941

April 22, 1941

MEREDITH, J.

MOINUDDIN—INFORMANT—PETITIONER
versusSHEGOBIND SAHU *alias* GOBIND

AND ANOTHER—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1908), s. 209—Duty of committing Magistrate—His power to weigh evidence and exercise judicial discretion—Weighing evidence and balancing it, difference—Trial of number of accused—Prosecution evidence identical against all—Evidence not believed against some—Either all must be discharged or all committed—Held that all accused ought to have been committed.

The law clearly empowers the committing Magistrate to weigh the evidence, and to exercise his judicial discretion, and it plainly contemplates that he should do so. Nevertheless, it is one thing to weigh the evidence with a view to determining whether there are or are not sufficient grounds for commitment within the meaning of s. 209, Criminal P. C., and another to balance the evidence, as it is the duty of the Sessions Court to do, in order to decide upon the guilt of the accused after considering the case as a whole. It is not for the Magistrate to usurp the functions of the Sessions Court. It is not for him to decide whether upon the whole this witness or that witness should or should not be believed. In short, though the Magistrate should weigh the evidence and exercise his judicial discretion, the criterion to be applied by him is not quite the same criterion as will be finally applied by the Sessions Court at the trial. If the Magistrate, after weighing the evidence, is satisfied that it is evidence upon which no reasonable Court could convict, it is his duty to discharge; but if it is a case of balancing probabilities, estimating pros and cons; if it is a case where a different Court might possibly, in his opinion, come to a conclusion different from his own, then it is his duty to commit where the evidence is sufficient for conviction, if believed, and that even though, he may himself not think the evidence sufficient for a conviction. In such circumstances he should leave it to the Sessions Court to estimate the result of the evidence as a whole after cross-examination and a full trial. These considerations are all the more applicable in a case where there are a number of accused persons, and the evidence led by the prosecution is practically identical against them all. Undoubtedly it is open to any of the accused to satisfy the Magistrate that that evidence is not at all fit to be believed; but if they do, the result should be the discharge of all the accused, and not commitment of some and discharge of others. 91 Ind. Cas. 34 (1), relied on.

A number of accused were produced before the committing Magistrate. The prosecution evidence was the same in case of all the accused. Two of the accused examined defence witnesses to establish an *alibi*. The Magistrate discharged these two accused and committed the rest. He did not in his order state definitely that he disbelieved the evidence of the prosecution witnesses, but held that in the case of these two accused persons the *alibi* had been established:

Held, that, in the circumstances the real alternatives were either to commit or to discharge all. Even without an express finding on the Magistrate's part that the prosecution witnesses were speaking falsely the course he adopted must, be liable to prejudice the trial of the persons he actually committed. It would have been better in such circumstances to leave the evidence as a whole with all its pros and cons to be weighed by the Court of Session. The case was one where all the accused should have been committed to stand their trial.

Cr. R. from an order of the Sessions Judge of Patna, dated December 31, 1940.

Messrs. Nizamuddin Khan and M. Rahman, for the Petitioner.

Messrs. Nageshwar Prasad and P. N. Sanyal, for the Opposite Party.

Order.—This rule had been issued at the instance of a private prosecutor against a Magistrate's order, discharging two persons, Sheogobind Sahu and Mahadeo Kahar, under s. 209 of the Criminal P. C.

Some occurrence took place in the evening of May 23, 1940, at village Nohsa near Patna, and in the course of it one Hamid met his death. A first Information, charging 19 persons with riot and murder, was lodged at the Police Station without any delay, and the Sub-Inspector of Police proceeded to the spot also without delay, and after completing his investigation he submitted charge sheet against all the 19 persons named in the First Information, including the opposite party, Sheo Gobind Sahu and Mahadeo Kahar.

The case was enquired into by the learned Sub-Divisional Officer of Patna Sadar Sub-Division. A number of persons testified as eye-witnesses, and were not cross-examined before the learned Magistrate. A large number of these eye-witnesses stated that it was Sheogobind who had given the order for assault, and it was Mahadeo who had struck the first blow upon Hamid. Prosecution witnesses Nos. 2, 3, 4, 5, 6, 7, 9 and 10 identified Mahadeo Kahar as having been in the mob, and of them prosecution witnesses Nos. 3, 4; 5, 6 and 7 stated that they had seen Mahadeo giving a spear blow to Hamid. Moreover, the village *defadar* (P. W. No. 8) testified that before his death Hamid had made a dying declaration to him.

that the first *bhala* blow was struck by Mahadeo.

As far Sheogobind Sahu, his presence in the mob was deposed to by all the eye-witnesses in the case, eight in number, and six of them spoke of his carrying a *bhala*.

Though the prosecution witnesses were not cross-examined with regard to this evidence, Sheo Gobind and Mahadeo examined defence witnesses to establish an *alibi*. They examined an Advocate and a Mukhtear to prove that at the time of the occurrence they had been at the Advocate's house, instructing him with regard to the argument to be made in a criminal case in which they were accused, and which had been fixed for the following day.

The learned Magistrate did not state definitely that he disbelieved the evidence of the prosecution witnesses, but he held that in the case of these two accused persons the *alibi* had been established. He, therefore adopted the course, of discharging these two, and committing the remaining 17 accused persons to the Court of Session for trial upon charges under ss. 147, 148, 326, 302 and 302 read with 149 of the I. P. C.

The learned Sessions Judge has already declined to interfere in revision with the order of discharge. Nevertheless in my view, it was an order which, having regard to all the circumstances of the case, should not have been made. I have said that the learned Magistrate nowhere expressly found that the prosecution witnesses could not be believed, and were giving false evidence. That is a point made in support of the rule. It is a point which indicates the inadvisability of the course which the Magistrate adopted. It is obvious that it placed him in a difficulty. He could not very well say that the prosecution witnesses were liars, and then proceed to commit 17 persons for trial upon the evidence of those very witnesses. It appears to me that if he definitely held that the evidence produced for the defence was of such a character as to show that the prosecution witnesses were not witnesses of truth, that would be a ground for discharging all the accused, but not for discharging two of them, and committing the remainder. The evidence for the prosecution was the evidence of the same witnesses against all the persons accused before him. It was not by reason of anything these witnesses had said, but by reason of what the defence witnesses had said that he differentiated between the testimony of the prosecution witnesses as against some of the accused and as against others. That course cannot, in my

view, possibly be justified. In such circumstances the real alternatives were either to commit or to discharge all. Even without an express finding on his part that the prosecution witnesses were speaking falsely the course he adopted must, it seems to me, be liable to prejudice the trial of the persons he actually committed. It would have been better in such circumstances to leave the evidence as a whole with all its pros and cons to be weighed by the Court of Sessions.

It is pointed out for the opposite party that the law clearly does not intend the committing Magistrate to act as an automaton. It clearly empowers him to weigh the evidence, and to exercise his judicial discretion, and it plainly contemplates that he should do so. A number of rulings have been cited in support of this proposition. It was hardly necessary to do so, because its correctness cannot be questioned. Nevertheless, it is one thing to weigh the evidence with a view to determining whether there are or are not sufficient grounds for commitment within the meaning of s. 209, and another to balance the evidence, as it is the duty of the Sessions Court to do, in order to decide upon the guilt of the accused after considering the case as a whole. It is not for the Magistrate to usurp the functions of the Sessions Court. It is not for him to decide whether upon the whole this witness or that witness should or should not be believed. The correct view of the matter has, to my mind, been very clearly and accurately expressed by the late Sulaiman, J. in *Akbar Ali v. Raja Bahadur* (1). In that case his Lordship said: "Section 213 uses the expression 'not sufficient grounds for committing the accused'. This expression is quite different from such expressions as 'the case not proved' or 'the accused are innocent'. I agree with the view of Lindsay, J. that when after hearing the evidence for the defence the Magistrate comes to the conclusion that their evidence rebuts that produced for the prosecution, or renders it so incredible or unreliable that a conviction will not follow, he may pass an order of discharge, as expressed by him in *Muhammad Abdul Hadi v. Baldeo Sahai* (2). I also fully accept the statement of the law laid down by my learned colleague in the case of *Emperor v. Ganpat Lal* (3), that if the Magistrate is

(1) 24 A L J 133; 91 Ind. Cas. 34; A I R 1925 All. 670; L R 6 A 185 Cr.; 27 Cr. L J 2.

(2) 40 A 615; 46 Ind. Cas. 290; 16 A L J 486; 19 Cr. L J 706; A I R 1918 All. 126.

(3) 46 A 537; 81 Ind. Cas. 315; A I R 1924 All. 664 (2); 22 A L J 411; L R 5 A 174 Cr.; 10 O. & A L R 551; 25 Cr. L J 795.

satisfied that the charge is without foundation and that there are no sufficient grounds for committing the accused person for trial, he is entitled, and, indeed, it is his duty, to discharge him. This, however, does not mean that the Magistrate is to arrogate to himself the functions of the Sessions Court and try the case as if he were that Court himself. The policy of the legislature seems to be that serious offences should be tried by the Sessions Judges, who are ordinarily more experienced. They are the proper Court for pronouncing an opinion as to the guilt or innocence of the accused in cases triable exclusively by the Sessions Court. Where, however, the evidence is wholly untrustworthy and the Magistrate is satisfied that it cannot lead to a conviction, he would be perfectly justified in discharging the accused, even though he has already framed his charge. The Magistrate has to see whether there are sufficient grounds of commitment or not. If he is satisfied that the evidence is altogether untrustworthy and not fit to be acted upon, he may discharge the accused. He should not, however, try to weigh the probabilities of the case and then after balancing the evidence on both sides decide whether the guilt of the accused has or has not been conclusively proved. In short, though the Magistrate should weigh the evidence and exercise his judicial discretion, the criterion to be applied by him is not quite the same criterion as will be finally applied by the Sessions Court at the trial. If the Magistrate, after weighing the evidence, is satisfied that it is evidence upon which no reasonable Court could convict, it is his duty to discharge: but if it is a case of balancing probabilities, estimating pros and cons; if it is a case where a different Court might possibly, in his opinion, come to a conclusion different from his own, then it is his duty to commit where the evidence is sufficient for conviction, if believed, and that even though, as was observed in *Akbar Ali v. Raja Bahadur* (1), he may himself not think the evidence sufficient for a conviction. In such circumstances he should leave it to the Sessions Court to estimate the result of the evidence as a whole after cross-examination and a full trial. These considerations are all the more applicable in a case like the present where there are a number of accused persons, and the evidence led by the prosecution is practically identical against them all. Undoubtedly it is open to any of the accused to satisfy the Magistrate that that evidence is not at all fit to be believed; but if they do, the result

should be the discharge of all the accused, and not commitment of some and discharge of others. In my view, the present is a case where all the accused persons should have been committed to stand their trial.

The rule is, therefore, made absolute, the application is allowed, the order of discharge is set aside, and Sheogobind Sahu and Mahadeo Kahar must be committed to the Sessions Court to stand trial together with the other accused in the case.

S.

Rule made absolute.

MADRAS HIGH COURT

Civil Revision Petition No. 356 of 1937

April 23, 1940

HORWILL, J.

NITHOOR THIMMANNA BHAT—

PETITIONER

versus

AITHAPPA ADYANTHAYA—RESPONDENT

Limitation Act (IX of 1908), s. 4—Applicability—Promissory note—On last day for suit on pro-note Courts closed—On re-opening day payee assigning pro-note and assignee filing suit on very day—Suit held maintainable—Limitation—Expiry of—Effect.

The wording of s. 3, Lim. Act indicates that s. 4 does not lengthen the period of limitation prescribed. So that suits to which s. 4 can be applied are, therefore, clearly not suits instituted during the period of limitation prescribed. Section 4 deals with one of the exceptions to the general rule that a suit filed after the period of limitation prescribed shall be dismissed.

On last day of limitation for filing a suit on a promissory note the Courts were closed for the summer recess. On the re-opening day the payee under the promissory note assigned his rights in the promissory note to other person and on the very same day the assignee filed the suit:

Held, that on the date of the assignment there was an interest that could be assigned. Section 4 applied to the case and the suit was maintainable. 136 Ind. Cas. 822 (1), relied on, 19 Ind. Cas. 820 (2), explained and held no longer good law, 169 Ind. Cas. 653 (4), referred to.

All that happens after the lapse of three years after the creation of a debt on a pro-note is that the debt cannot be enforced in a Court of law. The debt does not cease to exist; nor does the relationship of creditor and debtor.

C. R. P. to revise the decree of the District Munsif, Puthur, in S. C. S. No. 208 of 1936.

Mr. P. Sridhara Rao, for the Petitioner.

Mr. T. Krishna Rao, for the Respondent.

Order.—The promissory note on which the petitioner sued was dated May 10, 1930. There was an endorsement of payment on May 8, 1933, which gave a fresh period of limitation; and so the suit had to be filed on or before May 8, 1936. On that date, however, the Courts were closed for the summer

recess. On the reopening day, June 1, 1936, the payee under the promissory note assigned his rights in the promissory note to the present petitioner, and on the very same day the petitioner filed the suit. The District Munsif of Puthur, in whose Court the suit was filed, held that the suit was barred by limitation. He relied on the observation of the Chief Justice in the Full Bench decision of this Court in *Fatma Bi v. Nagoorkhan* (1), to the effect that s. 4 did not extend the period of limitation. He was of opinion that as at the time when the assignment was made the suit was barred, no rights passed to the assignee under the assignment. He therefore, although finding all the other points raised in favour of the petitioner, dismissed the suit.

All that happens after the lapse of three years after the creation of a debt is that the debts cannot be enforced in a Court of law. The debt does not cease to exist; nor does the relationship of creditor and debtor. As Beasley, C. J. said in *Fatma Bi v. Nagoorkhan* (1), there was on the date of the reopening of the Court an enforceable debt. The question that arose in that appeal was whether a person who could have filed the suit on the reopening of the Court but was unable to do so because the debtor was adjudged an insolvent, could prove in insolvency; and s. 46, Presi. Towns Insol. Act, came up for consideration. That section says that all debts to which the debtor is subject when he is adjudged an insolvent shall be deemed to be debts provable in insolvency; and the Full Bench held that on the date of the insolvency, which was the day when the Court reopened, *i. e.*, more than three years after the debt had been incurred, the debtor was still subject to the debt. If on the date of the assignment there was a debt, then there was nothing to prevent the creditor assigning it to some other person. A debtor might well pay his debt even though it were barred by limitation and one would expect an honourable debtor to do so. The lower Court is therefore clearly wrong in saying that on the date of the assignment there was no interest that could be assigned.

A decision of Beaman, J. in *Visram Vasudeo v. Tadaji Balaji* (2) has been referred to by the learned Advocate for the petitioner in support of his contention that the petitioner was entitled to sue, but that learned Judge, differing from a Bench decision of his own Court in *Bai Hemkore v.* (1) 55 M 630; 136 Ind. Cas. 822; A I R 1932 Mad. 287; 62 M L J 256; 35 L W 260; (1932) M W N 216; Ind. Rul. (1932) Mad. 321 (F B).
(2) 15 Bom. L R 348; 19 Ind. Cas. 820.

Musamalli (3), adopted a reasoning which has since been held to be erroneous both in his own Court and in other Courts. As to the actual point that is raised here, Beaman, J. had very little to say. He argued on an analogy from a case where an acknowledgment took place during the Court recess after the period of limitation had expired. A decision on which some reliance has been placed by the other side is one of King, J. in *Chidambaram Chettiar v. Venkatasubba Naick* (4). That was a case where an acknowledgment took place beyond the period of limitation but during the recess. Section 19, which saves limitation in the case of certain acknowledgments made within the period of limitation prescribed, says that :

"Where before the expiration of the period prescribed for a suit . . . in respect of any property of right, an acknowledgment of liability in respect of such property or right has been made in writing . . . a fresh period of limitation shall be computed from the time when the acknowledgment was so signed."

The wording of s. 3, Lim. Act indicates that s. 4 does not lengthen the period of limitation prescribed; for it says :

"Subject to the provisions contained in ss. 4 to 25 (inclusive), every suit instituted . . . after the period of limitation prescribed therefor . . . shall be dismissed."

So that suits to which s. 4 can be applied are therefore clearly not suits instituted during the period of limitation prescribed. Section 4 deals with one of the exceptions to the general rule that a suit filed after the period of limitation prescribed shall be dismissed. Whether, on the date of the reopening of the Court the petitioner could maintain the suit against the respondent would depend on the wording of s. 4, which permits of a suit being filed on the reopening of the Court beyond the period of limitation. Section 4 runs :

"Where the period of limitation prescribed for any suit . . . expires on a day when the Court is closed, the suit . . . may be instituted . . . on the day that the Court reopens."

The period of limitation prescribed for the filing of the suit with which we are now concerned expired while the Court was closed; and s. 4 says that when that is the case, the suit may be instituted on the date when the Court reopens. Section 4 therefore directly applies to the present case and the suit was therefore maintainable, and should have been decreed in the petitioner's favour. The petition is accordingly allowed and the suit decreed with costs. The respondent has filed an application under s. 8, Mad. Agri. Relief

(3) 26 B 782; 4 Bom. L R 608.

(4) 45 L W 72; 169 Ind. Cas. 653; A I R 1937 Mad. 367; (1937) 1 M L J 262; (1937) M W N 108; 10 R M 83.

Act, for scaling down the debt. That application will be transferred to the lower Court for disposal; and the decree passed by this Court will be subject to the result of that application.

N.-S.

Petition allowed.

PATNA HIGH COURT

Criminal Reference No. 17 of 1941

April 16, 1941

CHATTERJI, J.

JHARIA MINES BOARD—

versus

KARTAR AD-DHARMI AND ANOTHER

Bihar and Orissa Mining Settlements Act (IV of 1920), ss. 26 (3) (b); 25 (1)—By-laws framed under, by Jharia Mines Board of Health, s. 1 (h), Part III, s. 2—Definition of 'nuisance' in s. 1 (h) of by-laws, not exhaustive—Court must find out whether there has been nuisance affecting public health—S. 2, Part III, validity—Word 'nuisance' means nuisance affecting public health—Act itself, whether punishes nuisance as such.

The definition of nuisance in s. 1 (h) of the by-laws framed under s. 25 (1) of the Bihar and Orissa Mining Settlements Act by the Jharia Mines Board of Health is not exhaustive. The definition is no doubt unreasonable in so far as it makes the Medical Officer of Health the sole judge of 'nuisance' and leaves no option to the Court but blindly to act upon his opinion. But as the definition is not exhaustive the Court must in each case find out whether there has been any nuisance affecting the public health.

Section 2 of Part III of the by-laws framed by the Jharia Mines Board of Health under s. 25 (1) of the Bihar and Orissa Mining Settlements Act, is valid. It is quite consistent with the provisions of s. 25 (1) (x) of the Mining Settlements Act. Though in that section of the by-laws the word 'nuisance' only has been used, it must be understood to mean "nuisance affecting the public health."

It cannot be said that the Mining Settlements Act, itself does not punish nuisance as such. Section 26 (3) (b) of the Act clearly makes punishable any contravention of any by-law. Any by-law framed under the Act has the same force and validity as the provisions of the Act itself.

Cr. Ref. under s. 438, Criminal P. C., made by the Additional District Magistrate of Dhanbad in his letter No. 549-J., dated February 22, 1941.

Mr. Nirsu Narain Sinha, In support of the Reference.

Mr. H. R. Kazimi, Against the Reference.

Judgment.—This is a reference under s. 438 of the Criminal P. C. by the Additional District Magistrate of Dhanbad recommending that the order of the trying Magistrate acquitting the accused (1) Kartar Ad-dharmi and (2) Jagar Ad-dharmi, be set aside and the case remanded for retrial.

The accused Kartar Ad-dharmi as owner,

and accused Jagar Ad-dharmi as manager of a tannery and hide depot at Koiribandh within the Jharia Mining Settlement area were prosecuted for having contravened s. 2 of Part III of the By-laws of the Jharia Mines Board of Health framed under s. 25 (1) of the Bihar and Orissa Mining Settlements Act (IV of 1920). The trying Magistrate acquitted the accused under s. 245 of the Criminal P. C. An application then being made to the Additional District Magistrate, he has made this reference.

Section 25 (1) (x) of the Bihar and Orissa Mining Settlements Act authorises the Board to make by-laws consistent with the Act "providing for the prevention or abatement of nuisances affecting the public health committed by any persons within the limits of the Mining Settlement", "Board", as defined in s. 3 (b) of the Act, means "a Mines Board of Health established under this Act".

In exercise of the powers conferred by s. 25 (1) of the Bihar and Orissa Mining Settlements Act the Jharia Mines Board of Health framed certain by-laws which were approved by the Govt. of Bihar and Orissa under s. 25 (2) of the same Act. Section 2 of Part III of these by-laws provides "No person shall commit a nuisance, or allow a nuisance to continue, on his premises". Contravention of any of these by-laws is made punishable under s. 26 (3) (b) of the Bihar and Orissa Mining Settlements Act.

The word "nuisance" is not defined in the Bihar and Orissa Mining Settlements Act, but in s. 1 (h) of the by-laws framed by the Jharia Mines Board of Health it is defined as follows:— 'Nuisance' includes any act, omission, place or thing which in the opinion of the Medical Officer of Health is injurious to the public health."

The grounds on which the trying Magistrate acquitted the accused are as follows:

"The definition in the by-law clearly goes beyond the wording in s. 25 (1) (x) of the Act because the definition in the by-law makes the Medical Officer of Health the sole judge of 'nuisance' under by-law 2, Part III which is punishable under s. 26 (3) Mining Settlements Act. The Act itself does not appear to have contemplated such narrowing of the connotation of the words 'nuisance affecting public health'. If the definition in the by-law is accepted, there can be no appeal on the point if the facts alleged to have been committed amounted to a nuisance. The opinion of the Medical Officer of health may be relevant and important as being that of an expert. But it should not be definitive. As the accused have been prosecuted under s. 2, Part III of the by-laws which does not appear to me to be valid and as the Act itself does not punish nuisance as such, the accused are given the benefit of doubt and acquitted under s. 245 of the Criminal P. C."

It will be noticed that the definition of

nuisance in s. 1 (h) of the by-laws does not say that 'nuisance' means any act etc. but says nuisance includes any act, etc. The definition is thus not exhaustive. The definition is no doubt unreasonable in so far as it makes the Medical Officer of Health the sole judge of 'nuisance' and leaves no option to the Court but blindly to act upon his opinion. But as the definition is not exhaustive the Court must in each case find out whether there has been any nuisance affecting the public health.

So far as s. 2 of Part III of the by-laws is concerned, the learned trying Magistrate had no justification for holding that it is not valid. This section is quite consistent with the provisions of s. 25 (1) (x) of the Mining Settlements Act. Though in that section of by-laws the word 'nuisance' only has been used, it must be understood to mean "nuisance affecting the public health."

Another reason given by the trying Magistrate is that the Mining Settlements Act itself "does not punish nuisance as such." This is obviously fallacious. Section 26 (3) (b) of the Act clearly makes punishable any contravention of any by-law. Any by-law framed under the Act has the same force and validity as the provisions of the Act itself.

The reasons given by the learned trying Magistrate for acquitting the accused appear to be wrong. The order of acquittal must, therefore, be set aside. He must decide for himself whether the acts complained of amount to nuisance affecting the public health.

Accordingly, I accept the reference, set aside the order of acquittal and remand the case to the trying Magistrate for disposal according to law in the light of the above observations.

s.

Order accordingly.

ALLAHABAD HIGH COURT

First Appeal of 1940

January 15, 1941

BAJPAL AND DAR, JJ.

CHHEDA LAL JAIN—APPELLANT

versus

OFFICER, COMMANDING STATION

MEERUT CANTONMENT—RESPONDENT

Limitation Act (IX of 1908), s. 29 as amended in 1922 and s. 5—Expression "the remaining provisions apply," meaning of—S. 5, applicability of, to appeal under s. 29, Cantonments (House Accommodation) Act (VI of 1923).

The expression "the remaining provisions of this Act shall not apply" in the amended s. 29, Lim. Act simply means that they are not to apply *proprio vigore*, that is, merely by virtue of the Lim. Act itself, and that if they are to apply, the grounds for applying them must be found in the special or local Act itself. The Cantonments (House Accommodation) Act is a special Act and s. 5, Lim. Act does not apply to an appeal under s. 29, Cantonments (House Accommodation) Act. 126 Ind. Cas. 299 (1) and 143 Ind. Cas. 802 (2), relied on.

Mr. Shabd Saran, for the Appellant.

Bajpai, J.—The learned District Judge of Meerut had before him a reference under s. 19 read with s. 15, Cantonments (House Accommodation) Act (VI of 1923) relating to the rent of bungalow No. 17, R. A. Lines, Meerut. He dismissed the reference on May 30, 1940. Chheda Lal Jain, the person aggrieved by the order of the learned District Judge, has filed the present first appeal from order against the decision of the Court below. It is conceded that the appeal has been filed more than thirty days after the decision of the learned District Judge and is *prima facie* barred by time by reason of the provisions of s. 29, sub-s. (2) of the Act which say that

"no appeal under this section shall be admitted unless it is made within thirty days from the date of the decision against which it is preferred."

We have before us the appeal itself and an application under s. 5, Lim. Act. On behalf of the respondent it is contended that s. 5, Lim. Act, is not applicable to the present proceedings. There can be no doubt that the Cantonments (House Accommodation) Act is a special Act. The Preamble says:

"Whereas it is expedient further to amend and to consolidate the law relating to the provision of house accommodation for military officers in cantonments, it is hereby enacted as follows."

It is also not disputed before us that the Act is not a special Act. That being so, the question naturally arises whether s. 5, Lim. Act, is applicable to the special Act. Now s. 29, Lim. Act, as it stood before its amendment in 1922 was as follows:

"(2) Nothing in this Act shall—(a) affect the Contract Act 1872 s. 25; (b) affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India.

(2) Nothing in this Act shall apply to suits under the Indian Divorce Act.

(3) Sections 26 and 27 and the definition of 'easement' in s. 2 shall not apply to cases arising in territories to which the Indian Easements Act, 1882, may for the time being extend."

In view of the amendment effected in s. 29, Lim. Act, 1908, by the Act of 1922, the situation stands slightly altered, because as the section originally stood it laid down that the provisions of the Act did not affect or alter any rule of limitation prescribed in any

special or local Act. Sub-s. (2) to s. 29 now says that the periods of limitation prescribed by special or local laws shall be regarded as prescribed by that Act for the purpose of s. 3 and that section and other sections, namely s. 4, ss. 9 to 18 and s. 22 shall apply unless they are expressly excluded by the special or local Act and that "the remaining provisions of this Act shall not apply." The last phrase can only mean that the remaining provisions of the Act shall not apply unless they are expressly made applicable by the special or local Act. Under the old s. 29 none of the provisions of the Lim. Act was applicable unless they were expressly included by the special or local Act. The amendment to s. 29, Lim. Act in 1922 has extended and not restricted the scope.

Under the new s. 29, some of the provisions of Lim. Act are made applicable without being expressly included unless they are expressly excluded by the special or local Act. The rest of the provisions remain as before applicable only when they are expressly included. The expression "the remaining provisions of this Act shall not apply" in the amended s. 29 simply means that they are not to apply *proprio vigore*, that is, merely by virtue of the Lim. Act itself, and that if they are to apply, the grounds for applying them must be found in the special or local Act itself. This was the view taken by a Bench of the Patna High Court in *Hasan Imam v. Brahmddeo Singh* (1) and this is the view which commends itself to us. We are further fortified by the decision of the Calcutta High Court in *Neelratan Ganguli v. Emperor* (2). Their Lordships were dealing with the Emergency Powers Ordinance, II of 1932, which was a special law within the meaning of s. 29, Lim. Act. It was held that s. 5, Lim. Act had no application to an appeal under s. 39, of the Ordinance. Rankin, C. J. at p. 574* observed :

"Accordingly, while the provision of the Ordinance is that the appeal shall be brought within a certain time, *prima facie* that attracts the operation of s. 3, Lim. Act, which contains a provision against the Court entertaining 'the appeal'. It is necessary, however, in this case, to pursue the provisions of s. 29 of the Act somewhat further. That section goes on to provide that, for the purpose of determining the period of limitation, certain provisions of the Lim. Act shall apply only in so far as and to the extent to which they are not expressly excluded by the special law, and further that 'the remaining provisions of this Act

shall not apply.' Now, s. 5, Lim. Act, is not one of the provisions which are to apply in the absence of something to the contrary. It is one of the sections to which the concluding clause is applicable, namely 'the remaining provisions of this Act shall not apply', ... this is not a provision prohibiting any special law making the sections applicable or any special law according to the intention of which such a section as s. 5 can be deemed to be applicable. It means that, so far as the Lim. Act is concerned, the section is not to be deemed to be one which is to be applied to the special law."

Whatever, therefore, may be the merits of the present application under s. 5, which is supported by an affidavit not contradicted by the opposite party, it is clear that we have no jurisdiction to entertain the application. We accordingly dismiss the application under s. 5, Lim. Act.

s.

Application dismissed.

OUDH CHIEF COURT

First Civil Appeal No. 121 of 1937

April 1, 1941

YORKE AND AGARWAL, JJ.

KIRAT SINGH—APPELLANT

versus

RAM SARAN AND OTHERS—RESPONDENTS

U. P. Encumbered Estates Act (XXV of 1934), s. 14—Proceedings ripening into decree under s. 14 (7), nature of—Claimant, mortgage—Amount payable to him at time of redemption—That amount is to be determined and included in decree passed by Special Judge under s. 14 (7)—Transfer of Property Act (IV of 1882), ss. 77, 76—Usufructuary mortgage—Profits to be appropriated in lieu of interest—Mortgagor covenanting to make good loss arising from reduction of profits—Profits reduced by remission of rent—Liability of mortgagor to make good deficiency.

Proceedings under the Encum. Estates Act, ripening into a decree under s. 14 (7) are at the same time proceedings for the determination of the amount due from the landlord to the claimant on the date of the application under s. 4, and also proceedings for redemption of the mortgaged property. In effect by merely filing his application under the Encum. Estates Act the debtor applicant has instituted proceedings for redemption of all his mortgaged properties. Where the claimant creditor is mortgagee, if any amount is payable to him under the provision of the mortgage deed at the time of redemption, then that amount is to be determined and included in the simple money decree passed by the Special Judge under s. 14 (7) of the Encum. Estates Act. [p. 407, col. 1.]

A usufructuary mortgage provided for the appropriation of the profits in lieu of interest and the mortgagor stipulated to make good any loss due to reduction of the profits mentioned in the deed. The profits were reduced by remissions of rent :

Held, that the mortgagor was clearly liable to make good the deficiency. The mortgage deed was a contract within the meaning of s. 77 of the T. P. Act, and the covenant entered into by the mortgagor could be enforced although the mortgagee was not liable to accounting. 82 Ind. Cas. 406 (1), 144 Ind. Cas. 1025 (2) and 148 Ind. Cas. 903 (3), referred to. [p. 407, col. 2; p. 408, col. 1.]

(1) 9 Pat 747; 126 Ind. Cas. 299; A. I. R. 1930 Pat. 301; Ind. Rul. (1930) Pat. 603.

(2) 60 C 571; 143 Ind. Cas. 802; A. I. R. 1933 Cal. 124; 34 Cr. L. J. 633; 37 C. W. N. 195; (1933) Cr. Cas. 140; Ind. Rul. (1933) Cal. 478.

*Page of 60 Cal.—[Ed.]

F. C. A. against the order of the Special Judge, First Grade, Bara Banki, dated September 25, 1937.

Mr. Akhtar Husain, for the Appellant.

Mr. Ali Zaheer, for Respondents Nos. 1 to 4.

Judgment.—These are two first appeals from the judgment of the Special Judge, first Grade, Bara Banki, in two claim cases under s. 14 of the Encum. Estates Act, founded on the same document, Ex. 1, a possessory mortgage for Rs. 37,800 executed by Kirat Singh applicant debtor on January 27, 1930. This document was executed by the debtor in favour of a number of persons in shares, Lala Dharam Das half, Ram Saran and Gur Saran a quarter and Avadh Behari a quarter. Dharam Das died in 1932 and his representatives were *Mst. Shyama Kuer* and *Rameshwar*. Kirat Singh filed an application under the Encum. Estates Act in 1935 and separate claim cases were instituted one by *Rameshwar Prasad* relating to 1-4th share in this mortgage and the other by the remaining sharers of 3-4ths, *Ram Saran*, *Gur Saran*, *Avadh Behari* and *Mst. Shyama Kuer*. Exactly the same questions arose in both cases on account of the terms of the mortgage deed, Ex. 1. The creditors claimed that under the deed a certain sum of money was calculated as the amount of profits which would accrue annually to the creditors, and there was a provision that if the amount of profits fell short (obviously that is for a reason not due to any default on the part of the possessory mortgagees), this would have to be made good by the debtor mortgagor. On the other hand the mortgagor applicant contended that no rate of interest was fixed and therefore there could be no accounting and the provisions of s. 77 of the T. P. Act were applicable.

The learned Special Judge framed two issues only.

"1. Are the plaintiffs (claimant) entitled to claim in respect of arrears of rent and on account of remissions? If so, what amount?"

"2. To what amount are the plaintiff's (claimants) entitled against the defendant applicant?"

On the first issue the learned Special Judge after a careful consideration of the terms of the mortgage deed, Ex. 1, came to the conclusion that although the deed was not ordinarily "accountive" *vide* para. 2 which provides that after the payment of Govt. revenue Rs. 1,010 odd annually the mortgagees may continue to take the entire income in lieu of interest on the mortgage money, yet the debtor was liable to make good, by a species of accounting, any defi-

ciency in the profits. On the other hand he rejected the claim for arrears of rent of three years holding that, as the property was not going to be redeemed, that is, it was not going immediately out of the hands of the mortgagees, they had their own remedy by taking proceedings to realise those arrears of rent.

The first and main contention put forward on behalf of the appellant debtor is that the creditors were under the terms of the deed only entitled to realise any such deficiencies in the amount of profits at the time of redemption, and it is contended that the application under the Encum. Estates Act by the debtor and the present proceedings in the claim cases of the creditors do not come within the scope of redemption proceedings. On the other hand it is certainly to be borne in mind that in certain respects the provisions of the Encum. Estates Act override the ordinary provisions of the law. No doubt an application under the Encum. Estates Act is not itself an application for the redemption of a mortgage but the result of an application under the Encum. Estates Act is that the creditors have to file their claims under ss. 9 and 10 of the Act and the Special Judge has to examine those claims and determine the amount, if any, due from the landlord debtor to the claimant creditor on the date of the application under s. 4. He has further under sub-cl. (7) of s. 14 to pass a simple money decree for such amount together with any costs which he may allow etc. etc.

The effect of these proceedings is laid down in s. 18 of the Act which provides that

"Subject to the right of appeal or revision, the effect of a decree of the Special Judge under sub-s. (7) of s. 14 shall be to extinguish the previously existing rights, if any, of the claimant, together with all rights, if any, of mortgage or lien by which the same are secured and, where any decree is given by the Special Judge, to substitute for those rights a right to recover the amount of the decree in the manner and to the extent hereinafter prescribed."

A further consequence of such a decree and the sending of such a decree to the Collector is set out in s. 35 which provides that

"if at any time after the decrees granted by the Special Judge have been sent to the Collector under the provisions of s. 19 any person entitled to possession of any property under the provisions of this Act applies to the Collector to be put in possession of such property, the Collector shall deliver possession of such property to him."

As has been held in more than one case, among the persons entitled to possession after the transmission of the decree by the Special Judge to the Collector is included

the applicant who becomes entitled to possession as against the mortgagee because the mortgagee rights come to an end the moment a decree under s. 14 (7) is passed. By analogy therefore, proceedings under the Encum. Estates Act ripening into a decree under s. 14 (7) are at the same time proceedings for the determination of the amount due from the landlord to the claimant on the date of the application under s. 4, and also proceedings for redemption of the mortgaged property. In effect by merely filing his application under the Encum. Estates Act the debtor applicant has instituted proceedings for redemption of all his mortgaged properties.

In the light of these considerations the arguments based on the wording of para. 4 of Ex. 1 which makes such deficiencies as have been referred to earlier payable "at the time of redemption" have no force. That paragraph provides as follows:—

"If the present gross rental, which comes to Rs. 3,412-4-0 and which stands entered in the *patwari's* papers of 1337 *Fasli*, be reduced (*us se kam pare*, that is be reduced below that amount or come to the less than that amount) or be proved to be wrong, then I, the executant, shall be liable for the payment thereof and shall pay the same with interest at the rate of 1 per cent. per mensem at the time of redemption."

It appears to us to be quite clear that if any amount is payable to the creditors under this provision of the mortgage deed then that amount is to be determined and included in the simple money decree passed by the Special Judge under s. 14 (7) of the Encum. Estates Act.

Learned Counsel for the appellant has argued that this paragraph cannot be interpreted so as to cover remissions of rent which under the orders of the Govt. amounted to eight annas in the rupee in 1338 *Fasli* and seven annas in the rupee in subsequent years. He does not contend that it will not cover the erroneous statement of the recorded amount of profits contained in the paragraph. The actual gross rental entered in the *patwari's* papers for 1337 *Fasli* was Rs. 3,401-9 and it is not disputed that the difference between the higher and the lower of these two sums must be made good by the mortgagor. On the other hand it is contended that the provision in this paragraph is not wide enough to cover the case of remissions. We are unable to accept this contention. We are quite clear that by this paragraph the intention was to secure that the mortgagees would get a fixed annual profit of Rs. 3,412-4 less the amount of Rs. 1,010-15-8 which had to be paid as Govt. revenue. By the remissions the

amount of the annual profits was reduced and there was a large deficit in the payment of interest. Under the terms of this paragraph the appellant was clearly liable to make good the deficiency.

Learned Counsel has attempted to base an argument on s. 77 of the T. P. Act. Section 76 of the T. P. Act provides in regard to the liabilities of a mortgagee in possession and lays down under cl. (g) that "the mortgagee must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage give the mortgagor, at his request and cost, true copies of such accounts and the vouchers by which they are supported."

Section 77 on the other hand provides that:

"nothing in s. 76, cls. (b), (d), (g) and (h) applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal."

The argument on behalf of the appellant seeks to read these two sections as leading to the conclusion that if under the terms of the mortgage there is to be no accounting on the part of the mortgagee, there can be no claim on the part of the mortgagee for such amounts as are referred to in para. 4 of the present deed, that is he puts forward the argument that if by virtue of the terms of a mortgage deed the deed is not "accountive", to adopt the phrase used by the learned Special Judge, then there can be no accounting on either side. We do not think that the terms of ss. 76 and 77 of the T. P. Act lead to any such conclusion.

Reference was made to several cases, but most of these are really in favour of the respondents and not of the appellant. In the case of *Sitla Sahai v. Shambhu Singh* (28 O. C., 100) (1), there were provisions in the preamble of the deed to the effect that neither the mortgagee should have any claim to interest against the mortgagor nor the mortgagor any for profits against the mortgagee and his heirs. On the other hand there were certain other terms under which (1) the mortgagor was to pay Rs. 109 annually to the mortgagee in addition to all the profits, (2) if the mortgagee had to advance *takavi* to the tenants, he could recover the amount at the time of redemption with interest at a specified rate, (3) if the profits of the mortgagee were decreased owing to increase of revenue, cesses and rates (the same provision is present in the deed Ex. 1 in the present case), then the mortgagee might

(1) 28 O C 100; 82 Ind. Cas. 406; A I R 1925 Oudh 114; 11 O L J 543; 10 O & A L R 655.

demand the deficiency from the mortgagor every year, and if it was not made good, it would be payable at the time of redemption with interest at a specified rate. It was held that s. 77 and not s. 76 of the T. P. Act was applicable to the case and that the mortgagee was not liable to render accounts. The conditions following the preamble, (that is the terms quoted above) it was held merely set forth the various additional liabilities of the mortgagor, that is to say it is not inconsistent with the provisions of s. 77 that the mortgagor should have imposed upon himself additional liabilities such as those which are stated in paras. 4 and 6 of Ex. 1.

The decision of their Lordships of the Privy Council in *Bachchu Lal Pandit, alias Ram Shankar v. Syed Mohammad Mab Chaudhari* (10, O. W. N. 299) (2) embodies the same principle although there were certain undertakings by the mortgagors in the nature of personal covenants both to pay the amount of the decrease of the profits and the like. Their Lordships agreed with the view of the two Courts in India that the mortgage deed was a contract within the meaning of s. 77 of the T. P. Act, 1882. They enforced the covenant entered into by the mortgagors but did not hold the mortgagees liable to accounting.

Similarly there is really nothing in the case of *Mahmood Ali Khan v. Ali Mirza Khan* (11 O. W. N., 524) (3) which leads to any different conclusion. That was a case in which in a mortgage deed the rate of interest was mentioned but nonetheless it was held that it did not follow that the parties intended that there was to be accounting. It was remarked that a question of this description is to be decided with reference to the terms of each deed.

It seems to us clear that in the present case the creditors were not liable for any accounting to the mortgagors but the mortgagors contracted to make good to the mortgagees certain possible deficiencies. There is no force therefore in the contention that the debtor could not be made liable for the possible deficiencies and losses to the mortgagee indicated in paras. 4 and 6 of the deed because the mortgagee was not liable under the terms of the deed to account to the mortgagor.

The only other point to which a reference has been made in these appeals is the remark at the end of the judgment immediately pre-

(2) 10 O W N 299; 144 Ind. Cas. 1025; A I R 1933 P. C 136; 37 L W 537; (1933) M W N 278; 37 C W N 457; (1933) A L J 350; 6 R P C 7 (P C).
(3) 11 O W N 524; 148 Ind. Cas. 903; A I R 1934 Oudh 220; 6 R O 460.

ceding the operative order where the Judge remarks

"In the statement hereto annexed collection charges are added to the extent of 10 per cent of the collections. This the mortgagee is entitled to get in view of the rulings reported in *Kazim Husain v. Debi Dayal* (11 O. W. N. 387) (4), at p. 390 and *Secretary of State for India v. Saroj Kumar Acharjya* (1935 O. W. N. 261) (5)."

It is not disputed on behalf of the respondents that collection charges should not have been added. The cases referred to by the learned Special Judge are cases of mesne profits. In such cases collection charges are allowable as they are in ordinary suits for profits under the provisions of the Land Revenue Act, and it may well be that collection charges may properly be added where the mortgagee is held liable to accounting under s. 76 of the T. P. Act. In the present case, however, the rights of the parties are fully set out in the mortgage deed, and that deed makes no provision for collection charges. With reference to these collection charges and in consequence in respect of the interest allowed on those collection charges therefore the present appeals must succeed. The effect of this modification is that the amount to be decreed to Ram Saran, Gur Saran and Avadh Behari will be reduced from Rs. 20,225-10-1½ to Rs. 19,436-7-1½. The amount decreed in the case of *Mst. Shyama Kuer* will be reduced to Rs. 13,194-9-11½, while the decree in favour of Rameshwar Prasad will be for the same amount as that in the case of *Mst. Shyama Kuer*.

Subject to this modification of the amounts decreed we dismiss the appeals and direct that the parties shall pay and receive costs in proportion to their success and failure.

s.

Appeals dismissed.

(4) 11 O W N 387 (390); 148 Ind. Cas. 880; A I R 1934 Oudh 104; 6 R O 454; 18 R D 172.

(5) 1935 O W N 261; 154 Ind. Cas. 1; A I R 1935 P C 49; 7 R P C 142; 41 L W 284; (1935) M W N 165; (1935) A L J 438; 39 C W N 405; 1935 R D 94; 68 M L J 580; 37 Bom. L R 327; 62 C 499 (P C).

MADRAS HIGH COURT

Civil Revision Petition No. 95 of 1939

April 26, 1940

WADSWORTH AND PATANJALI SASTRI, JJ.

VENDOOR THAZHATH PARAVAN

AND ANOTHER—PETITIONERS

versus

VENTHRAYIL TARWAD KARNAVAN

GOPALAN NAIR—RESPONDENT

Madras' Agriculturists' Relief Act (IV of 1938).

ss., 8, 9—*Liability to pay principal sum originating in contract or tort—Compensation for withholding payment, if interest—Whether can be scaled down—Vendor and purchaser—Suit for purchase price paid under abortive sale, is one for money had and received—Liability to pay when arises.*

Whatever be the nature of the liability to pay the principal sum—whether it originates in contract or in tort, the compensation awarded for wrongful withholding of its payment can appropriately be regarded as “interest” and is thus liable to be scaled down under the Mad. Agri. Relief Act. 186 Ind. Cas. 214 (1), distinguished.

A suit by a purchaser for recovery of the purchase money paid under an abortive sale is one for money had and received to his account and when there is no consideration and the sale fails *ab initio*, the liability to refund the purchase money arises when it is received by the vendor. *Hanuman Kamat v. Hanuman Mumdard* (2), relied on.

C. R. P. to revise the order of the Sub-Judge, South Malabar at Calicut, dated September 3, 1938.

Mr. N. R. Sessa Aiyer, for the Petitioners.

Mr. T. K. Raman Nambissan, for the Respondent.

Patanjali Sastri, J.—This is a petition to revise the order of the Court of the Sub-ordinate Judge of South Malabar amending the decree obtained by the petitioner in S. C. S. No. 432 of 1934 on the file of that Court, under s. 19, Mad. Agri's. Relief Act, 1938. The respondent sold some trees to the petitioner on September 29, 1931 for Rs. 400 but before the petitioner could cut and carry them away, a third party successfully asserted a paramount claim to them and the sale to the petitioner therefore failed to take effect. The petitioner thereupon sued for the recovery of the amount of Rs. 400 “with interest at 24 per cent. per annum from September 29, 1931.” The Court however allowed interest at 12 per cent. only and passed a decree for Rs. 538-5-3 for the principal and interest till August 20, 1934, the date of the suit and Rs. 94-9-4 on account of costs with further interest at 6 per cent. on the aggregate amount from November 4, 1936, the date of the decree. The respondent applied to the Court below under s. 19 of the Act claiming to be an agriculturist for scaling down the decree debt aforesaid in accordance with the provisions of the Act. There is no dispute that the respondent is an agriculturist as defined by s. 3 (ii) of the Act. But it was contended for the petitioner that there was no relationship of debtor and creditor created between the parties when the sum of Rs. 400 was paid by the petitioner as the price of the trees, that no interest was payable on that sum, and the Court having allowed interest only as damages, it was not “interest”

which could be scaled down under the Act. It was said therefore that the only relief that the respondent would be properly entitled to was under s. 9 of the Act, in respect of the interest that was payable from the date of the decree, namely November 4, 1936. Alternatively, it was also urged that s. 8 was not in any case applicable as the liability in question must be deemed to have been incurred only when the consideration for the sale failed, that is to say, when the third party claiming paramount title to the trees successfully prevented the petitioner from cutting and carrying them away by obtaining an injunction from the Court, which was admittedly some time after October 1, 1932; so that, even assuming that the interest awarded under the decree prior to the date of suit was liable to be scaled down under the Act, it should be scaled down in accordance with the provisions of s. 9 and not s. 8. We are of opinion that both these contentions are unsustainable.

Learned Counsel urged that no interest would be payable under the law in respect of the plaintiff's claim for refund of the purchase money and the liability to pay the sum awarded as interest arose only on the date of the decree. It is unnecessary, in our view, to consider whether interest could be awarded on a claim for recovery of purchase money where a contract of purchase fails to take effect, as in this case a decree has been passed awarding interest and it is no longer open to the petitioner to question such award. It must therefore be taken that the petitioner's claim for the purchase money was a claim in respect of which interest was payable. The fact that the Court awarded interest as “damages” cannot, in our opinion, exclude the operation of the provisions of the Act. The Act nowhere defines “interest” and it must be remembered that “interest” is sometimes payable even where there is no agreement to pay it. The Interest Act provides for “interest” being allowed, subject to certain conditions, as damages for wrongful withholding of payment of sums due, and *Illus. (n) and (r) to s. 73, Contract Act*, contemplate “interest” being awarded as compensation for loss or damage caused by a breach of contract in certain cases. It seems to us therefore clear that whatever be the nature of the liability to pay the principal sum—whether it originates in contract or in tort, the compensation awarded for wrongful withholding of its payment can appropriately be regarded as “interest” and is thus liable to be scaled down under the Act. The petitioner's learned Counsel cited *Mottai Meera*

y. Abdul Kadir (1) as being contrary to this view. We are however clear that the case has no bearing on the question we are now considering. That was a case where a co-owner in possession of common funds had realized interest by their investment, and, in a suit for partition, he was directed to pay to the other co-owners their shares of such funds including the interest earned. An application having been made for relief under Act IV of 1938, the Court held that the liability enforced by the decree was not a "debt" within the meaning of the Act. It was pointed out that the interest awarded in such cases could be regarded either as an accretion to the fund liable to be divided or compensation for breach of trust payable under s. 23, read with ss. 90 and 95, Trusts Act, the application of Act IV of 1938 being excluded in either case. It is obvious that the position here is entirely different. The petitioner's suit for recovery of the purchase money paid under an abortive sale was one for money had and received to his account: see *Hanuman Kamat v. Hanuman Mumdar* (2) at p. 126, and it cannot be disputed that the basis of such an action is an imputed contract, at all events in circumstances like those of the present case which plainly exclude any hypothesis of tort or trust. The decision cited has therefore no application here.

As regards the alternative contention that s. 8 does not apply to this case because the liability to refund the price must be held to have arisen only after October 1, 1932 when an injunction was obtained against the petitioner, it is to be observed that this is not a case where the petitioner got anything under the sale of which he was subsequently deprived. It is not denied that before the petitioner could cut any of the trees, the person claiming paramount title intervened and successfully prevented the petitioner from doing so by obtaining an injunction from Court. The case is thus one where there never was any consideration and the sale failed *ab initio*. The liability to refund the purchase money therefore arose when it was received by the respondent, i. e., on September 29, 1931 (see *Hanuman Kamat v. Hanuman Mumdar* (2) already referred to) and falls under s. 8 of the Act. The revision Petition is dismissed with costs.

N.-S.

Petition dismissed.

(1) A I R 1939 Mad. 471; 186 Ind. Cas. 214; I L R (1939) Mad. 525; (1939) 1 M L J 528; 49 L W 391; (1939) M W N 279; 12 R M 603.

(2) 19 O 123 (126); 18 I A 158; 6 Ser. 91 (P C).

ODUH CHIEF COURT

Miscellaneous Appeal No. 20 of 1939

April 28, 1941

BENNETT, AND GHULAM HASAN, JJ.

Mst. HAJIRA KHATOON—DEFENDANT—

APPELLANT

versus

Saiyad MUSTAFA HUSAIN—APPLICANT—RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXI, r. 15—Death of one of joint decree-holders—Other, if can execute decree—Succession Act (XXXIX of 1925), s. 278—Letters of administration—No estate and no debts—Application device to obtain decision on question of title—Letters of administration cannot be granted—Proper remedy of applicant.

On the death of one of the two joint decree-holders, the other is entitled under O. XXI, r. 15, Civil P. C., to apply for the execution of the decree to its entire extent for the benefit of himself as well as the legal representative of the deceased joint decree-holder unless the decree imposes any condition to the contrary. [p. 412, col. 2.]

Where there is no estate which stands in need of administration, no suggestion that any creditors have to be paid or any debts due to the estate have to be collected, and an application for letters of administration is a transparent device to secure from the Probate Court a decision upon a contested question of title to the estate, there is no occasion for the grant of letters of administration and the proper course for the applicant is to obtain an adjudication of his rights in a regular suit properly framed for the purpose. 17 Ind. Cas. 155 (1) and 64 Ind. Cas. 61 (2), followed, 57 Ind. Cas. 583 (3), distinguished. [p. 412, col. 2.]

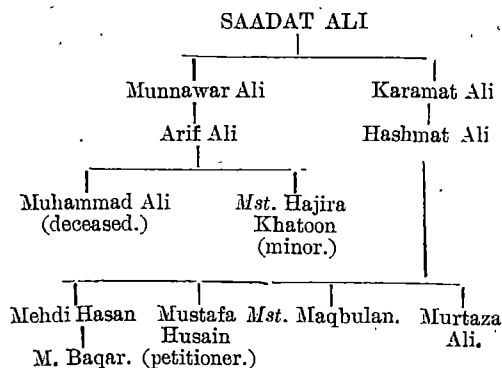
Misc. A. against the order of the District Judge, Hardoi, dated January 17, 1939.

Mr. Akhlaque Husain, for the Appellant.

Mr. R. I. Wahid, for the Respondent.

Judgment.—This is a Miscellaneous Appeal arising out of an order passed by the District Judge of Hardoi, dated January 17, 1939, granting letters of administration to the respondent.

The facts which give rise to this appeal lie within a narrow compass. A short pedigree no longer in dispute between the parties may be set out below:—



Arif Ali died some time in 1930 and was succeeded upon his death by his son Muham-

mad Ali and his daughter *Mst.* Hajira Khatoon. Both Muhammad Ali and *Mst.* Hajira Khatoon were minors. *Syed* Ishtiaq Ali, a Pleader of Hardoi, was appointed as guardian of the minors by the District Judge of Hardoi. It is not disputed that Muhammad Ali inherited two-thirds and *Mst.* Hajira Khatoon inherited one-third in the property of their father, Arif Ali. Muhammad Ali died on May 24, 1936. The respondent applied on January 8, 1938, under s. 278 of the Indian Succession Act for the grant of letters of administration with respect to the property left by Muhammad Ali. *Mst.* Hajira Khatoon, who was made a party to this application, filed a caveat through her guardian, *Syed* Ishtiaq Ali, Pleader, and contested the petitioner's rights to the letters of administration. She alleged that she was the sole heir of Muhammad Ali deceased, and the petitioner had no right to his property. She further alleged that the petitioner had lost all his rights due to his conversion to Christianity. She claimed exclusive right to the property of Muhammad Ali on the ground that both Muhammad Ali and Arif Ali were Shias, while the petitioner contended that they were Sunnis. There was some reference in the oral pleadings that according to the custom of the village and *wajib-ul-arz* the entire property of Arif Ali had devolved upon Muhammad Ali. The particulars of the custom were not given. The learned District Judge of Hardoi framed six issues in the case. Two of these related to the question whether Arif Ali was a Sunni or a Shia and whether Muhammad Ali was a Sunni or a Shia. The third related to the question whether the petitioner was an heir of Muhammad Ali under the Muhammadan Law applicable to the parties and the fourth issue related to the question whether the petitioner's conversion to Christianity deprived him of his right under the Muhammadan Law. There was also another issue to the effect whether the letters of administration should be granted to the petitioner assuming that he was an heir and there was no particular property to administer. There was also another issue, namely, whether in view of the intricate questions of personal law involved in the case, the Court should not refer the parties to a Civil Court. The two latter issues were treated as preliminary issues and were decided in favour of the petitioner.

The learned District Judge held that both Arif Ali and Muhammad Ali were Sunnis, and that consequently the petitioner was an heir of Muhammad Ali deceased. He also

held that the petitioner's conversion to Christianity did not deprive him of the rights under the Muhammadan Law. In the result he ordered letters of administration to be issued to the petitioner with respect to the estate of Muhammad Ali deceased.

Mst. Hajira Khatoon has preferred this appeal against the order of the learned District Judge.

It has been contended on behalf of the appellant that the order of the learned District Judge is wrong inasmuch as there is no estate in the present case which needs to be administered. It appears that the respondent left his residence in Sandila many years ago and returned shortly before the present controversy arose. He failed in his attempt to obtain orders for the appointment of guardianship in his favour by the removal of the present guardian, *Syed* Ishtiaq Ali. He carried the matter up to the Chief Court but was unsuccessful. Then he made another attempt to get orders of mutation from the Revenue Court, but that attempt also failed. It is urged that the respondent made the present application for letters of administration nearly 19 months after the death of Muhammad Ali.

A reference to the list of the properties left by Muhammad Ali filed by the guardian shows that Muhammad Ali owned a two-thirds share out of 11 pies share in village Ghoghhera, *pargana* and Tahsil Sandila and a two-thirds share in the mortgagee interest of 12 *biswansis* 10 *kachwansis* in *Patti* Bakhtawar Singh, village Damgarah, *pargana* and Tahsil Sandila. He also held a fractional share in a grove in Shahabad. He had also a two-thirds share in a residential house at Sandila and houses at Shahabad and Ghoghhera. As regards the debts due to Muhammad Ali, he had a two-thirds share in a final decree for sale for about Rs. 2,100, dated November 9, 1933, a two-thirds share in another sale decree for about Rs. 300 dated December 9, 1933, a two-thirds share in another sale decree, dated January 21, 1933, against Bakhtawar Singh and a two-thirds share in a simple money decree for Rs. 111, against one Darshan Singh, and lastly a debt for Rs. 25 was due to him from one Mujtaba Ali. He also had some cash in a Bank and some Post Office Cash Certificates and some money in the Savings Bank Accounts in Banks and in Post Offices. There is no evidence that Muhammad Ali owed any debt to any creditor.

It has been pressed upon us that after the death of Muhammad Ali the debts could not be realised and the property cannot be

administered without the letters of administration as the guardian cannot execute the decrees in respect of the property of Muhammad Ali; whose guardianship terminated with his death. This matter was considered by a learned Single Judge of this Court in an application under O. XLI, r. 5 of the Civil P. C. by the appellant praying for the stay of execution of the order granting letters of administration, and a similar argument was advanced on behalf of the respondent. The learned Judge observed that the decrees stood in the names of both the brother and the sister and that under O. XXI, r. 15 of the Civil P. C. *Mst. Hajra Khatoon* was entitled to apply for the execution of any decree to its entire extent for the benefit of herself as well as the legal representative of the deceased joint decree-holder unless any decree imposed any condition to the contrary. He also observed that the respondent was placed in a similar position and was entitled to execute the whole decree only under the provisions of O. XXI, r. 15 of the Civil P. C. by virtue of letters of administration. We are in entire agreement with this view. We do not think that there is any difficulty in the execution of those decrees without the grant of letters of administration. The only debt which is to be realised is a debt of Rs. 25 and it appears to be a parole debt. We do not think there is any justification for the administration of the estate. On the other hand, having regard to the circumstances of the case, we are of opinion that this is eminently a fit case in which the parties should be directed to go to a Civil Court for the adjudication of their respective titles. The question raised by the parties involves the trial of a serious question which can be more satisfactorily thrashed out by means of a regular suit. Having regard to the conduct of the respondent in taking no action in the matter since after the death of Muhammad Ali and delaying the filing of the application for letters of administration for nearly 19 months, and the further fact that prior to the filing of this application the respondent had been fighting unsuccessfully to obtain an order of guardianship in his favour and an order for mutation from the Revenue Court, we are by no means certain that the respondent is not really trying to obtain a summary decision on the question of title and avoiding recourse to a Civil Court.

We agree with the view taken by the Calcutta High Court in *Prosonno Kumari Devi v. Ram Chandra Singha*, 17 Ind. Cas. p. 155 (1).

(1) 17 Ind. Cas. 155; 17 C.L.J. 66.

and *Srimati Lakshmi Sundari v. Nityananda Dhupi* 64 Ind. Cas. p. 61 (2), to the effect that where there is no estate which stands in need of administration, no suggestion that any creditors have to be paid or any debts due to the estate have to be collected, and an application for letters of administration is a transparent device to secure from the Probate Court a decision upon a contested question of title to the estate, there is no occasion for the grant of letters of administration. We hold that the remedy sought by the respondent was misconceived, and that the proper course was to obtain an adjudication of his rights in a regular suit properly framed for the purpose.

Reliance has been placed by the learned Counsel on behalf of the respondent on a decision of the Patna High Court in *Babui Bhagwati Kuer v. Bahuris Ramsakhi Kuer* and *Babui Bhageshwari Kuer v. Bahuriah Bhagwati Kuer*, 57 Ind. Cas. p. 583 (3). The case, however, has no bearing upon the present case. All that was held in that case was that letters of administration cannot be granted to a minor and that they may be granted to his legal guardian, provided that the minor is the sole residuary legatee, or a person who would be entitled to the estate of the intestate. In considering the question whether the District Judge was right in granting letters of administration to the Manager of the Court of Wards, it was observed in that case that although the Manager had large powers of management over the estate of the proprietor, there was nothing in the Act that entitled him as such Manager and by virtue of his office to apply for letters of administration to the estate of the deceased in which the disqualified proprietor might have a large interest. In the present case no such question arises, as the guardian has not filed a counter petition for letters of administration being granted to him.

We allow the appeal with costs and set aside the order of the learned District Judge granting letters of administration to the respondent. The appellant will get her costs in this Court and in the Court below.

S.

Order accordingly.

(2) 64 Ind. Cas. 61.

(3) 57 Ind. Cas. 583; (1920) Pat. 187; 1 P. L. T. 304; 5 P. L. J. 347.

LAHORE HIGH COURT

Full Bench

Civil Original No. 212 of 1940

February 27, 1941

DALIP SINGH, MONROE AND SALE, JJ.

MEGH RAJ AND ANOTHER—PLAINTIFFS

versus

ALLAH RAKHIA AND OTHERS—

DEFENDANTS

Punjab Restitution of Mortgaged Lands Act (IV of 1938), ss. 2, 3, 7 and 12—Determination of validity of Act—Pith and substance—Subject-matter of Act falls within Sch. VII, Provincial Legislative List, item No. 21, Government of India Act, 1935, (25 & 26 Geo. V, Ch. 42) and is intra vires of Provincial Legislature—Government of India Act, 1935, (25 & 26 Geo. V, Ch. 42), ss. 219, 107, Sch. VII, Provincial List, item No. 21—Act found intra vires of Provincial Legislature—Court, if can consider extent to which provision barring Civil Court's jurisdiction would derogate from powers of High Court—Word "land" in item No. 21, includes trees standing thereon—Under s. 197, Statute is to be presumed legal—Interpretation of Statutes—Incidence of Act, does not affect its validity.

The test for determining the scope and validity of legislation is to ascertain the true nature and character of the enactment, that is to say its "pith and substance." The "pith and substance" of the Punjab Restitution of Mortgaged Lands Act (IV of 1938), is to empower the Collector to extinguish subsisting mortgages effected before June 8, 1901, subject to the condition of payment of compensation in certain cases. The subject-matter of that Act falls within the expression in item No. 21, "land, that is to say rights in or over land" and consequently the restriction on the jurisdiction and powers of Civil Court, provided by s. 12 of that Act, is also within the authority of the Provincial Legislature. For the same reasons, the impugned Act cannot be said to conflict with the Contract Act in so far as it deals with land other than agricultural. 192 Ind. Cas. 138 (1), relied on. [p. 414, cols. 1 & 2.]

The mere fact that the subject-matter of the impugned Act may also be affected by certain provisions in the Current Legislative List, would not attract the provisions of s. 107, regarding repugnancy. Consequently the Punjab Restitution of Mortgaged Lands Act, is *intra vires* of the Provincial Legislature. 182 Ind. Cas. 161 (3), relied on. [p. 416, col. 1.]

If the Act is *intra vires* of the Provincial Legislature, it is not for the Courts to consider the extent to which the provision barring the jurisdiction of the Civil Courts would derogate from the powers of the High Court. This is a matter which is within the special competence of His Excellency the Governor under s. 17 (b), Instrument of Instructions. [p. 415, col. 1.]

The expression "land" in item No. 21 of the Provincial Legislative List must be deemed to include trees standing on the land. [*ibid.*]

Under s. 107, Govt. of India Act there is a presumption in favour of the legality of a statute and the Courts should not declare an Act inconsistent or *ultra vires* unless the repugnancy to the constitution is clear and beyond doubt. 182 Ind. Cas. 161 (3), relied on. [p. 415, col. 2.]

The incidence of the legislation, cannot affect its validity. [p. 416, col. 2.]

Messrs. Badri Das, Achhru Ram, M. L. Puri, Narotam Singh and Roop Chand, for the Plaintiffs.

Messrs. M. Sleem (Advocate-General) and Mohammad Amin, for the Punjab Government.

Sardar Nihal Singh, for the Defendant (Allah Rakhia).

Sale, J.—This suit arises out of a petition presented to the Collector under s. 4, of the Punjab Restitution of Mortgaged Lands Act (IV of 1938). The point for determination is the validity of this Act. The facts, so far as they are disclosed in the plaint, are that on February 5, 1897, Dad mortgaged certain land with possession to Dewa Ram for Rs. 1,200. The stipulations were that the interest was to be balanced by the income and the mortgagor could redeem on payment of the principal. On May 25, 1915, a further charge to the extent of Rs. 4,300 was made on the land on the same conditions, in favour of Dewa Ram. Subsequently Dad died. On April 6, 1927, the three sons of Dad and a brother, created additional charge of Rs. 2,000 on the land on the same conditions. The total charge on the land by 1927 stood at Rs. 7,500. It is relevant to mention that the mortgaged land is described in the plaint as containing certain fruit bearing date trees and other barren trees. On January 18, 1940, the three sons and brother of Dad, the original mortgagor, presented an application under s. 4, Punjab Restitution of Mortgaged Lands Act, to the Collector for restitution of possession of the mortgaged land. This petition was met by the present suit instituted by the mortgagees in the Court of the Senior Subordinate Judge, Muzaffargarh, for a declaration and an injunction to restrain the defendant-mortgagors from prosecuting the petition. The main ground is that the Act in question is *ultra vires* of the Provincial Legislature but there are further objections that in any case the proceedings under the Act would only apply to the mortgage effected prior to June 8, 1901, and not to the subsequent charges.

The plaintiffs also asked for the issue of a temporary injunction under O. XXXIX, r. 1, Civil P. C., pending the final disposal of the suit. This application was rejected by the learned Senior Subordinate Judge on May 6, 1940; but before any further proceedings were taken by the trial Court an application was presented to this Court for the transfer of the case to this Court for the determination of the important issue regarding the validity of the Act. The suit was accordingly transferred to this Court by order of a learned Judge, and the Punjab Govt. was impleaded as a defendant. The case is

now before us as a Full Bench constituted for the decision of the preliminary point regarding the validity of the Punjab Restitution of Mortgaged Lands Act, IV of 1938, and this judgment will be confined to a decision of this question.

The Punjab Restitution of Mortgaged Lands Act is described as an Act to provide for the restitution of lands on which there is a subsisting mortgage effected prior to June 8, 1901, that is the date on which the Punjab Alienation of Land Act, 1900, came into force. The Act received the assent of His Excellency the Governor on September 1, 1938, and was first published in the *Punjab Gazette Extraordinary* of September 6, 1938. The commencement of the Act was, by notification in the *Punjab Gazette*, declared to be May 15, 1939. The important provisions of the Act, for the purposes of considering its validity, are contained in ss. 2, 3, 7 and 12. Under s. 2 the Act is limited to subsisting mortgages effected prior to June 8, 1901. Section 3, contains the definition of the expression "land" which is defined to mean land occupied or let for agricultural purposes or purposes subservient to agriculture or for pasture, and to include such matters as sites of buildings and other structures on the land and all trees standing on such land. Under s. 7 of the Act, power is given to the Collector ("notwithstanding anything contained in any other enactment for the time being in force") to extinguish a mortgage to which the Act applies, subject to the condition that, under certain circumstances, compensation is payable. Section 12 bars the jurisdiction of the Civil Courts to entertain any claim to enforce a right under a mortgage declared extinguished under the Act, or to question the validity of any proceedings under the Act. Now it has been laid down that the test for determining the scope and validity of legislation is to ascertain the true nature and character of the enactment, that is to say its "pith and substance." This test is referred to by Suláiman, J. in *United Provinces v. Atiqa Begum*, (1) at p. 35 :

"Their Lordships of the Privy Council have repeatedly stressed the fact that we must look to the pith and substance of the Act in order to ascertain its true nature and character. As laid down in *Russell v. Reg* (2) the true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs."

(1) A I R 1941 F C 16 (35); 192 Ind. Cas. 138; 7 B R 433; 13 R F C 15; 1941 O W N 297; 72 C L J 550; 1941 O L R 121; 45 C W N F C 27; 1941 A L J 170; 53 L W 397; 1941 R D 121; (1941) 1 M L J (F C) 6 Sup. (F C).

(2) (1882) 7 A C 829; 51 L J P C 77; 46 L T 869.

It seems clear that the "pith and substance" of the impugned Act is to empower the Collector to extinguish subsisting mortgages effected before June 8, 1901, subject to the condition of payment of compensation in certain cases. The validity of this Act is attacked by Mr. Badri Das on behalf of the plaintiffs on the ground that the substance of the Act—in particular the provisions contained in ss. 2, 3 and 12—is covered by Items Nos. 4, 5, 8, 10 and 15 of the "Concurrent Legislative List" (Part I) contained in Sch. VII, framed under s. 100, Govt. of India Act, 1935; and that by reason of ss. 100 and 107, Govt. of India Act, the Act is repugnant to the provisions of certain "existing Indian Laws" and is therefore, void to the extent of the repugnancy. The term "existing Indian Law" is, defined in s. 311, Govt. of India Act, to mean any law passed before the commencement of Part III, Govt. of India Act, and the particular laws referred to by Mr. Badri Das are the Civil P. C., the Lim. Act, the Evi. Act, Contract Act, Punjab Laws Act, all Acts of the Central Legislature, together with certain Regulations, dealing with the procedure for redemption of mortgages, which have been extended to the Punjab, such as, Regulations I of 1798 and 17 1806. In particular, Mr. Badri Das argues that the Act conflicts with the procedure for foreclosure of mortgages laid down in O. XXXIV, Civil P. C.; and he urges that the Provincial Legislature cannot provide a special procedure barring the jurisdiction of the Civil Courts, in regard to such matters as redemption of mortgages, which, prior to the commencement of the Govt. of India Act on April 1, 1937, were within the cognizance of the Civil Courts under s. 9, Civil P. C. As regards the Lim. Act, Mr. Badri Das contends that the Act conflicts with Arts. 134 and 148. As regards the Contract Act, Mr. Badri Das contends that a mortgage is, in one aspect, a contract; and he refers to Item No. 10 of Part I of the Concurrent Legislative List which relates to "contracts . . . but not including contracts relating to agricultural land." Mr. Badri Das also referred to Item No. 8 of the Concurrent Legislative List which deals with transfer of property other than agricultural land, and while conceding that the T. P. Act does not as such apply to the Punjab he has contended that the Courts should have regard to the recognized fact, that principles of the T. P. Act apply to the Punjab.

Finally, Mr. Badri Das contended that since the existence of the High Court is recognized as a statutory necessity by s. 219

et seq of the Govt. of India Act, the Provincial Legislature cannot, by any such enactment, as the one now impugned, bar the jurisdiction of the Civil Courts and so derogate from the powers of the High Court as to endanger the position which the Court is by the Act designed to fill. This latter argument appears to be outside the scope of the present enquiry. If the Act is *intra vires* of the Provincial Legislature, it is not for the Courts to consider the extent to which the provision barring the jurisdiction of the Civil Courts would derogate from the powers of the High Court. This is a matter which is within the special competence of His Excellency the Governor under s. 17 (b), Instrument of Instructions. All the Court has to consider is whether the Act is *intra vires* of the Provincial Legislature. For this purpose, the relevant provision of the Govt. of India Act on which the Advocate-General relies and the applicability of which is admitted by Mr. Badri Das is Item No. 21 of the Provincial Legislative List contained in Sch. VII, Govt. of India Act, read with Item No. 2 of that List. The relevant portion of Item No. 21 is as follows:

"Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant and the collection of rents, transfer, alienation and devolution of agricultural land . . ."

Item No. 2 confers on the Provincial Legislature power to legislate regarding the jurisdiction and power of all Courts except the Federal Court, with regard to these matters. The expression "land" as used in Item No. 21 is not defined in the Govt. of India Act and for the definition reference must be made to the English Interpretation Act, 1889, in s. 3 of which it is provided that "the expression 'land' shall include messuages, tenements and hereditaments, houses and buildings of any tenure." The expression "hereditament" in English Law is defined in Byrne's Law Dictionary as

"the widest expression for real property of all kinds and is therefore employed in conveyances after the words 'lands' and 'tenements' to include everything of the nature of realty which they do not cover."

There can be no doubt that "trees" which are regarded as immovable property and therefore realty would be covered by the expression "hereditament;" and the expression "land" in Item No. 21 of the Provincial Legislative List therefore must be deemed to include trees standing on the land. Mr. Badri Das contends that although Item No. 21 is applicable the Act is also effected by certain items in the Concurrent Legislative List already mentioned, *viz.*, Items Nos. 4, 5, 8, 10 and 15. His argument in this connexion

is two-fold: (1) that to the extent to which the substance of this Act is covered by these items the question of repugnancy of the Act under s. 107 with laws such as the Civil P. C., Lim. Act and Contract Act must be considered, and (2) that in any event, mortgages regarded from one aspect, are contracts, and that under Item No. 10 of the Concurrent Legislative List the Central Legislature has concurrent powers to legislate for contracts of all lands except contracts relating to "agricultural land."

The term "agricultural land" is nowhere defined but he contends that the definition in s. 3 of the impugned Act, including, as it does, pasture and trees standing on land, goes far beyond the ordinary accepted meaning of the term "agricultural land," and that, in so far as the impugned Act covers land which is not agricultural in the ordinary accepted sense, it conflicts with the law of contract. Now, as regards the question of repugnancy under s. 107, Govt. of India Act, it has been repeatedly laid down that there is a presumption in favour of the legality of a statute and the Courts should not declare an Act inconsistent or *ultra vires* unless the repugnancy to the constitution is clear and beyond doubt. Sir Shah Sulaiman, J. in his judgment in *Shyamakant Lal v. Ram-bhajan Singh* (3) at p. 200 says:

"When the question is whether a provincial legislation is repugnant to an existing Indian Law, the onus of showing its repugnancy and the extent to which it is repugnant should be on the party attacking its validity. There ought to be a presumption in favour of its validity, and every effort should be made to reconcile them and construe both so as to avoid their being repugnant to each other."

Again on p. 200* of the same judgment the learned Judge in dealing with the suggestion that the Act in question was repugnant to an existing Indian Law, lays down the law as follows:

"Now s. 107 (1) does not mean that a Provincial Law must yield if it is repugnant to any existing Indian Law whatsoever. It will give way (to the extent of repugnancy) only if it is repugnant to an existing Indian Law 'with respect to one of the matters enumerated in the Concurrent Legislative List,' unless the assent of the Governor-General or of His Majesty has been obtained as is referred to in sub-s. (2). If it is with respect to a matter falling within the Provincial Legislative List and not the Concurrent Legislative List, then it would prevail even as against an existing Indian Law."

According to this interpretation, the question for determination is whether the subject-

(3) (1939) 2 F L J 183 (200); 182 Ind. Cas. 161; A I R 1939 F C 74; 1939 O L R 399; 12 R F C 1; 5 B R 756; 20 P L T 473; (1939) M W N 674; (1939) F O R 193; 43 C W N F C 68; (1939) Kar. (F C) 165; 71 O L J 369; (1939) 2 M L J 45 Sup. (F O).

matter of the impugned Act falls within the Provincial Legislative List. If it does, the mere fact that it may also be affected by certain provisions in the Concurrent Legislative List, would not attract the provisions of s. 107, regarding repugnancy. The question of the proper construction of certain items in the Provincial Legislative List is discussed in the judgments of the learned Chief Justice of the Federal Court and Sir Shah Sulaiman, J. in *United Provinces v. Atiqa Begam* (1). At p. 25* of the judgment the learned Chief Justice particularly deals with Items Nos. 2 and 21 of the Provincial Legislative List; and in regard to the expression "land" in Item No. 21 the learned Chief Justice says:

"The general word is amplified and explained by a number of examples or illustrations, some of which would probably on any construction have been held to fall under the more general word, while the inclusion of others might not be so obvious..... I think however that none of the items in the lists is to be read in a narrow or restricted sense, and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it."

Further, in dealing with Item No. 22 "forests" the learned Chief Justice expresses the view that "the power to legislate with respect to forests includes power to legislate with respect not only to afforestation but also to disafforestation"; while in regard to Item No. 24 "fisheries", he considers that the power to legislate includes the power to prohibit fishing altogether in particular places or at particular times. Sir Shah Sulaiman, J. in dealing with Items Nos. 2 and 21 of List II at p. 32* of his judgment points out that the expression "land, that is to say, rights in or over land"

"has a wide scope.....Entry No. 2 of List II includes jurisdiction and powers of all Courts, with respect to any of the matters in that list. Accordingly, entries Nos. 2 and 21 read together would cover any restriction that may be imposed on the jurisdiction and powers of Courts, with respect to land.....As there is no category in List I or List III which is similar to entry No. 21 of List II, the latter must be given a liberal interpretation so as to invest Provincial Legislature with full power to legislate with respect to them, so long as such legislation does not conflict with any other provision. I am not prepared to hold that entry No. 21 must necessarily be confined to substantive provisions and not to procedural law.....On the other hand, legislation, which affects the jurisdiction and powers of Civil or Revenue Courts, would come under entry No. 2.....The result is that if the subject-matter is within entry No. 21, then restriction on jurisdiction and powers of Civil and Revenue Courts with respect to it would also be within the authority of Provincial Legislatures."

Having regard to the liberal interpretation

which the learned Judges of the Federal Court hold should be placed on the expression used in Item No. 21 of the Provincial List, it seems clear that the subject-matter of the Restitution of Mortgaged Lands Act does fall within the expression used in Item No. 21, "land, that is to say, rights in or over land". If so, it follows that the restriction on the jurisdiction and powers of Civil Courts, provided by s. 12 of the impugned Act, is also within the authority of the Provincial Legislature. For the same reason, we consider there is no force in Mr. Badri Das's more limited contention that the impugned Act conflicts with the Contract Act in so far as it deals with land other than agricultural. His argument is that the extinction of a mortgage is the extinction of a contract; and that because Item No. 10* of the concurrent Legislative List gives the Central Legislature power to legislate regarding contracts other than those relating to agricultural land, the provisions of the impugned Act conflict with this item in so far as the impugned Act defines "land" to include matters which go beyond what is ordinarily understood by the term "agricultural land." It is true that a mortgage is in one aspect a contract relating to land; but having found that the subject-matter of the Act falls within the scope of Item No. 21 of the Provincial List, viz., "Land, that is rights in or over land", we must look for the definition of "land" to the Interpretation Act, 1889; and since land is therein defined as including messuages, tenements and hereditaments, it would follow that the somewhat wide scope given to the expression "land" in s. 3 of the impugned Act does not go beyond the expression "land" as used in Item No. 21 of the Provincial Legislative List.

Reference may be briefly made to two other arguments referred to by Mr. Badri Das in support of his contention that the Restitution of Mortgaged Lands Act is invalid. He urges that discrimination is introduced by means of the arbitrary date fixed for the application of the Act, to subsisting mortgages effected prior to June 8, 1901, and that, therefore, the Act is invalid by reason of s. 298, Govt. of India Act. It is clear, however, that there is no discrimination in the Act, inasmuch as no distinction is made in the Act between agriculturists or non-agriculturists or between any class of persons. Mr. Badri Das's argument relates in fact to the incidence of the legislation, a question which cannot affect its validity. There is, therefore, no force in this argument.

He also referred to cl. (1) of s. 299, Govt. of India Act, which lays down that no person shall be deprived of his property in British India save by authority of law. This clause occurs in a section, which, as the marginal note shows, deals with the compulsory acquisition of land and it is not clear whether it is intended to be read in connection with the rest of the section, in which case it would not apply to the present case or whether it is intended to stand by itself. If the latter, the answer to this argument is that the authority for the deprivation is the enactment impugned, and there is no force in this argument unless this enactment is shown to be otherwise *ultra vires*. This fact the plaintiff has failed to establish. For these reasons I would hold that the Punjab Restitution of Mortgaged Lands Act (IV of 1938) is *intra vires* of the Provincial Legislature. In both these cases I would certify that a substantial question of law, as to the interpretation of the Govt. of India Act, is involved. The suit will now be remitted to the Senior Subordinate Judge, Muzaffargarh, for decision on the merits. The Advocate-General is entitled to his costs in this Court which I would assess at Rs. 500, and this amount will be included in the costs of the suit and will be payable by the plaintiff-mortgagees.

Dalip Singh, J.—I agree.

Monroe, J.—I agree.

D.

Order accordingly.

ODUH CHIEF COURT

Second Civil Appeal No. 91 of 1937

April 15, 1941

YORKE AND BENNETT, JJ.

Syed MEHDI HUSAIN—PLAINTIFF—

APPELLANT

versus

Syed MOHAMMAD JAWAD AND OTHERS—
DEFENDANTS—RESPONDENTS

Transfer of Property Act (IV of 1882), s. 58—Mortgage or sale—Deed, construction of—Test—Intention of parties—Surrounding circumstances, if can be considered—Unnecessary details in deed as to rights and liabilities of vendee—Emphasis on vendee being representative of vendor—Inadequacy of price—Period of 15 years given for re-purchase at exact sale price—Parties Muhammadans—These factors show that transaction was mortgage and not sale.

The question whether the sale-deed and "*ikrarnama*" executed on the same day record an out and out sale with a contract or condition for repurchase or they record a transaction of mortgage is in the first instance one of construction of the deed, but the Court is entitled to take into consideration a certain number of sur-

rounding circumstances, as for example, the circumstances in which the document was executed, the price at which the sale was concluded, the existence or non-existence of bargaining and the like. The crucial test is the intention of the parties. [p. 418, col. 2.]

The test whether the document or documents create the relationship of creditor and debtor, is not a very satisfactory one. It would be difficult to say that even a mortgage by conditional sale creates a "debt", since such a mortgage creates in the mortgagee no right to realise the consideration of the mortgage either as a personal liability or as a liability under the mortgage. [p. 418, col. 2; p. 419, col. 1.]

Reference to unnecessary details of the rights and liabilities of the vendee in the deed, the emphasis on the transferee being a representative of the vendor, the inadequacy of price and the vendor's not gaining any particular advantage by entering into a transaction of sale, go to show that the transaction was not a sale. [p. 422, col. 1.]

Where the parties to the transaction are Muhammadans, there is some amount of presumption in favour of the transaction being a mortgage concealed under the cloak of a sale-deed with a contemporaneous contract for resale. [p. 422, cols. 1 & 2.]

Where a period as long as 15 years is given for repurchase at the exact sale price, the probabilities are in favour of mortgage rather than sale. A period of 15 years is a long period within which there may be considerable rise or fall in the value of the property. [p. 422, col. 2.]

S. C. A. against the decree of the Civil Judge of Rae Bareilly, dated November 4, 1936.

Messrs. Hyder Husain and H. H. Zaidi, for the Appellant.

Mr. Hakimuddin Siddiqi holding brief of Mr. Naziruddin, for Respondent No. 1.

Judgment.—This is a second appeal by the plaintiff in a pre-emption suit referred to a Division Bench under the provisions of s. 14 (2) of the Oudh Courts Act on the ground that it involves an important question of law.

The plaintiff Syed Mehdi Husain, a minor under the guardianship of his grand-father Wajid Ali, as *mutwalli* of a *waqf* property in village Unchahar, district Rae Bareilly, sued for pre-emption in respect of the sale of certain land, measuring 7 *bighas* odd in *mahal* and village Unchahar. The vendee defendants contended that the plaintiff as a *mutwalli* was not a co-sharer in the *mahal*. They further contended that in any case the property, in respect of which the plaintiff claimed to be *mutwalli* of a *waqf* property, was property in respect of which the executant of the *waqf* was a mortgagee and not a proprietor. The executant of the *waqf* was the same Wajid Ali who was the guardian *ad litem* of the plaintiff. He had on September 29, 1921 executed a deed of *waqf-alal-aulad*, Ex. 2, by which he reserved the right to sell part of the *waqf* property and purchase other *waqf* property with the

proceeds. Subsequently in 1927 he sold some portion of the *waqf* property for Rs. 64,000 and purchased other property. On May 12, 1928, he got this property in village Unchahar under the sale-deed Ex. 3 executed by Saiyid Yusuf Hasan, along with which he himself executed an agreement to resell the property to Saiyid Yusuf Hasan in certain circumstances. This document was Ex. A-1. Subsequently on October 4, 1932 by a deed Ex. 4 Wajid Ali appointed his son Ikbāl Husain and another man Mohammad Wasi as *mutwallis*. Ikbāl Husain, however, subsequently died and was succeeded by the minor plaintiff Syed Mehdi Husain. It is said that Syed Mehdi Husain's name is entered in the revenue record as *mutwalli* and as beneficiary of the *waqf* to the extent of his share in the family property. Other points were raised in the suit which no longer arise.

The learned Munsif held that the plaintiff not having sued as *mutwalli* but only as a beneficiary under the *waqf* was not a co-sharer in the *mauza* and not entitled to maintain the suit. On this point the learned Civil Judge held in appeal that it was not seriously challenged before the Munsif that the plaintiff was *mutwalli*. It might be technically speaking true that the plaintiff did not sue as *mutwalli* but as he alleged that he was *mutwalli* of the property the mere omission in the relief clause that the decree for pre-emption should be given to him as *mutwalli* would not disentitle a Court from decreeing the plaintiff's claim as *mutwalli* if he were otherwise entitled to such a decree. In second appeal this point was not of course raised by the appellant but might have been raised on behalf of the respondents. Learned Counsel for the respondents has, however, conceded that he has not got an arguable case on this point.

The only point therefore which is for consideration in this appeal is the second point, namely whether the pre-emptor is *mutwalli* of property which is in his ownership under an out and out purchase made by the creator of the *waqf* Wajid Ali or that transaction was only a transaction of mortgage so that the pre-emptor is not as *mutwalli* owner of the property, and therefore a co-sharer in *Mauiza* Unchahar and entitled to maintain a suit for pre-emption.

The facts in regard to the acquisition of this property by Wajid Ali are set forth in the document purporting to be a sale deed, Ex. 3, executed by Saiyid Yusuf Hasan vendor on May 12, 1928, and the document Ex. A-1 executed on the same day by Wajid

Ali vendee in favour of Saiyid Yusuf Hasan. Put shortly Ex. 3 is framed as an absolute sale deed, by which property previously mortgaged to one Thakur Jadu Nath Singh is transferred to the vendee Wajid Ali, the consideration for the sale being the amount supposed to be due to the prior mortgagee under the mortgage. Exhibit A-1 executed the same day and presented for registration simultaneously with Ex. 3 is a deed of agreement executed by the vendee Wajid Ali undertaking that if within 15 years, time in any fallow season of *Jeth* the vendor, his heirs and representatives or his successors by paying Rs. 41,000 the consideration money want to have the property transferred to them (there are also provisions for piecemeal repurchase), the declarant, his successors and representatives who may succeed to him in any way as *mutwalli* will return back the said property without any objection. The costs of the new sale-deed will be borne by the vendor, that is the vendor under the deed of sale Ex. 3 referred to in this undertaking.

The question is whether in the circumstances the sale-deed and *ikrarnama* record an out and out sale with a contract or condition for repurchase or they record a transaction of mortgage. The question is in the first instance one of construction of the deed, but in view of the rulings on the subject the Court is entitled to take into consideration a certain number of surrounding circumstances, as for example the circumstances in which the document was executed, the price at which the sale was concluded, the existence or non-existence of bargaining and the like. Learned Counsel for the parties have put before us the leading cases on the question of interpretation of such a combination of documents as we have in the present case. The test which has usually been stated in these circumstances as the crucial test is the intention of the parties. Learned Counsel for the appellant in the present case has also sought to suggest that the proper test is whether the document or documents create the relationship of creditor and debtor, that is do they create a debt. We are inclined to think that this latter test is not a very satisfactory one. Even in the case of an usufructuary mortgage it is open to argument whether there is really a debt created, particularly in those cases in which the amount of mesne profits of the property is to be taken in lieu of interest. It has frequently been said that the term "debt" connotes the existence of a right in the creditor to realise the amount of a debt. In a recent Full

Bench case of the Lahore High Court, *Lachhman Singh v. Natha Singh* (I. L. R. 22 Lahore, 71) (1) it has been held that :

"the essence of 'debt' is the liability of the obligor which the obligee is entitled to enforce by action. Where a transaction neither imports the personal liability of the obligor to pay, nor confers on the obligee the right to recover the amount by the coercive machinery of the law, it cannot be called a debt."

Held also,

"That the principal characteristics of a usufructuary mortgage are that there is no personal liability of the mortgagor to pay nor has the mortgagee a right to have the mortgaged property brought to sale. The money secured by a usufructuary mortgage cannot therefore be called a 'debt' either according to the ordinary meaning of the word or the enlarged significance of the term as used in s. 7 (1) of the Punjab Relief of Indebtedness Act."

The position in the case of a mortgage by conditional sale is very similar, *vide* the provisions of s. 58 (c) of the T. P. Act defining mortgage by conditional sale as follows :

"Where the mortgagor ostensibly sells the mortgaged property—

On condition that on default of payment of the mortgage money on a certain date the sale shall become absolute, or

On condition that on such payment being made the sale shall become void,

or

On condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagor a mortgagor by conditional sale."

It is obvious that it would be difficult to say that a mortgage by conditional sale creates a "debt", since such a mortgage creates in the mortgagee no right to realise the consideration of the mortgage either as a personal liability or as a liability under the mortgage. This test therefore seems to fail; and indeed it is not one of the tests which emerge from the decisions which have been put before us. We do not propose to go at length into these cases as most of the points in the earlier cases are summarised in two cases, one of the Allahabad High Court and one of this Court.

The decision in *Bhagwan Sahai v. Bhagwan Din* (I. L. R. 12 All. 387) (2) is rather of negative nature. It was held by their Lordships that

"a document purporting to be one of sale, though it is accompanied by a contract reserving to the vendor a right to repurchase the property sold, on repayment of the purchase money within a certain time, is not on that account to be construed as if it were a mortgage."

In this particular case the right to repurchase was to be exercised within 10 years. Their Lordships considered the terms of the document and considered the case to be one

(1) I. L. R. (1941) Lah. 71; 191 Ind. Cas. 583; 42 P. L. R. 560; A. I. R. 1940 Lah. 401; 13 R. L. 300.

(2) 12 A 387; 17 I. A. 98; 5 Sar. 557 (P. C.).

of sale with a right to repurchase within the period stipulated.

In *Jhanda Singh Wahid-ud-din*, (I. L. R. 38 All. 570) (3) the view stated in *Bhagwan Sahai's case* (2) was affirmed. Their Lordships were of opinion that the intention of the parties which was the test in such a case must be gathered from the language of the document themselves viewed in the light of the surrounding circumstances. They concluded that the transaction was an out and out sale and not a mortgage by conditional sale. This was a case in which there was a right to repurchase with 9 or 10 years stated in an agreement executed a week later than the sale deed in the year 1852, and the vendors instituted a suit for redemption no less than 56 years later. Their Lordships referred to a remark in the English case of *Alderson v. White* (4) where, it is said by Lord Cranworth,

"I think a Court after a lapse of 30 years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be."

The case is, of course, easily distinguishable from the present case where the plea that this was a transaction of mortgage is put forward within the period fixed for repurchase and within a comparatively short period of the original deed of sale.

In *Bishambhar Nath v. Muhammad Ubaidullah Khan* (I. L. R. 45 All. 581) (5) a Bench of the Allahabad High Court restated the proposition that

"In deciding whether a given transaction is an out and out sale with a condition for repurchase or a mortgage by conditional sale, it is the intention of the parties at the time of entering into the transaction which must be regarded. That intention must be gathered from the terms of the deed itself and the surrounding circumstances."

The details of the transaction in this case are not in any way parallel to those of the present case, but in the course of the judgment a reference was made to two points which are of some interest in the present case. One of these was the fact that one of the parties was a Muhammadan, about which it was remarked,

"One of the parties being a Muhammadan may, in a doubtful case, lend some additional probability in favour of a document being construed as a mortgage but it does not in any way do away with the rule laid down by the Privy Council that a document is to be construed in accordance with the intention of the parties as evidence by its terms."

(3) 38 A 570; 36 Ind. Cas. 38; 31 M. L. J. 750; 21 C. W. N. 66; 20 M. L. T. 529; 14 A. L. J. 1189; (1916) 2 M. W. N. 570; 19 Bom. L. R. 1; 5 L. W. 189; 25 C. L. J. 524; 10 Bur. L. T. 131; 43 I. A. 284; A. I. R. 1916 P. C. 49 (P. C.).

(4) (1858) 2 De. G. & J. 97; 4 Jur. (N. S.) 125; 6 W. R. 242; 44 E. R. 924; 119 R. R. 38.

(5) 45 A 581; 77 Ind. Cas. 572; 21 A. L. J. 503; A. I. R. 1923 All. 586.

Elsewhere it was said

"It has not been suggested that the price paid under the deed was in any way inadequate to the value of the property at the time when the sale was effected."

In *Mst. Mumtaz Begam v. Mst. Lachhmi*, (A. I. R. 1929 All. 174) (6) certain tests for the determination as to whether a transaction was one of sale or of mortgage were laid down and it was said,

"It can be contended that a transaction was not intended to be a mortgage, when it is found that there was nothing to show that the relation of debtor and creditor continued to exist, there was nothing about interest or its equivalent, that the price was a very fair one for a sale, and that a very long period (five times as great as the period contemplated in the deed) had been allowed to elapse before the party took action."

Some other points have been mentioned in *Ram Das Rao v. Brindaban Ram* (A. I. R. 1931 All. 113) (7). It is pointed out that

"whether not two transactions are integral parts of the same transaction, connected and interdependent or whether they are disconnected and dissociated is in each case a question of fact which has to be ascertained from the evidence produced in the case and no question of legal presumption arises."

Elsewhere it was said that

"where there is a controversy as to whether the transaction is a sale or a mortgage by conditional sale, the matter has primarily to be determined upon a construction of the document or documents concerned. An absolute sale-deed does not cease to be so merely because the vendor stipulates that he shall have a right to repurchase."

The case law on this subject has been discussed at some length in the judgment of Sen, J., in this particular case. In the body of the judgment in this case also it is remarked,

"It may also be an important factor as to whether the sale consideration represents the actual value of the property."

Reference has also been made to *Mst. Gomti v. Meghraj Singh* (A. I. R. 1933 All. 443) (8). In this case there was, simultaneously with the sale deed, an agreement executed by the vendee under which the vendor was given a right of repurchase of the property for the sale price at any time after 25 years from the date of the sale. It was said that

"the time was not the essence of the contract and that the transaction was one of mortgage by conditional sale, the vendor being entitled to redeem within the maximum period of 60 years but after the expiry of the 25 years period fixed in the agreement."

There are no means of comparing a case of that kind with the present case in which a maximum period for repurchase is fixed

(6) A I R 1929 All. 174; 116 Ind. Cas. 807; Ind. Rul. (1929) All. 631.

(7) A I R 1931 All. 113; 129 Ind. Cas. 719; Ind. Rul. (1931) All. 207; (1931) A L J 571.

(8) A I R 1933 All. 443; 145 Ind. Cas. 147; 6 R A 31; (1933) A L J 907.

instead of a minimum period and the maximum period has not yet expired.

Greater reliance was placed by learned Counsel on a Calcutta case, *Mohammad Yusuffe v. Jashodha Kumar Das Purkaista* (2 Ind. Cas. 930) (9). In this case the agreement was that if the purchase money was repaid within four years, the purchaser would be bound to give up the property, and it was held that this was a case of sale with a contract for repurchase and not a case of mortgage.

Reliance was also placed for the appellant on *Muthuvelu Mudaliar v. Vythilinga Mudaliar* (I. L. R. 42 Mad. 407) (10). The head note runs as follows :

"Where in one and the same transaction land is sold absolutely but with a right of repurchase to be exercised before a certain date, the transaction does not necessarily become by virtue of s. 58 of the T. P. Act a mortgage by conditional sale, whatever the intention of the parties might have been."

Learned Counsel referred to a passage on p. 421* in the judgment of Seshagiri Ayyar, J. where he says,

"A party who wishes the document to be understood as being different from what the words suggest should show that the form in which the language is clothed does not express the real intention of the parties and that in substance the parties intended that there should be a transaction different from what the language imports. In other words there must be evidence to show that the parties intended a mortgage although they used expressions which *prima facie* cannot a sale."

On behalf of the respondents reliance has been placed first on the case referred to by the learned Civil Judge, *Mohammad Usman v. Abdul Rahman* (A. I. R. 1925 Calcutta 1151) (11), in which stress was laid on the habit of Muhammadans of disguising mortgages as sales and it was held that

"in construing a document between Muhammadans in order to find whether the transaction is a mortgage by conditional sale or an out and out sale, it should be remembered that documents are executed by Muhammadans in which they conceal, or at least try to conceal the real nature of the transaction and attempt to make out that the transaction is an out and out sale, although as a matter of fact the intention of the parties is to create a mortgage."

This is, of course, due to the desire of Muhammadans to avoid any appearance of lending money at interest. Another point referred to in this case was the existence of contrast between the real value of the property and the consideration that passed in money.

A reference was also made by learned

(9) 2 Ind. Cas. 930.

(10) 42 M 407; 50 Ind. Cas. 205; 9 L W 365; 25 M L T 332; (1919) M W N 393; 36 M L J 385.

(11) A I R 1925 Cal. 1151; 90 Ind. Cas. 100; 42 C L J 74.

*Page of 42 M.—[Ed.]

Counsel to *Narasingherji Gyanagerji v. Panuganti Parthasaradhi* (51 I. A. 305) (12). It will be sufficient to refer to the head note which runs as follows :

"Two deeds of the same date were so phrased as to be ostensibly a sale of certain villages with an agreement for a re-sale and re-purchase at the same price at a certain date."

(Two dates 5 and 6 years respectively after the date of sale were stipulated).

"It appeared however that the price named, which was an amount immediately required to prevent a sale under a decree, had been settled without bargaining; it was absurdly low, less even than the property would have realised upon a public sale. A clause in one of the deeds indicated that time was not to be of the essence of the contract for repurchase, and there were other provisions which supported the view that a mortgage was intended: *Held*, that the transaction was a mortgage by conditional sale, and that the purchasers upon a sale in execution of a decree against the mortgagor had a right to redeem."

These same points are mentioned and a reference made to this decision in a recent case of this Court *Fazal Ahmad, Dr. Syed v. Afzul Rahman, Maulvi*, (1937 O. W. N. 1236) (13) a case in which reference has been made to many of the cases discussed in this judgment. It is in the light of the above decisions that we proceed to consider the construction of the two deeds in suit. We take first the circumstances in which the sale-deed Ex. 3 was executed. They appear from the document itself. The opening portion of the sale-deed shows that this property had been mortgaged with possession about 14 years earlier on July 25, 1914, for Rs. 37,000 to *Thakur Jadu Nath Singh*. The mortgage contained three important conditions (1) that the mortgagor had no power to redeem the property until after the expiry of 10 years, (2) that he must redeem it within five years after the expiry of that period, that is within 15 years of the execution of the mortgage, and (3) that in case the mortgagor failed to redeem the property within the prescribed period, it should be entirely foreclosed. The document was in fact an anomalous mortgage. It is to be observed that at the date of execution of Ex. 3, the mortgagor had only about 15 months left in which he must redeem the property. The document goes on to mention that the mortgagee *Jadu Nath Singh* had been guilty of various acts of high-handedness and the mortgage was redeemable after deduction of certain amounts. The object of the execution of

Ex. 3 is said to be to save the mortgagor from the atrocities (high-handedness) of the mortgagee *Jadu Nath Singh*, and it is said that in order to achieve this result the vendor has made the aforesaid *Wajid Ali Sahib* ready to purchase the entire property as the trustee of the *wagf-alal-aulad*. The document goes on to fix the consideration as Rs. 41,000, Rs. 20,500 for each of the two sets of properties mortgaged, the whole of which is left with the vendee for redemption of *Jadhu Nath Singh's* mortgage with the stipulation that whatever amount shall remain as surplus shall be received by the vendor from the vendee by executing a receipt therefor. The vendor assumes liability in case the vendee has to pay anything in excess of Rs. 40,500 (Rs. 41,000 less Rs. 500 expenses of the sale-deed). Condition 2 of this sale-deed provides that the vendee shall bring a suit for redemption claiming set off respecting trees improperly cut by the mortgagee etc., "and all these proceedings shall be taken in consultation with the vendor." It is possible to interpret this consistently with the document being a sale-deed inasmuch as the vendor is to get the surplus remaining over after redemption but it is otherwise more consistent with the document being a mortgage.

Condition 4 lays down that

"after the execution and completion of this deed the entire property noted in Appendices Nos. 1 and 2 with all the external and internal rights and the customary and ordinary dues and all the *zemindari* and proprietary profits and all the appertenances and other things connected with the property, the *sewai* dues and the rent, the cultivated and uncultivated land, waste and *banjar* land, jungle, tanks, wells, *abadi* houses of *ryots*, as well as escheated houses, the personal as well as escheated groves and trees, rights of easement as well as irrigation rights, without the exception of anything or right, have now been transferred in favour of the vendee who has now become the absolute owner in possession of the property in place of me the vendor and he shall be competent to take all proceedings and seek all remedies as a representative of me the vendor."

In this paragraph as in others there is considerable stress laid upon the document being an out and out transfer of the property. It appears to us that in fact the case is over stated and this very paragraph contains indications that the over statement justifies suspicion. In a case of transfer of *zemindari* property by the owner as vendor to a vendee there is no necessity for all this reference to details, and in fact it is not usual to include so many details. The last sentence of this paragraph is particularly suggestive where the transferor says that

"the transferee is to be competent to take all proceedings and seek all remedies as a representative of me the vendor (*ba qaim mukami baiya*)."

(12) 51 I A 305; 82 Ind. Cas. 993; A I R 1924 P C 226; 47 M 729; 20 L W 701; 10 O & A L R 1172; 47 M L J 809; (1924) M W N 915; 40 C L J 481; 27 Bom. L R 4; 29 C W N 246; 26 P L R 18; 23 A L J 161; L R 6 A (P C) 41; 1 O W N 684 (P C).

(13) 1937 O. W. N 1236; 172 Ind. Cas. 536; 10 R O 178; A I R 1938 Oudh 57; 1938 O L R 10.

Really a person who has purchased property by a sale-deed is competent to take all proceedings and seek all remedies thereafter in his own right as the owner of the property, and the emphasis on the transferee being a representative of the vendor seems to suggest that the transferee was regarded as being or being expected to be only a temporary transferee.

The document shows no signs of any bargaining between the vendor and the vendee, and it has to be borne in mind that no consideration whatever passed between the parties except the sum of Rs. 500 said to be paid by the vendee for purchase of stamp and registration expenses. *Prima facie* if this is a sale-deed, the vendor seems to get practically nothing out of it, whereas prior to its execution he was, judging by the facts stated in the deed itself, in a position to institute a suit for redemption against Jadu Nath Singh on payment of a sum considerably less than the original consideration of the mortgage deed, Rs. 37,000. He makes the transfer to Wajid Ali for a purely problematic future sum, the surplus, which will remain after the mortgagee has been paid off. Bearing in mind this fact and the fact that in Ex. A-1, executed simultaneously and held by the Courts below to be inter-connected with Ex. 3, period of 15 years exactly similar to the period of Jadu Nath Singh's mortgage is fixed for repurchase of the property, it seems much more likely that the vendor was seeking by this transaction to exchange one contract for another, the second contract being clearly on easier terms than the first, since it gave the vendor or mortgagor a right to repurchase or redeem the property in two portions, that is in effect of instalments.

Turning to the question of price it has been stated in argument, and this argument has not really been met, that if this was a case of an out and out sale, the price was very inadequate. The price comes to about 16 or 17 times the annual rental. The learned Munsif who tried the case held that a reasonable price would have been 25 or 30 times the annual rental and the purchaser Wajid Ali had in fact himself sold property at 40 times the annual gross rental. The learned Civil Judge has also held that the alleged price of the property was grossly inadequate and this is a finding of fact which is binding upon us in second appeal.

Another point which has to be considered in the present case is that the parties are Muhammadans. There is therefore some amount of presumption in favour of this

being a transaction of mortgage concealed under the cloak of a sale deed with a contemporaneous contract for resale. The learned Civil Judge has also pointed to the fact that the parties were on friendly terms and we have noted the remark in the sale-deed that Wajid Ali had been persuaded to purchase the property. The underlying suggestion is that Wajid Ali had been persuaded to help the vendor and it would have been, we think, of little help to the vendor for Wajid Ali to take an out and out transfer of this property.

The learned Civil Judge has further relied on the circumstance that the alleged vendor has a long period up to 15 years within which to pay back the sale price and recover the property. He seems to think that the vendor could also have a claim to repurchase the property after the expiry of the period of 15 years fixed in the deed. We doubt the soundness of this view but we agree that where a period as long as 15 years is given for repurchase at the exact sale price, the probabilities are in favour of mortgage rather than sale. A period of 15 years is a long period within which there may be considerable rise or fall in the value of the property. The general tendency of landed property until the last few years was for it to rise in value, and it would not be very natural for an out and out purchaser of property to be willing to give it up as much as 15 years later at the price which he had paid for it. A case of this kind is to be distinguished from cases in which the period allowed for repurchase is only 3 or 4 years. Moreover such a condition for repurchase must greatly hamper the vendee in his handling of the property which in theory he has purchased out and out, and one would not expect the purchaser to be content to be under such a handicap for so long a period as 15 years.

We are not greatly impressed with some of the points relied upon by the learned Civil Judge as for example his statement that the vendor is entitled as of right to have the property reconveyed to him. The provision for resale of the property in *khali fasl Jeth* is also consistent both with a transaction of mortgage and a transaction of sale with a condition of repurchase, since that is the most convenient time of the year for effecting such a transfer of ownership.

Lastly the learned Civil Judge has referred to the terms of the deed, with some of which we have dealt already, but we may conveniently refer here to condition 5 which provides

that.

"the liability to pay the present revenue and cesses relating to the property sold shall be on the vendee. After the payment of the revenue and the cesses whatever profit shall remain all that shall be appropriated by the vendee and I, the declarant shall have no concern with any portion of the property sold or the income thereof."

Such a provision was entirely unnecessary if this document was a sale-deed and the very fact of its insertion goes quite a considerable way to support the view that the document does not evidence a transaction of sale.

Taking all these points into consideration we have no hesitation in agreeing with the learned Civil Judge that the documents Exs. 3 and A-1 evidence a transaction of mortgage by conditional sale. It is the only point which has been argued before us, and as the appellant has failed on this point, the appeal necessarily fails and is dismissed with costs.

s.

Appeal dismissed.

CALCUTTA HIGH COURT

Insolvency Jurisdiction No. 114 of 1938

April 12, 1940

PANCKRIDGE, J.

In re KEDARNATH SEN ;

Ex parte, HARSOOKDAS

BALKISSENDAS

Presidency Towns Insolvency Act (III of 1909), ss. 53 (3), 51—Execution sale—Purchase in good faith prior to adjudication order — Purchase, if can be assailed under s. 51—Person relying on s. 53 (3)—Burden is on him to show that he is covered by it.

Sub-s. 3 of s. 53, Presidency Towns Insol. Act, has this effect that if it can be shown that a purchaser in execution proceedings has purchased in good faith prior to the order of adjudication, his purchase cannot be assailed on grounds based on s. 51, Presidency Towns Insol. Act. If a party seeks to validate an otherwise invalid purchase by relying on sub-s. (3), the burden falls on him of showing that he is covered by it. 178 Ind. Cas. 135 (1), relied on, 157 Ind. Cas. 862 (2), not approved.

Mr. K. P. Khaitan, for the Petitioning Creditor.

Mr. P. C. Ghosh, for the Insolvent.

Mr. A. C. Sarkar, for Harsookdas Balkissendas.

Order.—In this case a creditor's petition for adjudication of the insolvent was presented on August 9, 1938. On March 14, 1939, Lort-Williams, J., who was then insolvency Judge, made a consent order which provided that the debtor should be adjudicated an insolvent, but that the order should not be completed, and should stand vacated if the

debtor liquidated the petitioning creditor's claims in certain instalments. The order concluded: "In default of payment of any one instalment within the time allowed, the order will be completed and filed." The debtor failed to make payments as provided by the order and on June 13, 1939, the order was drawn up on the application of the creditor.

It appears that certain judgment-creditors of the insolvent had taken execution proceedings in the Court of the Second Munsif of Hooghly and in the course of those proceedings they had attached certain immovable property in which the insolvent had a share. This property was brought to sale on June 17, 1939, and the plaintiff's son, Ajoy Kumar Sen, was declared the highest bidder for the sum of Rs. 902. The sale has never been confirmed, because before the day fixed for confirmation the Official Assignee initiated proceedings in the execution Court for setting aside the sale. These proceedings are now pending, and I have some doubt whether the Official Assignee has any *locus standi* in the matter, but that is a point on which I need not express an opinion. One of the creditors who is supported by the petitioning creditor has now applied for an order that the sale of the insolvent's properties affected on July 17 (*sic*) be declared void, and that the attachment effected by the judgment-creditors may be released, and that the Official Assignee should be directed to take possession of the property and have the same sold in due course of administration. Under s. 17, Presidency Towns Insol. Act

"On the making of an order of adjudication, the property of an insolvent, wherever situated, shall vest in the Official Assignee and become divisible amongst his creditors and thereafter, except as directed by the Act, no creditor, to whom the insolvent is indebted in respect of any debt provable in insolvency, shall during the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt, or shall continue any suit or other legal proceedings except with the leave of the Court and on such terms as the Court may impose."

Prima facie, therefore, on June 17, 1939, when the insolvent's son was declared the highest bidder, the property which he bought at the sale was no longer the property of the insolvent but had vested in the Official Assignee. Mr. Khaitan, for the petitioning creditors, has submitted that the sale is a nullity because it has never become absolute as contemplated by O. XXI, r. 92 (1), and he has drawn my attention to s. 65, Civil P. C., which provides that

"where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from

the time when the property is sold and not from the time the sale becomes absolute," and he argues that the property does not vest at all until the sale is made absolute, when it vests as from the date on which the purchaser is declared the highest bidder. I express no opinion as to the soundness of this submission, for, in the view that I take it is not necessary to decide that question, and I accordingly assume that there has been an execution sale within the meaning of the Civil P. C. and within the meaning of the Presidency Towns Insol. Act.

The purchaser relies on s. 53 (3), Presidency Towns Insol. Act. Section 53 is the first of a number of sections from ss. 53 to 57, inclusive, grouped under the heading "Effect of Insolvency on Antecedent Transactions." Sub-section (1) provides that where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of execution against the Official Assignee, except in respect of assets realized in the course of execution by sale or otherwise before the date of the order of adjudication, and before he had notice of the presentation of any insolvency petition by or against the debtor. Mr. Ghose, argues, and I think rightly argues, that that does not really throw much light upon the validity of execution sales in cases where the judgment-debtor becomes insolvent, because the sub-section seems to assume that execution has been effective and it merely makes provision as to the destination of the fruits of such execution. The sub-section on which Mr. Ghose relies is sub-s. (3), which is as follows :

"A person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the Official Assignee."

Mr. Sircar for the applicant has argued that that sub-section does not apply to sales taking place subsequent to adjudication, because, when property is purchased or purports to be purchased after adjudication, it is no longer the property of a debtor but the property of an insolvent, and he has referred to various sections in the Act, from the language of which he draws the conclusion that when the Act mentions a debtor it intends thereby to indicate a person, who, although possibly insolvent in the popular sense of not being able to meet his financial obligations, has not yet been adjudicated. There is certainly a good deal of force in that argument, because in sections such as ss. 13, 14 and 15 the word "debtor" clearly contemplates a person who has not yet had an adjudication order made against him. On the other hand s. 17 which deals with the state of things prevailing after the order of adjudication refers

not to the debtor but to the insolvent. Mr. Sircar's view has also some authority in its favour, because this point was directly discussed by the Madras High Court in *Mallikarjuna Rao v. Official Receiver, Kistna* (1), where the learned Judges came to the conclusion that the sub-section which I am considering can only refer to cases of execution sales held before adjudication, and cannot, operate in cases of sales held after adjudication, their reasons being that the sub-section comes in a portion of the Act which deals with the effect of insolvency on antecedent transactions, and by insolvency is meant adjudication. They also were of opinion that after adjudication the property vested in the Official Assignee, and was no longer the judgment-debtor's property available for execution. Mockett, J., deals at some length with the distinction between "debtor" and "insolvent" to which I have referred. The point there was directly in issue, and in my opinion the case has more relevancy than *Dinesh Chandra v. Jahanali Biswas* (2), in which there are observations which are not reconcilable with the Madras authority.

I am therefore disposed to hold that sub-s. 3 of s. 53 has this effect that if it can be shown that a purchaser in execution proceedings has purchased in good faith prior to the order of adjudication, his purchase cannot be assailed on grounds based on s. 51, Presidency Towns Insol. Act, which has the effect of antedating the insolvency in various circumstances which it is not necessary to discuss. However be that as it may, I am of opinion that on the facts sub-s. (3) affords no protection to the purchaser. It appears to me that if a party seeks to validate an otherwise invalid purchase by relying on sub-s. (3) the burden falls on him of showing that he is covered by it. In this case the parties being father and son, one is entitled to draw the strongest inference that the purchaser was well aware of his father's circumstances when he made the purchase. He admits that he knew that his father was in financial difficulties, and he must be taken to have known that his father had committed an act of insolvency by permitting the attachment of his property in execution of a decree to subsist. It would need the most cogent evidence on his part to convince me that he was not either perfectly well aware that insolvency proceedings were pending against his father, or at any rate that he did not deliberately shut

(1) I L R (1938) Mad. 1063; 178 Ind. Cas. 135; A I R 1938 Mad. 449; (1938) 1 M L J 471; (1938) M W N 201; 47 L W 705; 11 R M 408.
(2) 62 C 457; 157 Ind. Cas. 862; A I R 1935 Cal. 503; 39 C W N 424; 8 R C 130.

his eyes to the probability that there were such proceedings. In these circumstances I hold that the purchase was not in good faith, and I think there is every reason to suppose that it was made in his father's interest, though possibly it would not be strictly accurate to describe the transaction as a *benami* transaction. In these circumstances the application succeeds. There will be an order in terms of the notice of motion. The applicant will add the costs to his claim.

D.

*Application allowed.***OUDH CHIEF COURT**

Civil Reference No. 13 of 1940

April 24, 1941

YORKE AND BENNETT, JJ.

SURJAN SINGH—APPLICANT

versus

MASHAL SINGH—OPPOSITE PARTY

Court Fees Act (VII of 1870), Sch. I, Art. 1, s. 7 (ix)—U. P. Agriculturists' Relief Act (XXVII of 1934), ss. 12, 23—Application for redemption—Decree on payment of amount due under mortgage and other deeds of further charge executed by mortgagor—Appeal contesting liability under deeds of charge—Valuation of subject-matter of appeal—Court-fee payable—Civil Procedure Code (Act V of 1908), s. 35—Special costs—Point unnecessarily contested and time of Court and Crown Counsel wasted—Special costs may be allowed.

Where on an application under s. 12, U. P. Agri. Relief Act, for the redemption of a mortgage the Court passes a decree for redemption on payment of the amount due under the mortgage set up in the application and also under certain deeds of further charge executed by the mortgagor and an appeal has been preferred by the applicant against the decree contesting his liability for the payment of dues under the deeds of further charge, the value of the subject-matter of the appeal is the difference between the amount decreed by the trial Court and the amount for which the appellant admits his liability, and the appellant is liable to pay *ad valorem* court-fee on the amount of difference under Art. 1, Sch. I, Court Fees Act.

Where a point as to the court-fees has been quite unnecessarily and gratuitously contested and a considerable amount of the time of the Court and of Counsel for the Crown wasted on a very petty matter, special costs may be allowed under s. 35 of the Civil P. C.

C. Ref. made by the Chief Inspector of Stamps and Govt. Officer, U. P. at Allahabad.

Mr. K. N. Tandon for the Applicant.

Mr. H. K. Ghose, The Assistant Govt. Advocate, for the Crown.

Judgment.—This is a reference by the Chief Inspector of Stamps, U. P., under the provisions of s. 6-B (1) of the Court Fees Act as modified up to date by the United Provinces Court Fees (Amendment) Act, 1938.

The reference has arisen in the following circumstances :

One Surjan Singh filed an application under the provisions of s. 12 of the Agri. Relief Act for redemption of a mortgage on payment of Rs. 10 or whatever amount might be fixed by a Court. Among the defences taken was that there were two deeds of further charge executed by the mortgagors still subsisting which must be paid off before the applicant should obtain a decree for redemption. The Assistant Collector who decided the case held that these deeds had been executed and constituted deeds of further charge. He gave a decree for redemption on payment within one month of a sum of Rs. 2,121-5-6 made up of Rs. 271 due under the first usufructuary mortgage and Rs. 901-8 and Rs. 948-13-6 due under the two deeds of further charge dated June 5, 1879, and June 13, 1882.

Against this decree the applicant filed an appeal which was worded in the most peculiar fashion. He said that he was appealing against the two alleged deeds of further charge and was therefore paying a court-fee of Rs. 12-12 on the principal amount of these two deeds, namely, Rs. 100 and Rs. 64-5 total Rs. 164-5. His chief contention in the grounds of appeal was that the trial Court had erred in holding that these deeds of further charge and that the appellant was not entitled to redeem the property without paying the entire amount under these two deeds. He prayed that the appeal be allowed with costs and justice done. The learned Judge should undoubtedly have called upon the appellant to amend his prayer, and had he done so, it would at once have become clear that what the appellant was asking for was that the decree of the trial Court should be varied in this way that the claim for redemption should be decreed on payment of a sum of Rs. 271 only instead of the sum of Rs. 2,121-5-6 found by the trial Court.

The learned District Judge had to consider on March 29, 1940, the report of the Inspector of Stamps and he decided that the appellant was liable to pay court-fee on Rs. 485-5 in appeal. It is not apparent how the learned District Judge arrived at this figure but the point is not important. The Court proceeded subsequently on August 14, to decide the appeal, the difference between the court-fee due of Rs. 164-5 and that due on Rs. 485-5 having been made good by the appellant. Thereafter the reference made by the Chief Inspector of Stamps was received in this Court and has now come up for decision.

On behalf of the Chief Inspector and in support of the reference the learned Assistant Govt. Advocate has pointed to the deci-

sion of a Bench of the Allahabad High Court in *Anand Gir v. Ram Nazar Chaube* (1937 A. L. J. R., 1173)(1). In that case a mortgagor made an application under s. 12 of the Agri. Relief Act for the redemption of his mortgage on payment of a sum of Rs. 375. The Assistant Collector, on an inquiry made under the provisions of the Act, decided that the amount payable was Rs. 1,101 and directed the deposit of the balance within 15 days. It was pleaded on an appeal to the District Judge that the mortgagor was entitled to redeem on payment of Rs. 375 only. A court-fee of annas 12 was paid on the memorandum of appeal, regarding it presumably as an appeal from an order. It was held by the Bench that the memorandum of appeal does not come within the meaning of Art. 11 of the Second Schedule of the Court Fees Act, and therefore it must come within the provisions of Art. 1 of the First Schedule and consequently the court-fee had to be calculated *ad valorem*. It was held further that the value of the subject-matter of the appeal is the difference between Rs. 101 and Rs. 375.

The learned Assistant Govt. Advocate also referred to several other cases but in the main he very rightly bases his case on the Court Fees Act itself. Article 2-B of Sch. I, of the Court Fees Act provides that on a memorandum of appeal filed under s. 23, of the United Prov. Agri. Relief Act, 1934, the proper fee is the same fee as would be leviable on a memorandum of appeal under Art. 1. Article 1 provides that on a memorandum of appeal, not otherwise provided for in this Act, presented to any Civil Court an *ad valorem* court-fee is to be paid on the amount or value of the subject-matter in dispute and graded scale is provided according to the amount or value of the subject-matter. There cannot be the least doubt that in the present case the subject-matter in dispute is the difference between the sum of Rs. 2,121-5-6 and the sum of Rs. 271.

Learned Counsel for the appellant Surjan Singh has sought to argue that he is not in this appeal raising any question as to the amount which has been decreed on the basis of these two deeds of further charge, but he is contesting, he says, his liability under these two deeds and he contends therefore that the proper court-fee is that which would be paid in a suit for redemption falling under the provisions of s. 7 (ix) of the Court Fees Act. He has relied in support of this contention on a case of the Judicial Commis-

sioner's Court, *Ram Phal v. Deputy Commissioner, Bahraich, for Payagpur Estate* (12 O. C., 130)(2). That was a case in which A had executed an usufructuary mortgage of his property. After A's death his widow B executed several deeds of further charge. On the death of B the reversionary heirs brought the present suit to redeem the original mortgage. The Court of first instance held the plaintiff liable for payment of the sum due on two of the deeds of further charge also. The plaintiff appealed on the ground that he was not liable to redeem the two deeds of further charge. He valued his appeal at the amount due on the original mortgage and paid court-fee thereon. It was held by Mr. Chamier, J. C. and Mr. Tudball, A. J. C., that the court-fee paid being the same as that paid on the plaint which entitled him to an adjudication on his claim and there being no dispute as to the amount due on the subsequent deeds, the court-fee paid was sufficient.

Learned Counsel, however, seems to have forgotten that Mr. Chamier himself sitting with Mr. Evans to decide the case of *Basudeo Ban (Mahant) v. Sri Krishan Gir* (13 O. C., 62) (3), remarked about the case of *Ram Phal* (the names of which were given incorrectly as *Jawahir Singh v. Rajendra Bahadur*, though the reference was otherwise correct) :

"My notes of that case do not show that any authorities were cited by Counsel and it seems that we dealt with the case as if the question was not covered by authority. After hearing further arguments and considering the authorities to which our attention has been directed I am of opinion that that case should not be followed. It is contrary to the current of authority both in this Court and in the Allahabad High Court and is likely to cause confusion."

We find no force in the argument put forward by learned Counsel for the appellant Surjan Singh that he was seeking only to get the finding about these two deeds of further charge set aside. What he was seeking was a reduction of the amount on payment of which he could redeem the property from Rs. 2,121-5-6 to Rs. 271. As the Chief Inspector has very rightly said he was challenging the amount of Rs. 1,850-5-6 and that was the amount or value of the subject-matter in dispute, and he was bound to pay *ad valorem* court-fee under the provisions of Art. 1 of Sch. I on that amount.

We accordingly accept the reference and make a declaration under the provisions of s. 6-B (2) of the Court Fees Act that the proper court-fee has not been paid on the memorandum of appeal, in Civil Appeal No. 53

(1) (1937) A L J 1173; 173 Ind. Cas. 50; A I R 1938 All. 14; I L R (1937) All. 949; 1937 R D 575; 1938 A L R 70; 10 R A 456.

(2) 12 O C 130; 2 Ind. Cas. 600.

(3) 13 O C 62; 5 Ind. Cas. 941.

of 1939 of the Court of the District Judge. Hardoi, in *re: Surjan v. Mashal Singh* and that the amount of deficiency is Rs. 130-14-0 being the difference between a court-fee of Rs. 170 payable on Rs. 1,850-5-6 and Rs. 39-2-0 actually paid.

We think that the Govt. is entitled to the costs of this reference. The amount of costs ordinarily taxable for the fee of Counsel is only Rs. 4-14-0 at most but as the point has been quite unnecessary and gratuitously contested and a considerable amount of the time of the Court and of Counsel for the Crown wasted on a very petty matter, we allow special costs of Rs. 50 under s. 35 of the Civil P. C.

s. Order accordingly.

ALLAHABAD HIGH COURT

Civil Revision No. 279 of 1940

January 20, 1941

COLLISTER, J.

Mst. Bibi RAM PIARI—APPLICANT

versus

DAYA SHANKER—OPPOSITE PARTY

Contract Act (IX of 1872), s. 23—U. P. Stayed Arrears of Rent (Remission) Act (XVIII of 1939)—U. P. Stay of Proceedings (Revenue Courts) Act (IV of 1937)—Judgment-debtor executing bond in favour of decree-holder in consideration of latter refraining from executing his decree for arrears of rent, before passing of U. P. Acts of 1937 and 1939—Consideration is lawful—Subsequent passing of those acts does not make it unlawful—U. P. Act (XVIII of 1939), if applies to suit on contract in Civil Court—U. P. Acts of 1937 and 1939, are not connected with arrears irrecoverable at law.

Where a judgment-debtor has executed a bond in favour of the decree-holder before the passing of the U. P. Stay of Proceedings (Revenue Courts) Act (IV of 1937) and U. P. Stayed Arrears of Rent (Remission) Act (XVIII of 1939), in consideration for the decree-holder refraining from execution of his decree for arrears of rent which he could otherwise have lawfully taken out. There is nothing unlawful within the meaning of s. 23, Contract Act, in the consideration or object of that agreement and it cannot be affected by subsequent legislation barring a suit in the Revenue Court for recovery of arrears of rent.

The intention of the Legislature in enacting U. P. Stayed Arrears of Rent (Remission) Act, was to remit arrears of rent which had accrued prior to *Rabi 1344*, by barring their recovery in the Revenue Courts. The provisions of the Act are, therefore, inapplicable to a suit on a contract in a Civil Court unless they can be indirectly invoked by means of some other provision of the law.

The U. P. Acts IV of 1937 and XVIII of 1939, are not concerned with arrears of rent which are irrecoverable at law.

C. R. against an order of the Small Cause Court, Etawah, dated February 27, 1940.

Mr. S. N. Seth, for the Applicant.

Mr. M. L. Chaturvedi, for the Opposite Party.

Order.—This is a plaintiff's revision under s. 25, Small Cause Courts Act, from a decree dismissing her suit. The suit was for recovery of a sum of money on a bond dated July 4, 1934 which had been executed by the opposite party in favour of the applicant. The applicant had obtained a decree for arrears of rent against the opposite party, which the latter was apparently unable to pay; and by agreement between the parties a bond was executed under the terms of which the opposite party agreed to pay the decretal amount within four years in eight instalments. Four of these instalments were duly paid, but the applicant was compelled to institute a suit for recovery of the remaining four instalments. The suit had been dismissed by the Court below. The view of the learned Judge is that by the subsequent passing of Acts IV of 1937 and XVIII of 1939 the consideration for the bond has failed, the intention of the Legislature being that all rents prior to *Rabi 1344* should be remitted.

Section 2 of Act IV of 1937 provided *inter alia* that all suits for recovery of arrears of rent which had accrued prior to *Rabi 1344*, instituted while the aforesaid section was in force, should be stayed for such period as the section remained in force. Section 8 of Act XVIII of 1939 enacts *inter alia* that all suits for recovery of arrears of rent which had been stayed under the provisions of Act IV of 1937 shall be dismissed. The last mentioned Act received the assent of the Governor on January 30, 1940 and the suit out of which this revision arises was instituted on January 24, 1940 while Act IV of 1937 was in force. Act IV of 1937 is entitled "U. P. Stay of Proceedings (Revenue Courts) Act" and Act XVIII of 1939 is entitled "U. P. Stayed Arrears of Rent (Remission) Act," and both these Acts relate to suits and proceedings in the Revenue Courts. The intention of the Legislature in enacting Act XVIII of 1939 was to remit arrears of rent which had accrued prior to *Rabi 1344* by barring their recovery in the Revenue Courts. The provisions of the Act are therefore inapplicable to a suit on a contract in a Civil Court unless they can be indirectly invoked by means of some other provision of the law. Learned Counsel for the applicant relies on s. 23, Contract Act, which provides that "the consideration or object of an agreement is lawful unless" *inter alia* "it is of such a nature that, if permitted, it would defeat the provisions of any law."

The contract was entered into, as I have already said, on July 4, 1934, several years

before these two Acts were passed, and it cannot be said that the object or consideration of the agreement was at that time of such a nature as would defeat the provisions of any law. The applicant was perfectly at liberty to execute his decree in the Revenue Court in 1934; but, in lieu of doing so, he allowed the original contract to be novated by a bond, which provided for payment by eight instalments over a period of four years. The decree thus became unenforceable, a fresh contract having taken its place. Under this contract the opposite party executed a bond in consideration for the applicant refraining from execution of his decree, which he could otherwise have lawfully taken out. There was nothing unlawful within the meaning of s. 23, Contract Act, in the consideration or object of that agreement and I do not see how it can possibly be affected by subsequent legislation barring a suit in the Revenue Court for recovery of arrears of rent. Moreover, if the contract had not been novated in 1934, an application for execution would ordinarily have been barred by limitation by September 21, 1937, the date on which Act IV of 1937 came into force; and the Acts of 1937 and 1939 are not concerned with arrears of rent which are irrecoverable at law. In my judgment the view taken by the learned Judge is incorrect. I accordingly allow this application and set aside the decree of the Court below and I decree the suit with costs in both Courts.

s.

Application allowed.

PATNA HIGH COURT

Appeal from Appellate Decree No. 339
of 1940

March 24, 1941

AGARWALA, J.

JAGDISH CHANDRA DEO DHABAL
DEB—APPELLANT

versus

BISESWAR LAL AGARWALLA

AND OTHERS—RESPONDENTS

Registration Act (XVI of 1908), s. 17 (1) (d)—Compromise decree creating lease must be registered—Estoppel—Consent decree creates estoppel—Evidence Act (I of 1872), s. 114 (d)—Presumption—Court of fact cannot be compelled to raise presumption in favour of any party—Landlord and tenant—Rent, suit for—Held on facts that the lease was not valid—Compromise decree in previous ejectment suit did not operate as res judicata—Defendants were not estopped by reason of previous rent suit from alleging that plaintiff was not their landlord—Estoppel—Res judicata.

A decree embodying a compromise, purporting to grant a lease within the meaning of cl. (d) of sub-s. (1), s. 17,

Regis. Act is not exempted from registration. 136 Ind. Cas. 54 (3), referred to. [p. 430, col. 1.]

In the case of a consent decree the parties themselves decide the issues in dispute between them in the litigation in which that decree is made and they are estopped from subsequently challenging the decision at which they arrived. [p. 430, col. 2.]

The presumption mentioned in s. 114 (d), Evi. Act is a permissive presumption. A Court of fact cannot be compelled to raise the presumption mentioned in that section in favour of either party. [p. 431, col. 1.]

In 1914, a Padhan of certain estate granted a lease of certain land to one G. In the following year G settled plot No. 1618 with the father of the defendants by means of a registered *patta* and in 1925 the defendants' father executed a *kabuliyat* in respect of plot No. 1618 in favour of the Receiver who was then in possession of the estate. In 1929, the plaintiff who was the proprietor of the estate sued the defendants for possession of this plot alleging that neither the Padhan nor the Receiver had any right to settle the land. The suit was compromised on August 23, 1930. It was agreed that the defendants should retain possession not only of plot No. 1618 but also of the other two plots on the terms mentioned in a *kabuliyat* executed by the defendants in favour of the plaintiff on August 19, 1930. This *kabuliyat* evidenced the grant of the land for a term of 20 years but was not registered. In 1931, the plaintiff sued G to eject him from the land leased to him in 1914 including plot No. 1618. The suit was eventually dismissed by the High Court on the ground of limitation. In the meanwhile, however, in 1934 and 1935, the plaintiff had obtained rent decrees against the defendants on the basis of the *kabuliyat* of 1930. As a result of the dismissal of the plaintiff's suit, G served a notice on the defendants calling upon them to take a fresh settlement of plot No. 1618 from him or to quit this plot. In 1936, the defendants were recorded as tenants under G in the Record of Rights. In 1937 the plaintiff sued the defendants for rent of plot No. 1618 and other two plots:

Held, (i) that the *kabuliyat* of 1930 was not by itself sufficient to create a valid lease as there was no corresponding *patta* executed by the plaintiff. 136 Ind. Cas. 54 (3), relied on. [p. 430, col. 1.]

(ii) that the compromise of 1930 did not constitute a valid lease but even if it constituted a lease it was rendered inadmissible in evidence by s. 49, Regis. Act for the purpose of proving the lease for creating any interest under it as it was not registered; [p. 430, col. 2.]

(iii) that as the defendants compromised the suit of 1929 by accepting a fresh settlement from the plaintiff it may be safely assumed that they accepted the position that the settlements of 1915 and 1925 did not confer upon them any right to retain the land as against the plaintiff; but the question whether the compromise in which that suit ended constituted a valid lease in favour of the defendants was not and could not be the subject-matter of decision in the litigation of 1929 either by the Court or by the parties themselves, and did not operate as *res judicata* on the question which arose in this present litigation, namely, whether the relationship of landlord and tenant existed between the plaintiff and the defendants; [p. 430, col. 2; p. 431, col. 1.]

(iv) that the rent decrees of 1934 and 1935 did not preclude the defendants from alleging that the relationship of landlord and tenants did not exist between the plaintiff and themselves. [p. 431, col. 1.]

A. from a decision of the Special Subordinate Judge of Chaibassa, dated February 24, 1940.

Messrs. B. C. De and Ravaneshwar Misra, for the Appellant.

Mr. Narendra Nath Roy, for the Respondents.

Judgment.—This is an appeal by the plaintiff from concurrent decisions of the Courts below dismissing his suit for rent of revisional survey plots Nos. 1618, 1618/1953 and 1621 for the years 1342 to 1344. The material facts are that this land falls within the Dalbhum estate of which the plaintiff is the present proprietor. In 1914, a Padhan of the estate granted a lease of certain land to one Gaya Prasad. In the following year Gaya Prasad settled plot No. 1618 with the father of the defendants by means of a registered *patta* and in 1925 the defendants' father executed a *kabuliyat* in respect plot No. 1618 in favour of the Receiver who was then in possession of the Dalbhum estate. In 1929, the plaintiff sued the defendants for possession of this plot alleging that neither the Padhan nor the Receiver had any right to settle the land. The suit was compromised on August 23, 1930. It was agreed that the defendants should retain possession not only of plot No. 1618 but also of the other two plots whose numbers I have given above, on the terms mentioned in a *kabuliyat* executed by the defendants in favour of the plaintiff on August 19, 1930. This *kabuliyat* evidenced the grant of the land for a term of 20 years. In 1931, the plaintiff sued Gaya Prasad to eject him from the land leased to him in 1914 including plot No. 1618. The suit was eventually dismissed by this Court on July 15, 1935, on the ground that it was barred by limitation. In the meanwhile, however, in March, 1934, and February, 1935, the plaintiff had obtained rent decrees against the defendants on the basis of the *kabuliyat* of 1930. As a result of the decision of this Court dismissing the plaintiff's suit, Gaya Prasad served a notice on the defendants calling upon them to take a fresh settlement of plot No. 1618 from him or to quit this plot, in 1938, the defendants were recorded as tenants under Gaya Prasad in the Record of Rights. The present suit was instituted in 1937. The Courts below have held that the plaintiff is not entitled to the rent of plot No. 1618 as the defendants had been evicted therefrom by title paramount. As the *kabuliyat* of 1930 provided a consolidated rent for all the three plots covered by it the Courts below have not allowed the plaintiff rent for the other two plots either.

The first question that falls for consideration is whether the defendants are estopped from denying the plaintiff's title to plot No. 1618 by reason of the provisions of s. 116 of the Evi. Act. That section debars a tenant

of immovable property, during the continuance of the tenancy, from denying that the landlord had title to the demised property at the beginning of the tenancy. If the tenancy is still continuing the estoppel must operate provided that a valid tenancy was created in 1930. The first question to be considered, therefore, is whether the relationship of landlord and tenant alleged to exist between the plaintiff and the defendants has been terminated by eviction of the defendants by title paramount. The Courts below have taken the view that in the circumstances that have happened, namely, the dismissal of the plaintiff's suit against Gaya Prasad, the defendants have in law been evicted from plot No. 1618. The Courts below have relied on the decision in *Alaga Pillai v. Ramaswami Thevan* (1), in which it was held that eviction, for the purpose which I am considering need not be by actual dispossession of the tenant; but if the true owner is armed with a legal process for eviction which cannot be lawfully resisted the threat to put him out of possession amounts in law to eviction even though the tenant is not actually put out of possession. In that case it is to be observed, however, that the true owner had armed himself with the necessary notice under s. 7 of the Mad. Land Encroachment Act, 1905, in the face of which notice the tenant could not have lawfully resisted eviction. The case, therefore, cannot be relied upon for deciding the question which arises in the present appeal. The next case relied upon is *Ram Chandra Chatterji v. Promotha Nath Chatterji* (2), in which it was held that it is not necessary for the tenant actually to go out of possession for the purpose of being evicted by title paramount, if, upon a claim being made by the owner of the paramount title, the tenant attorns to him or enters into another arrangement for holding under him. In the present case, the only evidence that the defendants attorned to Gaya Prasad or entered into any new arrangement for holding under him, subsequent to the compromise of 1930, is that the survey authorities have made an entry in the Record of Rights that the defendants are holding plot No. 1618 under Gaya Prasad. It is, I think arguable that the entry in the Record of Rights raises a presumption that the defendants are holding under Gaya Prasad since the date of the entry in 1936. But as the defendants have not averred that they have attorned to Gaya

(1) A I R 1926 Mad. 187; 91 Ind. Cas. 1024; 49 M L J 742; (1925) M W N 878; 23 L W 296.

(2) 35 C L J 146; 63 Ind. Cas. 754; A I R 1922 Cal. 237.

Prasad, or entered into any new arrangement with him since 1930, it may be considered doubtful whether the entry in the Record of Rights can be relied on for this purpose. I propose, therefore, to discuss the second question which arises in this case, namely, whether there has been a valid lease by the plaintiff to the defendants in consequence of the *kabuliyat* or compromise of 1930. In view of the decision of this Court in *Sachindra Mohan Ghose v. Ramjash Agarwala* (3), it is quite clear that the *kabuliyat* of August 19, 1930, is not by itself sufficient to create a valid lease as there was no corresponding *patta* executed by the plaintiff.

It is contended on behalf of the plaintiff-appellant, however, that the compromise entered into by the parties in 1930 constitutes a valid lease and that by reason of the provisions of s. 17 (2) (vi) of the Regis. Act this compromise did not require registration. I am unable to accept this contention. Under s. 107 of the T. P. Act a lease for a term of years can be created only by a written document. Section 17 (1) of the Regis. Act requires that certain documents shall be registered. These documents are divided into five groups enumerated in cls. (a) to (e) of s. 17 (1). Clause (d) refers to leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent. It is clear, therefore, that a lease for 20 years requires registration. Sub-s. (2) of s. 17, however, provides certain exceptions. Among those exceptions is that mentioned in cl. (vi) namely, any decree or order of a Court. The exceptions mentioned in sub-s. (2), however, apply only to the classes of documents mentioned in cls. (b) and (c) of s. 17 (1) and do not apply to leases which are mentioned in cl. (d) of s. 17 (1). If it is necessary to refer to any authority at all on this point it is sufficient to refer to *Sachindra Mohan Ghose v. Ramjash Agarwala* (3), where it was held that all decrees and orders are not excluded from compulsory registration by reason of the provisions of s. 17 (2) (vi) but only those are excluded which partake of the character of documents mentioned in cls. (b) and (c) of sub-s. (1) and that, therefore, a decree embodying a compromise purporting to grant a lease within the meaning of cls. (d) of sub-s. (1) is not exempted from registration. Fazl Ali, J. who delivered the judgment in that case referred to the attempts which had been made from time to time to bring leases created

by compromise within cl. (vi) of s. 17 (2) and observes,

"It appears to me, therefore, that it is now too late to contend that a decree, even though it operates to create a lease, does not require registration under s. 17 of the Regis. Act."

I must hold, therefore, that if the compromise of 1930 constituted a lease it is rendered inadmissible in evidence by s. 49 of the Regis. Act for the purpose of proving the lease or creating any interest under it.

It is contended, however, on behalf of the appellant, that even if this be so, the compromise operates as *res judicata* between the plaintiff and the defendants as to the relationship of landlord and tenant. Cases were referred to in which it has been held that although, in the case of a consent decree, nothing is decided by the Court so as to attract the provisions of s. 11 of the Civil P. C., yet such a decree operates as an estoppel to the same extent as a decision of the Court does in a contested litigation. This proposition is of course not disputed. It may be conceded that in the case of a consent decree the parties themselves decide the issues in dispute between them in the litigation in which that decree is made and that they are estopped from subsequently challenging the decision at which they arrived. Applying that principle to the present case the position is that the question on which the parties were at issue in the suit of 1929 was whether the defendants in that suit were entitled to retain possession of plot No. 1618 by reason of the settlement of it with them by the Padhan in 1915 or by the Receiver in 1925. As the defendants compromised that suit by accepting a fresh settlement from the plaintiff it may be safely assumed that they accepted the position that the settlements of 1915 and 1925 did not confer upon them any right to retain the land as against the plaintiff; but the question whether the compromise in which that suit ended constituted a valid lease in favour of the defendants was not and could not be the subject matter of decision in the litigation of 1929 either by the Court or by the parties themselves. Much stress, however, was laid on the decision in *Secretary of State for India in Council v. Atteendranath Das* (4). The head-note in that case is as follows:

"A decree passed by consent is as effective a bar to a subsequent suit as one passed on contest, not only with reference to the conclusions arrived at in the previous suit, but also with regard to every step in the process of reasoning on which the said conclusions are founded. By 'every step in the process of reasoning' is meant the findings on the essential facts on

(3) A I R 1932 Pat. 97; 136 Ind. Cas. 54; 12 P L T 871; 11 Pat. 98; Ind. Rul. (1932) Pat. 54.

(4) 63 C 550.

which the judgment or the ultimate conclusions are founded."

As I have already indicated the conclusion which must be taken to have been arrived at in the litigation of 1929 is that the defendants were not entitled to retain possession of plot 1618 by virtue of the settlements of 1915 and 1925. Neither the *kabuliyat* of 1930 nor the compromise of that year can be described as a step in the process of reasoning by which this conclusion was reached. In my view, therefore the *kabuliyat* of 1930 did not constitute a valid lease in favour of the defendants, the compromise of the year is not admissible for the purpose of proving a lease to the defendants, and does not operate as *res judicata* on the question which arises in this litigation, namely, whether the relationship of landlord and tenant exists between the plaintiff and the defendants.

The learned Advocate for the plaintiff-appellant relies on the rent decrees of 1934 and 1935 as constituting *res judicata* on the relationship of landlord and tenants between the plaintiff and the defendants. He referred to the decisions in *Hiranmoy Kumar Shaha v. Ramjan Ali Diwan* (5) *Raj Kumar Boy v. Alimuddin* (6) and *Muhammad Gauhar Ali v. Samiruddin Sheikh* (7). The effect of these decisions is that a decree in a suit for rent is conclusive between the parties, that the relationship of landlord and tenant existed at the time that the decree was passed and that by reason of the presumption mentioned in s. 114 (d) of the Evi. Act it may be presumed that that relationship continued until it is shown by evidence that it discontinued. The presumption mentioned in s. 114 (d) is a permissive presumption. A Court of fact cannot be compelled to raise the presumption mentioned in that section in favour of either party, and in the present case the Courts below have not raised the presumption in favour of the plaintiff. Furthermore, the entry in the Record of Rights of 1936 showing the defendants as tenants under Gaya Prasad is a piece of evidence pointing to the contrary conclusion. I, therefore, hold that the rent decrees of 1934 and 1935 do not preclude the defendants from alleging that the relationship of landlord and tenants does not now exist between the plaintiff and themselves.

(5) 20 C W N 48; 29 Ind. Cas. 694; A I R 1916 Cal. 357.

(6) 17 C W N 627; 16 Ind. Cas. 911.

(7) 12 C W N 32.

In the result my conclusion is that the suit has been rightly decided by the Courts below and the appeal must be dismissed with costs.

s.

Appeal dismissed.

BOMBAY HIGH COURT

Cross-First Appeals Nos. 204 and 275 of 1937 and Civil Applications Nos. 1040 of 1937 and 9 of 1939

November 8, 1940

BEAUMONT, C. J. AND SEN, J.

RAMABAI SHRINIWAS NADGIR—

APPELLANT

versus

GOVERNMENT OF BOMBAY—

RESPONDENT

Civil Procedure Code (Act V of 1908), s. 53—Watan property—Whether property inherited by son—Evidence Act (I of 1872), s. 21—Admission by party in pleading in one suit—Whether binding on him in other suit.

Watan property is not to be regarded as property inherited by the son, so as to expose it to liability to execution under s. 53, Civil P. C. 151 Ind. Cas. 151 (1), 151 Ind. Cas. 207 (2) and *Jaggivandas v. Imdad Ali* (3), relied on.

A party is not bound by an admission in his pleading except for the purposes of the suit in which the pleading is delivered. It frequently happens that a party is prepared in a particular suit to deal with the case on a particular ground and to make an admission, but that admission is not binding in any other suit, and certainly not for all time.

Messrs. J. C. Shah (in No. 204) and R. A. Jahagirdar, The Govt. Pleader (in No. 275), for the Appellant.

Mr. R. A. Jahagirdar, The Govt. Pleader (in No. 204), for the Respondent.

Messrs. K. R. Bengeri, H. C. Coyajee and J. C. Shah (in No. 275), for Respondents Nos. 1 and 2, respectively.

Beaumont, C. J.—These are two cross-appeals against an order made by the First Class Subordinate Judge of Dharwar. An order was made by the Privy Council in certain litigation that costs should be paid by the defendants, who were the Secretary of State for India, and defendants Nos. 1 to 3 in this suit, or their predecessors. The Secretary of State for India ultimately paid those costs in full, and then he filed this suit to recover contribution from his co-defendants, and a decree was passed on November 26, 1934, directing contribution. In the case of defendant No. 3, it had been stated by an amendment of the plaint that the original defendant had died, and his son, defendant No. 3, was held to be liable to the extent of the property he got inherited from his father.

The Secretary of State for India then took out the present *darkhast* in order to execute the decree against the three defendants. The contention of all the defendants was that the lands sought to be attached were *watan* lands, and that they could not be attached by virtue of the protection afforded under s. 13, Watan Act.

As against defendant No. 1, the learned Judge held, in view of certain admissions made by that defendant in the witness-box, that the lands which were sought to be attached were not *watan* lands. In the case of the other two defendants, he held, basing his decision on the Record of Rights, that the lands were *nadgirki watan* lands. I am not quite sure whether he merely meant to hold that the lands of defendant No. 1 were not shown on the Record of Rights as *nadgirki watan* lands, or whether he meant to hold that the admission of defendant No. 1 would rebut the presumption arising from the entry in the Record of Rights that they were *nadgirki watan* lands. I am rather disposed to think that there is no distinction between the lands held by defendant No. 1 and the lands held by defendants Nos. 2 and 3. However, having held that the lands of defendants Nos. 2 and 3 were *watan* lands, it was then necessary to establish that they had been assigned as remuneration for services under s. 23, Watan Act, because, unless they had been so assigned, the protection afforded by s. 13 does not arise.

There is really no evidence on the record to show that any of these lands had been assigned under s. 23 as reward for services. The learned Judge, in the case of defendants Nos. 2 and 3, held that Govt. were bound by an admission in their written statement filed in the original suit of 1913 in which the costs were incurred, and that by that admission Govt. had acknowledged that the lands had been assigned as reward for services; but the learned Judge's view on that point is clearly wrong. A party is not bound by an admission in his pleading except for the purposes of the suit in which the pleading is delivered. It frequently happens that a party is prepared in a particular suit to deal with the case on a particular ground and to make an admission, but that admission is not binding in any other suit, and certainly not for all time. Govt. may have known much less about the position in 1913 than they know now. If they had pleaded erroneously in the suit of 1913 and had discovered the error in time, they could have amended the pleading, and it would be a strange thing to hold that, after the suit had

been disposed of, and the chance to amend the pleading had gone, Govt. were bound for all time by their admission. In my opinion there is no evidence on record that the lands of any of the defendants had been assigned by the Collector under s. 23, Watan Act and that, therefore, the protection afforded by s. 13 came into operation.

But, in the case of defendant No. 3, there is a separate defence. As I have pointed out, the decree sought to be executed provides that he is liable to the extent of the property he got inherited from his father, and of course, the executing Court is bound by the decree. Therefore if he inherited this *watan* property from his father, that property is liable. But on the authority of the cases, to which the learned trial Judge referred, *viz.* *Vithaldas v. Shrinivasrao* (1), *Vishvanath v. Keshavbhat* (2), and *Jaggivandas v. Imdad Ali* (3), it is, I think, established that a son does not inherit *watan* property from his father at any rate to the extent of making that property liable for the father's debts. As was pointed out by this Court in *Vithaldas v. Shrinivasrao* (1), to hold that *watan* property was liable for the father's debts, like other property of a Hindu father, would really be to go behind the prohibition contained in s. 5, Watan Act, which prevents a *watandar* from alienating or mortgaging *watan* property beyond the term of his own life. The learned Govt. Pleader seeks to distinguish the cases of *Vithaldas v. Shrinivasrao* (1) and *Vishvanath v. Keshavbhat* (2), on the ground that the decrees in these cases were ordinary money decrees against the father, whereas here there is an express provision that the decree may be executed against the property of the father inherited by the son; but that does not really carry the matter any further, because in my view the effect of the decisions of this Court is to show that *watan* property is not to be regarded as property inherited by the son, so as to expose it to liability to execution under s. 53, Civil P. C. Whether it can be regarded as inherited for other purposes, it is not necessary for us to consider, I think therefore that the learned Judge's decision was right as to defendant No. 3.

In the case of defendant No. 1, I think that his decision was also right, although I base my opinion on different grounds from those which appealed to the learned Judge. We are told that defendant No. 1 has died

(1) 36 Bom. L R 169; 151 Ind. Cas. 151; A I R 1934 Bom. 116; 58 B 218; 7 R B 48.

(2) 36 Bom. L R 181; 151 Ind. Cas. 207; A I R 1934 Bom. 119; 58 B 273; 7 R B 51.

(3) 6 B 211.

since the date of the decree appealed from and that his widow has been brought on record. Of course, a question may arise in execution how far the property can be attached as against the widow of defendant No. 1, but we are not concerned with that. The appeal of defendant No. 1 must be dismissed, because the decree only dealt with his liability during his lifetime. The result will therefore be that the appeal of defendant No. 1 will be dismissed with costs, and the appeal of Govt. First Appeal No. 275, will be allowed with costs as against defendant No. 2 but, dismissed with costs as against defendant No. 3 in proportion to the claims of defendants Nos. 2 and 3.

Sen, J.—I agree.

s.

Order accordingly.

PATNA HIGH COURT

Civil Revision No. 362 of 1940

March 18, 1941

FAZL ALI, J.

HARI KANT JHA—PETITIONER

versus

NATHU CHOUDHURY AND ANOTHER—
OPPOSITE PARTY

Negotiable Instruments Act (XXVI of 1881), s. 20—Stamped and signed paper delivered to person—Power of such person to complete it in favour of any person—Promissory note—Stamped and signed paper delivered by defendant to a person—Suit by plaintiff on hand note—Defendant producing receipt executed by such person—Question whether hand note was completed in favour of plaintiff at date of receipt is one of fact.

Section 20 of the Negotiable Instruments Act gives general authority to a person to whom a stamped and signed paper is delivered to convert it into a negotiable instrument payable to any specified person and accordingly it is open to a person receiving a blank inchoate instrument to complete it in favour of any person besides himself. 186 Ind. Cas. 809 (1), referred to.

A hand-note is certainly a negotiable document, but if it is found as a fact that it was never negotiated that would alter the situation. Where the defendant had delivered a stamped and signed paper to a person, the question as to whether at the time when the payment was made by the defendant under a receipt purported to have been executed by such person, the hand note had already been completed in favour of the plaintiff who has brought a suit on the hand note, is a question of fact.

C. R. from an order of the Small Cause Court Judge of Darbhanga, dated March 6, 1940.

Mr. Rati Kant Chaudhury, for the Petitioner.

Mr. R. P. Jaruhar, for the Opposite Party.

Order.—This is an application under s. 25 of the Small Cause Court Act impug-

ing the judgment and decree of the Small Cause Court Judge of Darbhanga dismissing a suit brought by the petitioner for the recovery of a sum of Rs. 265 odd on the basis of a hand note said to have been executed on *Katick 12, 1334 Fasli* by the opposite party in his favour. The defence in the suit was that the hand note in question had been executed not in favour of the plaintiff, but in favour of his relation Ram Bahadur Jha and that it had been satisfied by the payment of a sum of Rs. 250 to Ram Bahadur Jha in *Fagun 1346*. The learned Small Cause Court Judge after considering the evidence came to the conclusion that the defendants had not taken any loan under the hand note in suit from the plaintiff, but they had taken a loan from Ram Bahadur Jha and the loan had been satisfied as alleged by the defendants. The learned Judge in discussing the evidence referred to certain minute discrepancies which, if they had stood alone, would not have been considered by me to be sufficient to warrant the dismissal of the plaintiff's suit. Again, the finding of the learned Small Cause Court Judge that the hand note in question had not been executed in favour of the plaintiff but that certain blank papers containing the signature and the thumb impression of the defendants had been made over to Ram Bahadur Jha was also not sufficient to dispose of the suit because as was pointed out in *Hriday Singh v. Kailash Singh* (1), s. 20 of the Negotiable Instruments Act gives general authority to a person to whom a stamped and signed paper is delivered to convert it into a negotiable instrument payable to any specified person and accordingly it is open to a person receiving a blank inchoate instrument to complete it in favour of any person besides himself. The principle underlying this decision is that the authority of a person to whom a stamped and signed paper is delivered to complete it in favour of another person cannot be challenged when the defendant himself chooses to send the instrument into the world in a form showing that the document is a hand note. But the matter does not rest there. In the present case the defendants produced a receipt (Ex. A) which purported to have been granted by Ram Bahadur Jha to them in satisfaction of a loan under a hand note. It is recited in this document that the sum had been received in full payment of the principal and interest on the basis of a hand note bearing the same date as the hand note in suit. It is

(1) 1940 P W N 874; 186 Ind. Cas. 809; 12 R P 532; 6 B R 398; 19 Pat. 404; A I R 1940 Pat. 377; 21 P L T 845.

further recited that as the hand note was missing Ram Bahadur Jha had to grant the receipt in order to protect the defendants. The learned Small Cause Court Judge has found as a fact that the receipt was granted in discharge of the hand note in suit which had been given to Ram Bahadur Jha in an incomplete form. This finding cannot in the state of the evidence on the record be said to be one which the Court was not entitled to arrive at. In my opinion this finding concludes the matter and I am unable in revision to hold that it is not correct.

It may be stated that Mr. Choudhury placed great reliance on the following observations made by Agarwala, J., in the decision to which reference has been made :—

"The defendant in the present suit also pleaded that he had made certain payments to Shamnandan Prasad Singh in respect of the amount for which he is now sued. In a suit by the payee of a hand note against the drawer the defence that payments have been made to some one who is not the payee cannot be taken into consideration. See s. 78, Negotiable Instruments Act."

In my opinion these observations do not apply to this case on the findings arrived at by the learned Small Cause Court Judge. In this case the view taken by the learned Judge seems to have been that the hand note never changed hands and that it always remained the hand note of Ram Bahadur Jha. A hand note is certainly a negotiable document, but if it is found as a fact that it was never negotiated that would alter the situation. The question as to whether at the time when the payment was made under Ex. A the hand note had already been completed in favour of the plaintiff is a question of fact and in the absence of any finding on the point I do not think that the decision to which reference has been made can be of any help to the plaintiff. In these circumstances the application fails and is dismissed. In the circumstances of the case there will be no order as to costs.

s.

Appeal dismissed.

MADRAS HIGH COURT

Civil Revision Petition No. 214 of 1937

December 8, 1939

MOCKETT, J.

BONDA SUBBA RAO—PLAINTIFF

—PETITIONER

versus

KANDREGULA NARASIAH—

DEFENDANT—RESPONDENT

Civil Procedure Code (Act V. of 1908), s. 15—Suit triable both by Village Court and District Munsif—S. 15 does not apply to such suit—Limitation Act (IX

of 1908), s. 4—Suit triable both by Village Munsif and District Munsif—Limitation expiring during vacation of latter Court and suit filed on first opening day—Former Court open during latter's vacation—Suit, if within time—Madras Village Courts Act (I of 1889), ss. 13, 20.

The District Munsif's Court is regulated by the provisions of the Civil P. C. The Court of the Village Munsif is not. The procedure of the Village Courts is very special and decidedly of comprehensive character. However, although the provisions of the Lim. Act will apply to suits under the Village Courts Act, (s. 20) there is no provision applying the Civil P. C. to such suits. Hence where a suit is triable both by the Village Court and the District Munsif s. 15, Civil P. C., has no application in such a case and the suit can be instituted in any of those Courts. 31 Ind. Cas. 59 (1), referred to.

The Court ought not to imply that a litigant should be deprived of his right to go to a normal Court subject to normal procedure because a Court of a very special nature, the village Court, happened to be open to him. To take away the right given by the Lim. Act requires, some more substantial basis than implication.

Where, therefore, a suit which is triable by both by the Village Munsif and the District Munsif and the limitation for which has expired during long vacation of District Munsif's Court, is instituted in that Court on the opening day of that Court, the suit is within limitation under s. 4, Lim. Act. It is not barred by limitation merely because the Village Munsif's Court was open during vacation of the District Munsif's Court and the suit could have been instituted there, because, *prima facie* the plaintiff is entitled to sue in the District Munsif's Court and there is no compulsion to go to the Village Munsif's Court.

C. R. P. under s. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Ramachandrapur in S. C. S. No. 162 of 1936.

Mr. M. Bapiraju, for the Petitioner.

Mr. M. S. Ramachandra Rao, for the Respondent.

Order.—A short point is raised in this petition on which there is no authority whatever. The plaintiff petitioner sued the defendant on a balance of a promissory note for Rs. 20. The promissory note is dated July 5, 1927, renewed by payment on June 13, 1930 and again on June 12, 1933, so that it would become barred on June 12, 1936. The District Munsif's Court of Ramachandrapur was closed for the long vacation from May 9, 1936 to June 19, 1936. The 20th was a penultimate Saturday and the 21st was a Sunday and so the petitioner filed the suit on June 22, 1936. It is not contended that under ordinary circumstances the suit would not be within time; but the point was taken before the learned District Munsif that this was a suit which is cognizable by a village Court under s. 13, of the Mad. Village Courts Act. That is so. It is therefore, argued that this suit could have been filed in the Court of the Village Munsif which was

open during the vacation of the Court of the District Munsif and that it became barred on June 12, 1936, and any period subsequent thereto is not available to the plaintiff. The District Munsif took the view that the plea of limitation on which the defendant relied before him was well founded. He rested that finding on the fact that normally the suit ought to have been filed in the Village Court and simply because the suit is barred by time the plaintiff cannot take advantage of the concurrent jurisdiction of this Court to try suits which are primarily triable by Village Courts. Before me reliance has been placed by both sides on s. 20 (A) of the Mad. Village Courts Act which states that if a suit which is triable by Village Court is instituted in the Court of a District Munsif, he may, unless sufficient reasons exist to the contrary, transfer it to the Village Court. I may also refer to sub-s. (2). It is argued that the spirit of the act is that suits of this value should in the first place be tried under the Village Courts Act. There are of course two great differences between the two tribunals. The District Munsif's Court is regulated by the provisions of the Civil P. C. The Court of the Village Munsif is not. The latter view seems to me to be the effect of the decision in *Augustus Brothers v. Fernandez* (1). If that is so I think it is right not to apply s. 15, Civil P. C. to a suit of this sort. Section 15, Civil P. C. says "Every suit shall be instituted in the Court of the lowest grade competent to try it" and I think that must refer to Courts subject to Code. The procedure of the Village Courts is very special and decidedly of comprehensive character. I notice, however, that although the provisions of the Indian Lim. Act will apply to suits under the Village Courts Act (s. 20) there is no provision applying the Civil P. C. to such suits.

The point which I have to decide appears to have behind it no authority—that I have already indicated—and I must, therefore, decide the question as a matter of first impression after hearing the interesting arguments of learned Counsel on either side. In the absence of authority I do not consider that the period allowed by s. 4 of the Lim. Act was intended to be cut down. I do not think that I ought to imply that a litigant should be deprived of his right to go to a normal Court subject to normal procedure because a Court of a very special nature the Village Court, happened to be open to him. To take away the right given by the Lim.

(1) 29 M. L. J. 474; 31 Ind. Cas. 59; 2 L. W. 890; 18 M. L. T. 377; (1915) M. W. N. 765; A. I. R. 1916 Mad. 544.

Act requires, I think, some more substantial basis than implication. *Prima facie* the plaintiff is entitled to sue in the District Munsif's Court. There is no compulsion to go to the Village Munsif's Court, *prima facie* owing to the long vacation of the District Munsif's Court and the dates of the promissory note the plaintiff was entitled under s. 4 of the Lim. Act to wait until June 22, before filing the suit. In the absence of authority I see no reason why that right should be curtailed.

The result is in my view this petition should be allowed with costs in this Court; but in the lower Court each side will bear its own costs. The matter will go back for decision by the District Munsif. It will be open to the defendant to raise any point other than the point that the plaintiff had agreed to give up his claim which has already been decided. The defendant indicates that he will rely upon the terms of the Mad. Agri. Relief Act.

N.S.

Petition allowed.

PATNA HIGH COURT

Appeal from Appellate Decree No. 238

of 1940.

March 28, 1941

AGARWALA, J.

NEHAL KHAN—DEFENDANT—APPELLANT
versus

FELU DOME AND OTHERS—RESPONDENTS
Chota Nagpur Tenancy Act (VI of 1908), ss. 208, 213, 258—Decree obtained against some tenants of holding only—Order of sale of holding in execution is void—S. 208 does not authorise such sale—S. 213, applicability of, where sale is challenged on ground of being void for want of jurisdiction in executing Court—Decree effective only against part of tenancy interest—Sale of holding in execution is nullity—Suit by tenant not impleaded in rent suit for declaration of title to land is not barred by s. 258—Sale under s. 208 entirely without jurisdiction—Effect—Practice—Suit for declaration of plaintiff's title to land sold in execution of rent decree to which he was not made party, against auction-purchaser—It cannot be dismissed merely because some of persons having interest in holding were not impleaded—Limitation Act (IX of 1908), Art. 12—Applicability to suit for declaration that plaintiff's interest is not affected by sale where sale is nullity.

Section 208, Chota Nag. Ten. Act does not authorise the sale of a holding in execution of a decree obtained against some only of the tenants of the holding and an order directing the sale of the holding in execution of such a decree is void and without jurisdiction. 142 Ind. Cas. 781 (3) and 148 Ind. Cas. 168 (2) (4), relied on.

Section 213, does not apply where the sale is challenged not on the ground of any irregularity or fraud in publishing or conducting it but on the ground that it is void for want of jurisdiction in the execut-

ing Court. No application is needed to set aside a null sale. When a decree is effective against only a part of the tenancy interest, a sale held in execution of it is entirely without jurisdiction and does not affect the interest of any of the judgment-debtors. Where one of the tenants of a holding is not impleaded in the suit for rent, a part of the tenancy interest is not represented in the suit and the decree obtained in the suit does not affect the interest of the tenant not impleaded and the sale held in execution of that decree is a nullity. A suit brought by such tenant for declaration of his title to the land is not, therefore, barred by s. 258. 148 Ind. Cas. 168 (2) (4), referred to.

Where a sale under s. 208 is entirely without jurisdiction it does not affect the interest of any of the judgment-debtors even though the sale of their interest under s. 210 (b) might be valid. 148 Ind. Cas. 168 (2) (4), followed.

Where one of the tenants who was not impleaded in a suit for rent of the holding, brings a suit subsequent to the sale of the holding in execution, against the auction-purchaser, for declaration of his title to the land, so far as the plaintiff and the auction-purchaser are concerned, the suit cannot be defeated merely on the ground that some persons who might possibly have an interest in the holding are not made parties though the decision is not binding against such persons.

Where a sale held in execution of a rent decree was valid Art. 12 Limi. Act applies but if the sale is a nullity there is no occasion to set it aside and a suit for a mere declaration that the plaintiffs' interests are not affected by it, is not governed by Art. 12. *Moti Lal v. Karab-ul-din* (1), relied on, 113 Ind. Cas. 681 (2), referred to.

A. from a decision of the Subordinate Judge of Dhanbad, dated January 17, 1940.

Mr. N. N. Roy, for the Appellant.

Mr. U. N. Banerji, for the Respondents.

Judgment.—This appeal is by defendant No. 1 and arises out of a suit relating to land which belonged to the ancestor of the plaintiffs and the *pro forma* defendants. At a private partition it was allotted to the grandfather of the plaintiffs. In the Record of Rights published in 1925, it was recorded in the names of the plaintiffs and the *pro forma* defendants. The landlord, defendant No. 2, sued for the rent of the holding impleading all the persons whose names were recorded in the Record of Rights, except plaintiff No. 2, and obtained a decree for Rs. 37-4. In execution of this decree the holding was put up for sale and was purchased by the appellant for Rs. 45 on July 31, 1934. Plaintiff No. 2 then applied to set aside the sale. The application purported to be under s. 213 of the Chota Nagpur Tenancy Act and was rejected. The present suit was instituted by the plaintiffs on September 10, 1937, for a declaration of their title to the land and confirmation of possession on the ground that the decree and sale in execution of it were null and void as plaintiff No. 2 was not impleaded in the suit. It has been found that the appellant, the auction-purchaser at the execution sale, obtained delivery of possession.

The plaintiffs have, therefore, been given the declaration which they sought and decree for recovery of possession, the appropriate court-fees having been paid on the plaint.

The first question that arises is whether the plaintiffs' suit is barred by limitation. It is contended on behalf of the appellant that the suit is governed by Art. 12 of the Lim. Act and is, therefore, barred. That Article applies *inter alia* to a suit to set aside a sale in pursuance of a decree or order of a Collector or other officer of revenue, and provides a period of limitation of one year from the date of the confirmation of the sale. If the sale was a valid sale, there is no doubt that this article applies and the suit is barred by limitation; but if the sale is a nullity there is no occasion to set it aside and a suit for a mere declaration that the plaintiffs' interests are not affected by it, is not governed by Art. 12: see *Moti Lal v. Karab-ul-Din* (1). Reference is made to the observations by Ross, J. to the contrary in *Raje Baldeo Das Birla v. Lal Nilmaninath Sahi Deo* (2), Fazl Ali, J. does not appear to agree with these observations and they were unnecessary for the purpose of deciding that case. As the matter is governed by the decision of the Privy Council the suit must be held to be within time if the sale was a nullity. It was also contended that the present suit, if decreed, affects the order for sale passed by the Deputy Commissioner under s. 208 (1) in execution of the decree and that as s. 208, falls in Chap. XVI, s. 258, is a bar to the suit. Section 208, does not authorise the sale of a holding in execution of a decree obtained against some only of the tenants of the holding and an order directing the sale of the holding in execution of such a decree is void: see the decisions in *Jagdishwar Dayal Singh v. Pathak Dwarka Singh* (3), and *Raja Sri Sri Jyoti Prasad Singh Deo Bahadur v. Tara Sankar Chatterji* (4).

The next contention is that as plaintiff No. 2 applied to set aside the sale under s. 213, and his application was rejected, a bar to the maintainability of the suit is created by the operation of s. 258. So far as it is material to the present case, that section pro-

(1) 24 I A 170; 25 C 179, (186); 1 C W N 639; 7 Sar. 222 (P C).

(2) 8 Pat. 122 (128); 113 Ind. Cas. 681; 9 P L T 627; A I R 1928 Pat. 615.

(3) 12 Pat. 626; 142 Ind. Cas. 781; Ind. Rul. (1933) P C 108; 17 R D 334; L R 14 A 272 Cr.; 61 M L J 590; 14 P L T 289; A I R 1933 P C 122; 37 L W 767; 37 C W N 629; 59 C L J 412; (1933) M W N 522 (P C).

(4) 12 Pat. 799; 148 Ind. Cas. 168 (2); 14 P L T 670; A I R 1933 Pat. 537; 6 R P 421.

vides that :

"No suit shall be entertained in any Court to vary, modify or set aside, either directly or indirectly, any decision, order or decree of any Deputy Commissioner or Revenue Officer in any suit, application, or proceeding under Chap. XVI, of the Act, except on the ground of fraud or want of jurisdiction, and that every such decision, order or decree shall have the force and effect of a decree of a Civil Court in a suit between the parties and, subject to the provisions of the Act relating to appeal, shall be final."

If the decision of the Deputy Commissioner on the application of plaintiff No. 2 was a decision under s. 213, (which falls within Chap. XVI), the present suit was clearly barred and since the decision has the effect of a decree of a Civil Court it would be conclusive between the parties; but s. 213, merely relates to an application to the Deputy Commissioner to set aside an execution sale on the ground of material irregularity or fraud in publishing or conducting it. The section does not apply where the sale is challenged not on the ground of any irregularity or fraud in publishing or conducting it but on the ground that it is void for want of jurisdiction in the executing Court. No application is needed to set aside a null sale. It has been held in *Raja Sri Sri Jyoti Prasad Singh Deo Bahadur v. Tara Sankar Chatterji* (4), that when a decree is effective against only a part of the tenancy interest a sale held in execution of it is entirely without jurisdiction and does not affect the interest of any of the judgment-debtors. In the present case as plaintiff No. 2 was not impleaded in the suit for rent a part of the tenancy interest was not represented in the suit and the decree did not affect the interest of plaintiff No. 2. Accordingly, the sale held in execution of that decree was a nullity.

The next contention on behalf of the appellant is that at least the right title and interest of the tenants other than plaintiff No. 2 passed by the execution sale. In *Raja Sri Sri Jyoti Prasad Singh Deo Bahadur v. Tara Sankar Chatterji* (4), it was held that where a sale under s. 208, is entirely without jurisdiction it does not affect the interest of any of the judgment-debtors even though the sale of their interest under s. 210 (b) might be valid.

The last contention on behalf of the appellant was that some of the tenants who were impleaded as defendants in the rent suit have not joined in the present suit and the suit is, therefore, bad for misjoinder of parties. The Courts below have held that the holding now belongs to the plaintiffs exclusively. That decision, of course, is not binding against persons who are not parties to the present litigation. So far as the plaintiff

iffs and the auction-purchaser are concerned however, the suit cannot be defeated merely on the ground that some persons who might possibly have an interest in the holding are not parties.

In the result the appeal fails and is dismissed with costs.

s.

Appeal dismissed-

OUDH CHIEF COURT

Execution of Decree Appeal No. 18 of 1938

March 24, 1941

BENNETT, J.

THE DEPUTY COMMISSIONER, PARTABGARH—DECREE-HOLDER—APPELLANT

versus

Mst. SHAHZAD KOER AND ANOTHER—

JUDGMENT-DEBTORS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), s. 151—Decree-holder to prove that decree cannot be satisfied against movable property of judgment-debtor—Nature of proof—Burden, when shifts—Evidence Act (I of 1872), ss. 101, 106.

It is for the decree-holder to show in the first instance under s. 151, Oudh Rent Act that satisfaction of the decree cannot be obtained against the movable property of the judgment-debtor but very little evidence is required to shift the burden on to the judgment-debtor. Whether a judgment-debtor has or has not movable property from which a decree may be satisfied is a matter specially within his own knowledge, and if the decree-holder shows that there is reason to think that he has no such property, and files an affidavit to that effect; it is for the judgment-debtor to prove that he has such property. [p. 439, col. 1.]

Ex. D. A. against the order of the District Judge of Rae Bareilly, dated December 23, 1937.

Rai Bahadur H. K. Ghosh, for the Appellant.

Mr. Sri Ram holding brief of Mr. H. D. Chandra, for the Respondents.

Judgment.—This is a second execution of decree appeal against the judgment and decree dated December 23, 1937, of the learned District Judge of Rae Bareilly dismissing an appeal against an order passed by an Assistant Collector of the First Class of Partabgarh, dated July 20, 1937.

The history of the case dates back to March 10, 1932, when the Court of Wards Dhingwas Estate obtained a decree for arrears of rent against Mst. Shahzad Kuar and Mst. Dilraj Kuar. Application for execution of this decree was made three times, namely, in July 1932, in October, 1933, and lastly on October 31, 1934. The first application was for execution by rateable distribution and some amount was obtained. The

second application was for attachment of immovable property and the judgment-debtors paid Rs. 40. The last application was for sale of the under-proprietary rights. A sum of about Rs. 333 was then due.

An application was made by the judgment-debtors in January, 1935, for appointment of a Receiver and this application was dismissed.

March 22, 1935, was fixed for sale of the immovable property. On that date, however, an objection was preferred by the judgment-debtors. This was under s. 151, of the Oudh Rent Act. Under this section no process in execution of a decree for money shall issue against a judgment-debtor's immovable property, other than for attachment of that property, unless satisfaction of the decree cannot be obtained against his movable property. It may be noted that there had been no previous suggestion by the judgment-debtors that they had any movable property from which the decree might be satisfied.

This objection was disallowed by the executing Court. The judgment-debtors appealed to the District Judge who dismissed their appeal. They then appealed to the Chief Court and this appeal was allowed. The judgment of the learned Judge of this Court who heard the appeal shows that it was first argued that the provisions of s. 152 of the Oudh Rent Act were independent of the provisions of s. 151. This contention was not accepted. The learned Judge also held that the decree-holder was not entitled to sell the judgment-debtors' rights, that is, under proprietary rights, without at least trying to obtain satisfaction of the decree against their movable property, and that the Courts were not justified in overruling the judgment-debtors' objection to that effect.

It was also argued that the principle of *res judicata* applied because the judgment-debtors had failed to put in an objection under s. 151 of the Oudh Rent Act prior to March 22, 1935. It was held that the principle of *res judicata* would not apply in the absence of any order or decision of a Court on a point in issue. The question whether the decree-holder could proceed against the judgment-debtors' under-proprietary rights was never raised, much less decided. The case was accordingly sent back to the executing Court to proceed according to law.

It appears from this order that the case was sent back to the executing Court to consider the objection of March 22, 1935, on the merits.

An affidavit was then filed by the decree-

holder to the effect that the judgment-debtors had no movable property.

The order of the Assistant Collector dated July 20, 1937, shows that it was admitted by the Govt. Pleader in his Court that fresh process for the attachment of movable property could not be legally issued. This was in view of the provisions of s. 145 of the Oudh Rent Act, more than three years having elapsed since the decree. The Govt. Pleader contended, however, that the immovable property under attachment could be sold if the decree-holder satisfied the Court that the judgment-debtors had no movable property which could satisfy the decree. The Assistant Collector then referred to the provisions of s. 151 and observed that it appeared to be imperative that process for the attachment and sale of the movable property should be issued in the first instance, the immovable property being liable to be sold only when the movable property has not been able to satisfy the decree. Until process is issued for the attachment of movable property and no such property has been obtained it could not be held with certainty that the judgment-debtors have no movable property. There was no evidence before him to show that the judgment debtors had not got enough movable property to satisfy the decree. As it was too late to issue fresh process for the attachment of any movable property, the execution application was dismissed; that is, I understand, what the Assistant Collector meant when he said that the suit was dismissed.

The learned District Judge upheld this order, observing that it was the duty of the decree-holder to be on the look out when he made his application for execution to see that the provisions of s. 151 were complied with. It was for the decree-holder to satisfy the Court that there was no movable property with the judgment-debtors which could satisfy the decretal amount, and this could not be done unless the movable property was brought to the notice of the Court and attached. The District Judge considered the argument that the condition laid down under s. 151 was satisfied by the production of the affidavit, but observed that the Assistant Collector had already taken this fact into consideration because he had said that there was no evidence to hold that the judgment-debtors had not got movable property, and an affidavit by itself was not sufficient to prove the decree-holder's assertion.

It appears, therefore, that the principal question for consideration is whether the lower Courts rightly imposed the burden of

showing that there was no movable property from which the decree could be satisfied on the decree-holder, and in holding that this burden had not been discharged.

Learned Counsel for the respondents referred to a decision of the Board of Revenue *Babu Suraj Narain Singh v. Sheo Baran Pande*, (Selected Decisions No. 12 of 1892), in which it was held that before execution against immovable property can be had the decree-holder must either take out execution against both person and movable property of the judgment-debtor or prove to the satisfaction of the Court that it would be useless to do so.

It may be conceded that it is for the decree-holder to show in the first instance under s. 151 that satisfaction of the decree cannot be obtained against the movable property, but in my opinion very little evidence is required to shift the burden on to the judgment-debtor. Under s. 101 of the Indian Evi. Act whoever desires any Court to give judgments as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist: and under s. 106 when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. It cannot be doubted that whether a judgment-debtor has or has not movable property from which a decree may be satisfied is a matter specially within his own knowledge, and if the decree-holder shows that there is reason to think that he has no such property, and files an affidavit to that effect, I consider that it is for the judgment-debtor to prove that he has such property. In the present case the judgment-debtors did not state in their application what property they had, nor did they ask for any enquiry to be made.

Learned Counsel for the respondents objected that the affidavit filed by the decree-holder was irregular since it had not been filed under O. XIX, r. 1 or 2 of the Civil P. C. It appears to me, however, that it may be regarded as an affidavit filed to rebut the application made by the judgment-debtors on March 22, 1935, the affidavit being required in view of the order passed by this Court on July 17, 1936. Under r. 2 of O. XIX, the Court at the instance of either party may, upon an affidavit, order the attendance for cross-examination of the deponent. No application for examination of the decree-holder was made by the judgment-debtors, nor did they file any counter affidavit: nor had any affidavit been filed by them with their objection of March 22, 1935.

The circumstances of the earlier execution

proceedings certainly suggest that the judgment-debtors had at that time no movable property (apart from that from which partial satisfaction of the decree was obtained). In the two previous applications no suggestion had been made by the judgment-debtors that they could satisfy the decree from movable property except to the small extent mentioned, and it may be argued that this raises a presumption that they possessed no such movable property. It is also significant that they did not raise this objection until more than three years had elapsed since the passing of the decree. This and the way in which the objection was made suggest to my mind that actually they had no movable property from which the decree might be satisfied, and that they were merely trying to take advantage of the fact that more than three years had elapsed.

In my judgment the affidavit of the decree-holder considered with the previous history of the case was sufficient to shift the burden of proof from the decree-holder to the judgment-debtors, and, therefore, the Courts below were not justified in holding that the application of the decree-holder for execution against the immovable property must fail because they had failed to prove that the judgment-debtors had not got movable property.

I do not consider that the judgment-debtors should be allowed to escape liability by putting forward for the first time more than three years after the decree an objection under s. 151 of a vague nature which was not supported either by an affidavit or by an offer to produce evidence of the existence of movable property.

I accordingly allow this appeal, set aside the order of the lower Courts and direct that proceedings in execution against the immovable property shall now proceed on the application of October 31, 1934. The decree-holder is entitled to his costs in this Court and in the Courts below.

S.

Appeal allowed.

RANGOON HIGH COURT

First Appeals Nos. 183 of 1935 and 43, 75 and 80 of 1939

January 15, 1940

MOSELY AND SHARPE, JJ.

U TUN YIN AND OTHERS—APPELLANTS

versus

U BA HAN AND OTHERS—RESPONDENTS

Burmese Buddhist Law—Widow or widower is proper person to administer estate and is entitled to letters of administration.

It may be laid down as a general rule that the widow or widower is the proper person to administer the estate. The widow or widower usually has possession of the whole of the estate at the time of the death of the other spouse, and is in most cases entitled to the whole or a large part of it. Though it would be rash to lay down an absolute rule that in no circumstances should letters of administration be granted to any other person, it would require very special reasons to justify such a grant. *Ne Win v. Ma Aung Gale* (1), relied on.

F. As. against the decree of the District Court, Pyapon, in C. R. Nos. 18, 17 and 26 of 1933.

Mr. *E Maung* (1), for the Appellants.

Messrs. *P. K. Basu* and *Ba Maung*, and *E. Hay*, for Respondents Nos. 1, and 2, 3, 4 respectively.

Sharpe, J.—These four appeals, which have been heard together, represent the latest stage in the protracted and complicated litigation which has followed upon the death, on June 27, 1933, of a Burmese Buddhist woman named Daw Tok. These appeals arise out of three applications for the grant of administration of her estate, which has been valued by the various applicants at something between two and three and a half lakhs of rupees. The first application, in point of time, is that filed by Ba Han on July 4, 1933; he is admittedly a nephew of the deceased (being her sister's child), but his claim to be her *keittima* adopted son, upon which his whole case rests is contested by his two rival claimants. The second application was that of Tun Yin, filed on July 17, 1933; he claims to be the surviving husband of the deceased, a claim which is contested by applicant No. 3 (whom I am about to mention) but which is admitted by Ba Han, who, however alleges that Tun Yin is not a fit and proper person to administer the deceased's estate. The third application was filed on November 6, 1933 by Ma Hla Nyun, a niece of the deceased (being her brother's child); she alleges that she is the *keittima* adopted daughter of the deceased a claim which is contested both by Ba Han and Tun Yin. Ma Aye Myint and Maung Hla Maung, sister and brother, respectively, of Ma Hla Nyun have also been made parties to this litigation, but neither of them has taken any active part in it. All three applications, which were filed in the District Court of Pyapon, were made under s. 218, Succession Act, which provides that such a grant as that now applied for may be made "to any person who, according to the rules for the distribution of the estate applicable in the case of such deceased (the section deals with Buddhist *inter alia* and I have already mentioned that the deceased

in the present case was a Buddhist) would be entitled to the whole or any part of such deceased's estate."

In *Ne Win v. Ma Aung Gale* (1), a Bench of the late Chief Court of Lower Burma held that having regard to the main feature of the Burmese Buddhist Law respecting the ownership of property by married couples, and the devolution of such property on the death of one of them, it may be laid down as a general rule that the widow or widower is the proper person to administer the estate. It is unnecessary for me here to discuss the law in regard to the devolution of the estate of a Burmese Buddhist married couple upon the death of one of the spouses. It is enough for me to say that I respectfully agree with the general rule laid down in *Ne Win v. Ma Aung Gale* (1) and which I have stated above and I will content myself with quoting one sentence from the judgment of Irwin, J., in that case:

"The widow or widower usually has possession of the whole of the estate at the time of the death of the other spouse, and is in most cases entitled to the whole or a large part of it. It would be rash to lay down an absolute rule that in no circumstances should letters of administration be granted to any other person, but I am strongly of opinion that it would require very special reasons to justify such a grant."

It will thus be seen that, if Tun Yin establishes his marriage to Daw Tok, he ought to have the grant unless there are "very special reasons" to the contrary; and if he does obtain the grant, questions concerning the status of Ba Han and/or Ma Hla Nyun need not be investigated. It is conceded that, if Tun Yin was Daw Tok's husband at the time of her death, he is entitled to what is by far the greater part of the estate, notwithstanding the fact, if it be the fact, that both Ba Han and Ma Hla Nyun were Daw Tok's *keittima* adopted children. For these reasons I shall deal with Tun Yin's case first. Ba Han admits that Tun Yin was Daw Tok's husband, but Ma Hla Myun does not. Two questions therefore arise: was Tun Yin Daw Tok's husband at the time of her death? If so, are there any "very special reasons" to justify us in refusing his application? In my judgment the burden of proving his marriage with the deceased lies upon Tun Yin, but the burden of proving facts upon which to base a finding of "very special reason" for refusing him a grant lies upon the person alleging that Tun Yin ought not to have a grant, that is to say that the burden of proof on the second question (if it arises) is upon Ba Han. [After discussing certain evidence his Lordship concluded as follows.] On the first

part of the case, I find that Tun Yin was Daw Tok's husband at the time of her death, and on the second part of the case I find no evidence to justify me in saying that there are "very special reasons" for rejecting Tun Yin's application. In my judgment, therefore Tun Yin's application for the grant of administration of his late wife's estate should be allowed, on payment of the requisite court-fees and on furnishing security to the satisfaction of the District Court within such time as may be allowed by it. I think therefore that Tun Yin's appeal (that is to say, Civil First Appeal No. 183 of 1935) must be allowed with costs both here and below. In regard to the costs in this Court, I think that there should be an Advocate's fee of twelve gold *mohurs* for the first day of the hearing before us; and Advocate's fee of ten gold *mohurs* for each of the following three further full days of the hearing before us namely December 15, 19 and 20; and an Advocate's fee of five gold *mohurs* for each of the other two days of the hearing namely December 14 and 21, when there were no afternoon sittings of the Court. All the costs (including the Advocate's fee) to be paid by Ba Han and Ma Hla Nyun in the proportions of two-fifths by Ba Han and three-fifths by Ma Hla Nyun.

I must now say a word about the other three appeals before us. Applications for grant of administration are intended to be disposed of comparatively quickly, without deciding who is and who is not entitled to share in the estate of the deceased person, and so that the estate may be speedily wound up. Here a most lamentable state of affairs is disclosed. Tun Yin himself commenced giving evidence in September 1934 and continued doing so till July 1935, during which time he was the only witness under examination. It is now over six and a half years since Daw Tok died, and only now is her estate to be administered. Having decided Tun Yin's case in the way in which I have done, it is unnecessary for me to go into the question of status (with consequent right to inherit) in regard to Ba Han and Ma Hla Nyun, unless or until Tun Yin fails to pay the necessary fees or furnish security.

Mosely, J.—I agree with the judgment of my learned brother. We are ordinarily reluctant to interfere with decisions of learned District Judges on simple questions of fact, considering the advantage that the District Court has in having witnesses before it and forming an estimation of their credibility and seeing their demeanour; but there is no doubt that in the present case the

District Judge had no warrant whatever for his finding that "there can be no doubt that a fair quantity of jewellery was left in the possession of Tun Yin," and for the finding, on which the case rested, that Tun Yin had in his possession the emerald ring in particular. The whole matter boiled down to the evidence of Maung Ba Hla, and as my learned brother has shown, that evidence did not show that the emerald ring was returned to Daw Tok before her death.

D. Order accordingly.

PATNA HIGH COURT

Appeal from Appellate Order No. 338
of 1940

May 7, 1941

HARRIES, C. J. AND FAZL ALI, J.

RAMPRATAP MARWARI—APPELLANT

versus

LACHMAN MISTRY—RESPONDENT

Chota Nagpur Tenancy Act (VI of 1908), ss. 46, 47, 6, 4—Persons protected under ss. 46 and 47—Person holding immediately under raiyat, if protected—Under-raiyat, if raiyat—S. 60, Civil Procedure Code (Act V of 1908), applicability to case.

Sections 46, 47, Chota Nag. Ten. Act, are intended to protect the rights of a *raiya* only. The definition of "*raiya*" in s. 6 is wide enough to include an under-*raiya*: but cl. (2) of s. 6 makes the position clear. A person shall not be deemed to be a *raiya*, unless he holds land either immediately under a proprietor or immediately under a tenure-holder or immediately under a Mundari *khunt-kattidar*. Where a person does not claim to hold the land under a proprietor or a tenure-holder or a Mundari *khunt kattidar*, he cannot be held to be a *raiya* in the sense in which the expression has been used in the Chota Nagpur Ten. Act though he may be an under-*raiya*. There are only three classes of *raiya*s mentioned in this section, and these are occupancy *raiya*s, non-occupancy *raiya*s and *raiya*s having *khunt-katti* rights. Under-*raiya*s, on the other hand are tenants, holding whether immediate or mediately, under-*raiya*s.

Where the money decree-holder is not trying to sell the occupancy right in the lands but merely trying to sell the shop or house and such right, title and interest as the judgment-debtor who is not a *raiya* has in the land in question, such interest cannot be said to be protected under s. 47. There is nothing in s. 60, Civil P. C. to prevent the sale of such judgment-debtor's interest in the land in dispute. The shop or house which has been erected by him certainly belongs to him, and he has undoubtedly a disposing power over the profits of the land which he may exercise for his own benefit. The case, therefore, comes within the category of those properties which can be sold under the provisions of s. 60 of the Civil P. C.

A. from an order of the District Judge of Manbhum, dated November 6, 1940.

Messrs. S. C. Mazumdar and P. N. Sanjayal, for the Appellant.

Messrs. S. N. Banerji and R. K. Ghosh, for the Respondent.

Fazi Ali, J.—It seems to me that both the Courts below have missed the real point which arises in this case. What that point is will appear from the following brief statement of the facts which have given rise to this appeal.

The appellant has obtained a money decree against the respondent, and he seeks to attach and sell the interest of the respondent in certain property. The property in question consists of survey plot No. 3 and portions of plots Nos. 4 and 6 with a house standing on them. These plots are entered in the *raiyyati khatian* in the names of Purusottam Mahto and Madhu Mahto who are admittedly settled *raiyyats*. In the year 1904 one Rajani Kanta Banerji took settlement of some homestead lands including the lands in question from the father of Purusottam Mahto and Madhu Mahto by a *patta* (Ex. C) for the purpose of building houses upon them. During the Survey and Settlement operations Rajani Kanta Banerji was entered as under-*raiyyat* with occupancy rights under the settled *raiyyats*. The appellant afterwards took oral settlement of the disputed lands from Rajani Kanta Banerji and constructed a house on them. It is stated by the Munsif in his judgment that the respondent-judgment-debtor had taken settlement from Rajani Kanta Banerji for purely residential purposes, and from his previous deposition in the money suit it appears that he has built a *pakka* house on it and shops are held in that house. The question which arose in the Courts below was whether the house or shop and the interest which the respondent has in the disputed land are liable to be sold in execution of the money decree. What was contended on behalf of the judgment-debtor in the Courts below was that this property was not liable to be sold under the provisions of ss. 46 and 47 of the Chota Nagpur Ten. Act. Section 46 imposes restriction on the transfer of their rights by *raiyyats*, and s. 47, provides that

"no decree or order shall be passed by any Court for the sale of the right of a *raiyyat* in his holding or any portion thereof nor shall any such right be sold in execution of any decree or order."

Now, for the purpose of deciding this case, both the Courts below seem to have assumed that the respondent has acquired the same status as Rajani Kanta, and they have entered into an elaborate discussion as to the status of Rajani Kanta. The Munsif held that Rajani Kanta was not a *raiyyat* inasmuch as the lease, which he took from the original *raiyyats* of the disputed land, was for building purposes. On this view he has

held that the respondent also has no *raiyyati* interest in the disputed land, and his interest is liable to be sold in execution of the decree.

The learned Subordinate Judge, who heard the appeal from the judgment of the Munsif, has taken a contrary view. In his opinion Rajani Kanta was a *raiyyat*, and he has come to the conclusion that though the Chota Nagpur Ten. Act was passed in 1908 ss. 46 and 47 of the Act show that those provisions of the Act were intended to have retrospective effect as regards transactions before 1903. He points out that as Rajani Kanta obtained his lease after 1903 ss. 46 and 47 are applicable to his interest. He has tried to show that Rajani Kanta was an agriculturist, and he has also referred to s. 78 of the Chota Nagpur Ten. Act for the purpose of showing that the interest or Rajani Kanta cannot be proceeded against under ss. 46 and 47 of the Chota Nagpur Ten. Act.

Now, the point which, in my opinion, arises in this case is not what status Rajani Kanta had in the disputed lands but what status the judgment-debtor has in regard to this land. It is common ground that Rajani Kanta had taken his lease for building purposes and it has been pointed out to us that he has been alienating portions of the land covered by his lease from time to time. These facts *prima facie* seem to support the conclusion arrived at by the Munsif that Rajani Kanta cannot be said to be a *raiyyat*; but as I have already stated, the point to be decided in this appeal is whether the respondent is protected by ss. 46 and 47 of the Chota Nagpur Ten. Act. Now, even a casual reading of these sections will show that they are intended to protect the rights of a *raiyyat* only. The first question to be considered, therefore, is whether the respondent is a *raiyyat*. Section 6 of the Chota Nagpur Ten. Act states that

"a '*raiyyat*' means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family, or by hired servants, or with the aid of partners; and includes the successors-in-interest of persons who have acquired such a right, but does not include a Mundari *khunt-kattidar*."

This definition seems to be wide enough to include an under-*raiyyat*; but cl. (2) of s. 6 makes the position clear. It is stated in that clause that a person shall not be deemed to be a *raiyyat*, unless he holds land either immediately under a proprietor or immediately under a tenure-holder or immediately under a Mundari *khunt-kattidar*. As the respondent does not claim to hold the

land under a proprietor or a tenure-holder or a Mundari *khunt-kattidar*, he cannot be held to be a *raiyat* in the sense in which the expression has been used in the Chota Nagpur Ten. Act. It is argued that he is at least an under-*raiyat* and that an under-*raiyat* also must be regarded as a *raiyat*. But a reference to s. 4 of the Act shows that though an under-*raiyat* may be a tenant he is not *raiyat*. There are only three classes of a *raiyats* mentioned in this section, and these are occupancy *raiyats*, non-occupancy *raiyats* and *raiyats* having *khunt hatti* rights. Under-*raiyats*, on the other hand, are described as tenants holding, whether immediate or mediately, under *raiyats*. Therefore, whether the respondent be an under-*raiyat* or not, he is not a *raiyat*, and, therefore, he cannot claim the benefit of either s. 46 or s. 47 of the Chota Nagpur Ten. Act.

It was contended on behalf of the respondent that even though he may not be a *raiyat*, yet inasmuch as the appellant is seeking to sell portions of a holding, is entitled to object to the sale on the ground that the Court cannot sell what it is expressly forbidden to sell under s. 47 of the Chota Nagpur Ten. Act; but in my opinion, this is not the correct way of approaching the case. The appellant is not trying to sell the occupancy right in the lands. He is merely trying to sell the shop or house and such right, title and interest as the respondent has in the land in question. I do not see how such interest can be said to be protected under s. 47.

It was also contended on behalf of the respondent that the interest of the respondent cannot be sold under s. 60 of the Civil P. C. It was urged that the respondent not being a *raiyat* can be ejected from the land by his landlord at any moment, and that s. 60, does not contemplate that such a precarious right as the respondent has in the land is capable of being sold. I do not, however, find anything in s. 60 to prevent the sale of the respondent's interest in the land in dispute. The shop or house which has been erected by the respondent certainly belongs to him, and he has undoubtedly a disposing power over the profits of the land which he may exercise for his own benefit. The case, therefore, comes within the category of those properties which can be sold under the provisions of s. 60 of the Civil P. C.

In my opinion, the learned District Judge was wrong in holding that the interest of the judgment-debtor-respondent cannot be sold, and I would, therefore, allow this appeal,

set aside the order of the learned District Judge and restore the order of the Munsif. The appellant will be entitled to his costs in this Court and in the Courts below.

Harries, C. J.—I agree.

D.

Appeal allowed.

MADRAS HIGH COURT Special Bench

Original Petition No. 267 of 1939
September 24, 1940

LEACH, C. J., KING AND PATANJALI
SASTRI, JJ.

VAIDYARATNAM P. S. VARIER,
KOTTAKKAL, SOUTH MALABAR

PETITIONER

versus

COMMISSIONER OF INCOME TAX,

MADRAS—RESPONDENT

Income Tax Act (XI of 1922), s. 6 (vi), (iv)—Assessee carrying on extensive business in Ayurvedic medicines and also maintaining a dramatic troupe—Troupe giving performances at assessee's business premises at different places—Prices for admission charged—Profits arising from troupe performances held income from 'other sources', within meaning of s. 6 (vi).

The assessee carried on an extensive business in the manufacture and sale of Ayurvedic medicines at Kottakkal, Palghat and Calicut, where he owned premises in which he sold medicines. One of his other activities was the maintaining of a dramatic troupe which gave public performances in the Malabar District, Cochin and Travancore at certain seasons of the year. At each place, adjoining the premises used by him for the sale of his medicines was a hall in which the assessee's dramatic troupe also gave performances. At all the performances prices for admission were charged.

Held, that the assessee maintained the troupe on a commercial basis, and whether he did so for the purpose of advertising his Ayurvedic medicines was not material. The maintenance of the troupe was not a hobby but a possible source of income and the profits arising therefrom were income from "other sources" within the meaning of s. 6 (vi), Income Tax Act, even if it could not be classified as income from a business under s. 6 (iv).

Messrs. D. A. Krishna Variar and Ravi Varma, for the Petitioner.

Mr. K. V. Sesha Ayyangar, for the Respondent.

Leach, C. J.—The assessee is an Ayurvedic physician. He carries on an extensive business in the manufacture and sale of Ayurvedic medicines at Kottakkal, Palghat and Calicut. In addition to the income which he derives from the manufacture and sale of medicines and from the practice of his profession, he derives income from property and "sundry other sources." One of his other activities is the maintaining of a dramatic troupe which gives public perfor-

mances in the Malabar District, Cochin and Travancore at certain seasons of the year. At Kottakkal, Palghat and Calicut the assessee is the owner of premises in which he sells his medicines. At each place, adjoining the premises used by him for the sale of his Ayurvedic medicines, is a hall in which the assessee's dramatic troupe also gives performances. At all the performances prices for admission are charged. For the year 1937-38, the assessee returned an income of Rs. 18,061-4-11 and sought to deduct a sum of Rs. 3,475 as loss incurred by him in that year in the maintenance of the dramatic troupe. The Income-tax Officer refused to allow the deduction. The ground for refusal was that the maintenance of this dramatic troupe really amounted to a hobby of the assessee and therefore could not be classified as a business. This order of the Income-tax Officer was confirmed by the Commissioner on appeal. The assessee then asked the Commissioner to state a case on the ground that the refusal to allow the deduction involved a question of law. The Commissioner rejected the application, and in consequence the assessee applied to this Court for an order compelling the Commissioner to make a reference. This Court agreed with the assessee that a point of law was involved and accordingly directed the Commissioner to make a reference on the following question :

"Is there material to support the finding that the assessee's dramatic troupe is maintained by him as a hobby and not as a business or as a source of income?"

The Commissioner has now made the reference. The assessee has maintained this dramatic troupe for many years, and in the statement of the case made by the Commissioner the profits and losses for the years from 1922-23 to 1933-34 are set out. In 1922-23 there was a profit of Rs. 997 and in 1928-29 a profit of Rs. 1,820. It is common ground that when these profits were made the income-tax authorities assessed them to income-tax. In the other years mentioned there were losses and upto and including the year 1934-35 the income-tax authorities allowed deductions for the losses when assessing the assessee to income-tax. It is difficult to see how they could do otherwise seeing that they had insisted on taxing the assessee when he had made profits. The Income-tax Officer, Palghat, who made the assessment for the year 1935-36 however decided that the assessee should not be allowed to deduct the loss of Rs. 3,475 which admittedly he had suffered in that year in this connection.

The only ground that the Income-tax Officer advanced for disallowing this loss was that the dramatic troupe was a hobby and therefore could not become "a source" of income. That was his opinion, and as already indicated it was concurred in by the Commissioner.

The Commissioner has given two reasons in support of his decision. He says that the motive behind the formation of the dramatic troupe was philanthropic and not commercial because in a prospectus issued by the assessee it was said that the object of the founding of the troupe was to stage Malayalam dramas on reformed lines and to utilise the proceeds arising out of such performances for rendering free medical aid at the assessee's Vaidyasala. The second reason was that the assessee would never have persevered with such a losing concern unless he looked upon it as a hobby unconnected with his business activities. In opposing the finding that he was merely indulging in a hobby the assessee stated that he seldom attended the performances and therefore the maintenance of the troupe could not be regarded as a hobby. The Commissioner has taken some pains to show that this statement is not true, but it is difficult to see what bearing this statement has on the question, whether true or false.

It is manifest that the assessee maintains this troupe on a commercial basis, whether he does so far the purpose of advertising his Ayurvedic medicines matters not. If this troupe earns a profit, as it has done in two of the years mentioned in the statement of the case, the profit would obviously be income from "other sources" within the meaning of s. 6 (vi), even if it could not be classified as income from a business under s. 6 (iv). In 1929-30 the profit made was taxed under "other sources." We are not prepared to accept the reasons advanced by the Commissioner in support of the theory that there is here a hobby and not a possible source of income. In fact, we have no hesitation in holding that there was no material on the record to support the finding that the assessee's dramatic troupe is maintained by him as a hobby. It may not be a "business," but it certainly must be classified as a source, or possible source of income. The question referred will be answered in the negative and as the assessee has succeeded, he is entitled to his costs, which we fix at Rs. 250. He is also entitled to the refund of his deposit of Rs. 100.

N.S.

Answer accordingly.

ODUH CHIEF COURT

Civil Miscellaneous Application No. 135
of 1941

filed in

First Civil Appeal No. 24 of 1940

April 25, 1941

YORKE AND AGARWAL, J.

BISHAMBHARNATH AND OTHERS

—PLAINTIFFS—APPELLANTS—

OPPOSITE PARTY

versus

Kunwar SRI PRAKASH SINGH

AND ANOTHER—DEFENDANTS—RESPONDENTS

—APPLICANTS

Suits Valuation Act (VII of 1887), s. 4—Suit for declaration that certain trust in respect of certain villages was public and not private trust—Valuation for purposes of jurisdiction is market value of property.

Section 4 of the Suits Valuation Act leaves no room whatever for the idea of a notional value. [p. 446, col. 1.]

In a suit for declaration that a trust created by a certain person in respect of certain villages was a public trust and not a private trust, the title to the villages is affected by the relief sought and, therefore, the suit falls within the mischief of s. 4 of the Suits Valuation Act, and the valuation for the purposes of jurisdiction is the market value of the property itself and not any arbitrary valuation. *Krishna v. Raman* (1), referred to.

C. Mis. App. praying that the valuation of the appeal may be fixed and the record may be ordered to be printed dated February 13/14, 1941.

Mr. B. P. Misra, for the Applicant.

Mr. Mahabir Prasad Srivastava, for the Opposite Party.

Judgment.—By our order of March 21, 1941, we held that the question raised by application on behalf of the respondents, No. 135 of 1941, should be decided as a preliminary question in view of the fact that it would affect the question whether the record should be printed or not. The question raised in this application is in regard to the valuation of the present suit for the purposes of jurisdiction. The suit was originally filed as regular suit No. 160 of 1938 in the Court of the Munsif, Biswan, Sitapur, and the prayer was that a declaration be granted that the trust created by Thakur Fateh Singh on December 4, 1899 by his will in respect of villages Ulra and Dafra with the hamlets thereof is a public trust and not a private trust. The plaintiffs in instituting this suit valued it for purposes of jurisdiction at Rs. 500. The suit was one falling within the purview of Art. 17 of the Second Schedule of the Court Fees Act and for purposes of the court-fee was stamped with a court-fee of Rs. 15. In the trial Court the defendant (father of the present respondents) objected to this arbitrary valuation of the suit for purposes of jurisdiction, and

after considering the matter the Munsif on January 14, 1939, held that for purposes of jurisdiction the suit was incorrectly valued and was beyond his jurisdiction. He took the view that for the purposes of jurisdiction the suit was to be valued, according to the value of the subject-matter which according to Govt. rules would be 30 times the land revenue of the villages in suit, and would therefore amount to about Rs. 47,610, the land revenue being Rs. 1,587. The plaint was returned to the plaintiffs for presentation in the Court having jurisdiction to entertain the suit and the plaintiffs presented their plaint in the Court of the Civil Judge, Sitapur, but again failed to give it a valuation for purposes of jurisdiction other than an arbitrary valuation. This time they selected the figure of Rs. 5,200. The defendants took an objection to the valuation of the suit and an issue was framed and decided by the learned Civil Judge who held that the proper valuation for purposes of jurisdiction was not Rs. 5,200 but Rs. 47,610, being 30 times the land revenue of the property in suit.

The plaintiffs' suit was dismissed and the plaintiffs have come to this Court in first civil appeal and they have again valued their appeal for purposes of jurisdiction at Rs. 5,200. The effect of this is that only a type-written record will be prepared and no appeal will lie from the decision of this Court as of right to their Lordships of the Privy Council.

Learned Counsel for the respondents has put forward two main contentions. The first is that the appellants are bound by the decision of the Munsif who returned the plaint to them, since they have never appealed against that decision. Secondly he had urged that it is not open to the plaintiffs-appellants to put an arbitrary valuation on the appeal for purposes of jurisdiction. As regards the first point we are not impressed with the contention that there is any question of *res judicata* about the matter. All that the Munsif could decide was that the suit was not within his jurisdiction. He was not entitled to arrive at any finding which would be binding on the Civil Judge in this matter. In the Court of the Civil Judge the decision of the Munsif on this point could not in any circumstance operate as *res judicata* nor was it so treated.

On the other hand on the merits the matter appears to us to be entirely free from doubt, and learned Counsel for the appellant has not put forward any argument which seems to have any force at all. He admits that for

purposes of jurisdiction this suit falls within the mischief of s. 4 of the Suits Valuation Act (Act VII of 1887) as modified up to date by U. P. Act VII of 1939. Section 4 of the Act provides that.

"suits mentioned in paras. IV (a), IVA, IVB, V, VA, VB, VI, VIA, VIII and X (d) of s. 7 and Arts. 17, 18 and 19 of Sch. II of the Court Fees Act, 1870, as in force for the time being in the United Provinces, shall be valued for the purposes of jurisdiction at the market value of the property involved in or affected by or the title to which is affected by the relief sought or at the amount involved in or affected by or the title to which is affected by the relief sought, and such value shall in the case of land be deemed to be the value as determinable in accordance with the rules framed under s. 3."

(It is those rules of course which lay down that the valuation shall be 30 times the land revenue). Learned Counsel has made a vain attempt to introduce into s. 4 the idea of a notional value which is to be found in the Court Fees Act in certain cases. Section 4 of the Suits Valuation Act, however leaves no room whatever for the idea of a notional value. In the present case the sole question for decision is whether the title a trustee of the two villages in suit vests in the public or in private persons, that is whether they are the subject of a public trust or a private trust. The position then is that the title to these villages is affected by the relief sought and therefore the valuation for the purposes of jurisdiction is the market value of the property itself. Learned Counsel might possibly have put forward the argument that the valuation for the purposes of jurisdiction was to be sought for under the second head, that is with reference to the amount involved in or affected by or the title to which is affected by the relief sought, but he has done nothing of the kind. He has merely sought to show that it is impossible to give anything but an arbitrary value to the relief of a declaration that property is the subject of a public trust and not of a private trust. That argument, however, is entirely irrelevant and it was doubtless to obviate arguments of this kind that s. 4 of the Suits Valuation Act was amended and worded as it now stands.

Learned Counsel sought to rely on *Krishna v. Raman*, (I. L. R. 11 Madras, 266) (1). In that case their Lordships of the Madras High Court, after referring to a case in which it was held that a suit to remove a *karnavan* is not a suit to recover *tarwad* property and to be valued as such, but is a suit which asks for a relief that is incapable of valuation, and that the value put upon it by the parties was the one to be adopted,

(1) 11 M 266.

went on to say,

"These decisions (that is, this and the one previously referred to) proceed on the view that possession is always in the *tarwad* and that the subject-matter of the suit is not the land but an interest in it, namely, the right to management which is not capable of valuation. But it does follow that a District Munsif has jurisdiction over every suit for the removal of a *karnavan* though the *tarwad* property to be managed is very considerable in value. The right of management must, from the nature of things, rise in value in proportion to the value of the property to be managed. It is not, therefore, unreasonable to take into consideration the value of the property and to see that the value put by the parties on the right of management for the purpose of jurisdiction is *bona fide* and, if *bona fide*, to adopt it as the value of the subject-matter for purposes of jurisdiction. The Subordinate Judge was wrong in holding that, because the subject-matter is incapable of precise valuation, the District Munsif had necessarily jurisdiction over the suit."

This case is, if anything, helpful to the respondents and not to the appellants. It was decided as far back as 1887 and the question which was then in doubt as to the proper jurisdictional valuation of such a suit is exactly the question which has been set at rest by the enactment of s. 4 of the Suits Valuation Act in its present form.

We have no doubt that the appeal has been incorrectly valued at Rs. 5,200 for purposes of jurisdiction. The proper valuation is Rs. 47,610 being 30 times the land revenue. We allow the application and direct that the appellants shall within one week from this date amend their petition of appeal in accordance with this order. Should they fail to do so, the appeal will be put up for orders of dismissal.

s.

Application allowed.

MADRAS HIGH COURT

Letters Patent Appeal No. 75 of 1937

December 4, 1939

LEACH, C. J. AND KRISHNASWAMI

AYYANGAR, J.

KONA ADINARAYANA

—DEFENDANT No. 1—APPELLANT

versus

DRONAVALLI VENKATASUBBAYYA

AND OTHERS—PLAINTIFFS—

RESPONDENTS

Contract—Specific performance—Suit for—Contract by vendors to sell land—One of them minor—Vendee going into possession and retaining it for long time without repudiating contract—Purchase price not paid—Suit by vendors for specific performance—Minor becoming major then—Suit held maintainable—Right to repudiate held waived.

A, B and C who were brothers and members of joint Hindu family agreed to sell a piece of land to vendee. C was minor. A and B signed the contract and A also signed as manager of the family and guardian

of C. Vendee went into possession and remained in possession for a long time enjoying the rents and profits of the land without paying the purchase price. Vendors sued for specific performance of the contract. C had by then, reached majority.

Held, that the vendee having remained in possession of the land without repudiating the contract must be deemed to have waived the right to repudiate it on the ground that one of the vendors was a minor when the contract was executed. The vendors were entitled to maintain the suit. *Hoggart v. Scott* (1) and *Salisbury v. Hatcher* (2), relied on.

L. P. A. preferred under clause 15 of the Letters Patent to the High Court against the decree of the Honourable Mr. Justice Venkataramana Rao in S. A. No. 726 of 1935 preferred against the decree of the Court of the Subordinate Judge, Masulipatam in A. S. No. 27 of 1935 (O. S. No. 272 of 1933 District Munsif's Court, Gudivada).

Mr. P. Somasundaram, for the Appellant.
Mr. P. Satyanarayana Rao, for the Respondents.

Leach, C. J.—The appeal arises out of a suit for specific performance of a contract for sale of land tried in the Court of the District Munsif of Gudivada. The respondents were the plaintiffs. On August 4, 1930, by a contract in writing the respondents agreed to sell three quarters of an acre of land in Kistna District at the price of Rs. 1,095. The respondents are brothers and are members of an undivided family. The third respondent was a minor at the time the contract was entered into. The contract was signed by the major brothers and by the first respondent as the manager of the family and as the guardian of the minor.

The appellant went into possession immediately after the execution of the contract and admittedly he has remained in possession and had enjoyed the rents and profits ever since. The suit for specific performance was filed on August 4, 1933. The appellant, although he was in possession and was treating the land as his own, set up the defence that the suit for specific performance would not lie as one of the vendors was a minor. His attitude under the circumstances can only be described as that of a very dishonest person. At the time of the institution of the suit the minor member of the vendor family had reached majority. The District Munsif granted the respondents a decree, but on appeal the Subordinate Judge of Masulipatam held that the major brothers alone were entitled to sue for specific performance. Accordingly, he limited the decree to 2-3rds of the land on payment of two-thirds of the purchase con-

sideration. The appellant then appealed to this Court and the first and second respondents filed a memorandum of cross-objections. The appeal was heard by Venkatarama Rao, J., who restored the decree of the District Munsif, but gave a certificate permitting of this Letter Patent Appeal.

In holding that the respondents were entitled to maintain a suit for specific performance the learned Judge relied on the decisions in *Hoggart v. Scott* (1) and *Salisbury v. Hatcher* (2). In the first of these cases it was held that a plaintiff in a bill for the specific performance of a contract was entitled to a decree if, at the time of the hearing, he would shew a good title, although he had not a good title at the time of the contract.

Leach, M. R. observed :—

"The defendant, if he had thought fit, might have declined the contract as soon as he discovered that the plaintiffs had no title; as he was not bound to wait until they had acquired a title; but, he now having taken that course, it is enough that at the hearing a good title can be made."

In *Salisbury v. Hatcher* (2) Knight Bruce, V. C. said :—

"In case of specific performance the want of mutuality is a consideration generally material, but it is contrary to principle and authority to say that perfect mutuality is required in order to call a Court of Equity into action. There are cases in which plaintiffs have had a decree for specific performance against defendants, who, when the bill was filed, were not in a condition to enforce specific performance in their own favour. Where no legal invalidity affects the contract, the enforcement of it in this Court is matter of judicial discretion."

In that case the purchaser not having rejected the purchase as soon as he had ascertained the real interest of the vendor and the vendor latter having acquired a perfect title a decree for specific performance was passed.

As Venkataramana Rao, J., has pointed out the fact that the appellant remained in possession of the land and did not repudiate the contract the right to repudiate must be deemed to have been waived. There is nothing in the law of India which prevents the application of the principle applied in *Hoggart v. Scott* (1) and *Salisbury v. Hatcher* (2) and I consider that those principles have direct application here. It would indeed be regrettable if the Court could not give to the respondents the relief they ask against the injustice which they have suffered at the hands of the appellant. At no stage has he repudiated the contract but he has refused

(1) (1830) Tamlyn 500; 1 Russ & M 293; 39 E. R. 113; 9 L. J. Ch. 54; 31 R. R. 112.

(2) (1842) 2 Y. & C. C. 54; 60 R. R. 26; 12 L. J. Ch. 68; 6 Jur. 1051.

to pay the price of the land which he has enjoyed for over nine years.

The appeal will be dismissed with costs throughout.

N. S.

Appeal dismissed.

CALCUTTA HIGH COURT

Appeal No. 348 of 1937

July 24, 1940

NASIM ALI AND NARSING RAU, JJ.
ABANI NATH MUKHOPADHAYA

AND ANOTHER—DEFENDANTS—

APPELLANTS

versus

AMAR NATH MUKHOPADHAYA AND

OTHERS—RESPONDENTS

Will—Construction—“*Satyadhikari Oh Dokholikar*” and “*Satyaban Oh Dokholikar Purusannukromah*”, meaning of—*Principles of construction*.

Where a clause or a word in a will is susceptible of two meanings it must be interpreted according to that sense to which the law will give effect. *Bhooban Mohini Debya v. Hurrish Chunder* (5), relied on. [p. 450, col. 2.]

According to a will by a Hindu, the testator's grandson R was to become with previous arrangement (made in some previous will) ‘*Shatyadhikari Oh Dokholikar*’ (of the disputed property). If at the time of his death he were to leave no male child then R's uterine brother S and on his death his eldest son was to become ‘*Shatyaban Oh Dokholikar Purusannukromah*.’ If two aforesaid grandsons and or any male child of their family (*bangsha*) be not in existence then the testator's existing son P or his eldest son was to become ‘*Satyaban Oh Dokholikar*’ none of the testator's heirs was given power to transfer.

Held, that the words “*Shatyadhikari Oh Dokholikar*” were not used to convey all the interest possessed by the testator. He must have used the word to confer some interest which was less than his own interest. The estate was given to R simply without express words of inheritance. It would in the absence of a conflicting context carry by Hindu Law an estate of inheritance. The estate given to R was therefore was not an English estate tail male. [p. 449, col. 2.]

Held, also that the word “*purusannukromah*” meant “generation after generation.” S therefore got an estate of general inheritance and the prohibition against alienation of this estate was void in law. [p. 450, col. 2.]

A. from the appellate decree of the Additional District Judge, Hooghly dated September 24, 1936.

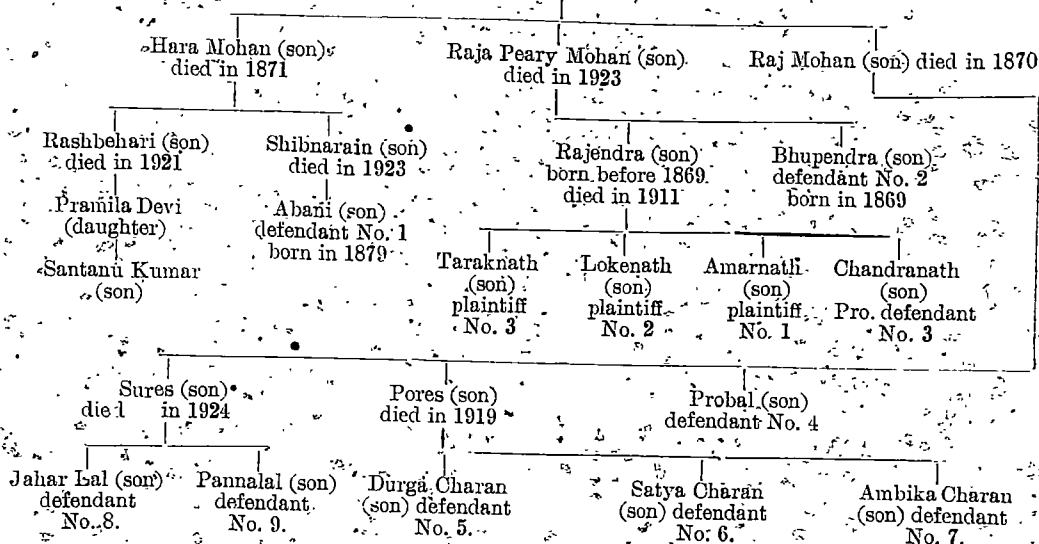
Messrs. *Hiralal Chakravarty* and *Syamasdas Bhattacharyya*, for the Appellants.

Mr. *Atul Chandra Gupta*, Dr. *Radhakibinod Pal*, Messrs. *Apurbadhan Mukherjee* and *Bijan Behari Mitter*, for the Respondents.

Nasim Ali, J.—The subject-matter of dispute in the suit out of which this second appeal arises is that portion of the 3 *bighas* 2 *cottas* of land with the structures and buildings thereon mentioned in para. 12 of the last will (dated July 11, 1879), in Bengali language of Babu Joy Kissen Mukherjee, a wealthy *zamindar* of Uttarpara which does not appertain to the Uttarpara Public Library. The following genealogy shows the relationship of the parties in this suit to Babu Joy Kissen :

JOY KISSAN MUKHERJEE

died in 1888



On June 14, 1928, defendant No. 2 granted in favour of defendant No. 1 a lease of the disputed property for 15 years. The material portions of the last will of Babu Joy

Kissen are paras. 12 and 16 of the will. Paragraph 12 of the will may be divided into four clauses: Clause 1—*Rashbehari Mukhopadhyay*, in accordance with previous

arrangement (made in some previous will) will become "Shatyadhikari Oh Dokholikar" (of the disputed property). Clause 2—God forbid, if at the time of his death he leaves no male child then his uterine brother Shib Narayan Mukhopadhyay and on his death his eldest son "pursuannukromah" will become "Shatyaban Oh Dokholikar". Clause 3—God forbid, if my two aforesaid grandsons (Rashbehari and Shib Narayan) or any male child of their family (*bangsha*) be not in existence then my existing son Peary Mohan Mukhopadhyay or his eldest son shall become Satayaban Oh Dokholikar and shall continue as such. Clause 4—But, none of my heirs shall have power to transfer.

"Paragráph 16—If anyone among my heirs or their descendants will get dances, amusements or music, etc., held on the occasion of any marriage, *sradh* or *pūja* ceremony or hold any conference in the rooms on the floor above the said Library, no one shall be entitled to raise any objection thereto. All shall have equal rights in these matters."

The questions for determination in this appeal are whether on a true construction of the last will of Joy Kissen (1) the heirs of Joy Kissen or their families have the right to hold *nach* (dances), *tamasa* (amusements), *gan* (music), etc., on the occasions of marriage, *sradh* or *pūja*, etc., or any *baitak* (conference) in the *baitakkhana* (the floor above the library) in the manner specified in para. 16 of Joy Kissen's last will; (2) defendant No. 1 has got only a life interest in the disputed property; (3) the lease of the disputed properties granted by defendant No. 1 to defendant No. 2, on June 14, 1928, or any other alienation of the disputed property by defendant No. 1 will be operative after the death of defendant No. 1. The Courts below have answered the second question in affirmative and the third question in the negative. So far as the first question is concerned, the finding of the trial Judge is that the plaintiffs and defendants Nos. 3, 5 to 7 and defendant No. 9 have no such right of enjoyment but the other defendants have. A declaration to this effect was embodied in the decree passed by him. The Additional District Judge, however, deleted from the decree of the trial Court that portion of the declaration which was in favour of defendants Nos. 2, 4 and 8 as he was of opinion that these defendants did not join in the suit as plaintiffs and did not also pay the requisite court-fees for such relief though at the same time he observed that the trial Judge was justified in making observation in his judgment that defendants Nos. 2, 4 and 8 had such rights of enjoyment.

Hence this second appeal by defendants

Nos. 1 and 2. The plaintiffs and the other defendants have filed no cross-objections. The first contention on behalf of the appellants in this appeal is that the District Judge having found that defendants Nos. 2, 4 and 8 are not entitled in this suit to a declaration in their favour to the effect that they have got right of enjoyment of the *baitakkhana* as specified in cl. 16 of the will and that he having directed the deletion of this declaration from the decree of the trial Judge he should have also deleted the observations of the trial Judge in his judgment in connection with this matter from the judgment of the trial Judge. I accept this contention as this position was not controverted by defendants Nos. 2, 4 and 8. The second question relates to the quantity of interest of defendant No. 1 in the disputed property under the terms of Joy Kissen's last will. The decision on this question depends on the true construction of para. 12 of the will. It appears from other parts of the will (e. g., paras. 2, 3, 6, 10 and 17) that wherever the testator intended to bequeath his whole interest he used the word "*paibin*" (shall get). He did not use this word in para. 12. The words "Shatyadhikari Oh Dokholikar" in cl. 1 of para. 12, therefore, were not used by him to convey all the interest possessed by him. He must have used the word to confer some interest which is less than his own interest.

"There is no rule that the first recipient must take all the interest possessed by the testator for limited interests are common enough: *Kristormoney Dossee v. Norendra Krishna Bahadoor* (1) at p. 39."

What then is the nature of this limited interest? Clause 2 lays down that on the death of Rashbehari without a male issue the property would go to Shib Narayan or his eldest son. The contention of the plaintiffs that the limited interest given to Rashbehari by the clause is an English tail male. The argument in support of this contention is this. Clause 1 should not be construed independently of the subsequent clauses. The words "God forbid if at the time of his death he leaves no male child" in cl. 2 and the words "if there be no male child of their (two grandsons) families" in cl. 3 by implication lay down the course of succession and limit it to the male issues of Rashbehari in succession. Clause 4 forbids alienation. The combined effect of these provisions is that the estate created in favour of Rashbehari is an English estate tail male. I am unable to accept this contention for the following reasons:

(1) 16 I. A 29 (39); 16 C 383; 5 Sar. 285; 13 Ind. Jur. 90 (P. C.).

The estate was given to Rashbehari simply without express words of inheritance. It would in the absence of a conflicting context carry by Hindu Law an estate of inheritance. *Tagore case* (*Ganendro Mohun Tagore v. Jutendro Mohun Tagore*) (2), at p. 65. There are no express words in any of the four clauses prescribing the course of succession to the estate given to Rashbehari or limiting it to the male line as was the case in *Kumar Tarakeswar Roy v. Kumar Shoshi Shikholeswar* (3). The words in cls. 2 and 3 relied on by the plaintiffs by implication do not prescribe the course of succession. They occur in clauses where the testator was not prescribing the course of succession but was laying down the contingencies on the happening of which the property would go to other persons. The construction proposed by the plaintiffs would create an English estate tail male which was prohibited by the decision in *Tagore case* (2). It must be assumed that when the testator was making his will seven years later he must have had regard to the effect which the law of the country had attached to a disposition similar to an English estate tail male: *Sreemuty Soorjémoney Dossee v. Denobundoo Mullick* (4), at p. 550. There being no conflicting context to cut down the estate of general inheritance created in favour of Rashbehari the words in cl. 4 forbidding alienation must be rejected as being repugnant or rather as an attempt to take away the right of transfer which the law attaches to the estate which the testator has sufficiently shown his intention to create though he has added a qualification which the law does not recognize: *Tagore case* (2), at p. 65. I therefore hold that the estate given to Rashbehari is not an English estate tail male.

The testator has not stated expressly the time when the uncertain event specified in cl. 2 is to occur. In view of the provisions contained in s. 111, Succession Act, 1865, it may be contended that this time is the time of the death of the testator and the gift to Shib Narayan did not at all take effect. I express, however, no opinion on this question as it is an admitted fact in this case that after the happening of the contingency mentioned in cl. 2, Shib Narayan entered into possession of the disputed property to the exclusion of Rashbehari's daughter. What was then the nature of Shib Narayan's

(2) (1872) I A Sup. Vol. 47 (65); 9 Beng. L R 377; 16 W R 359; 2 Suther 692; 3 Sar. 82 (P O).

(3) 10 I A 51; 9 C 952; 13 C L R 62; 4 Sar. 439; 7 Ind. Jur. 327 (P O).

(4) 6 M I A 526 (550); 4 W R 114; 1 Ind. Jur. (N. S.) 37; 1 Suther 291; 1 Sar. 583 (P O).

interest in the disputed property? In cl. 2 the testator has added the word 'purusanukromah' to the words 'Shatyaban Oh Dokholikar' while describing the nature of the interest given to Shib Narayan or his eldest son. The object of adding the word 'purusanukromah' was to prescribe expressly the course of succession to the estate created in favour of Shib Narayan or his eldest son. This word has not acquired any technical meaning. It is used in two senses: (1) from male to male and (2) from generation to generation. If the word was used by the testator in the first sense he would be creating an estate of inheritance which will be hit by the decision in the *Tagore case* (2). If he used the word in the second sense an estate of inheritance which would be valid in law. The contention of the plaintiffs is that the second construction would be inconsistent with the words "if any male child of their (two grandsons') family be not in existence" in cl. 3 and the words forbidding alienation in cl. 4 while the first construction would not.

This argument assumes that the aforesaid words in cl. 3 lay down the course of succession. There is no foundation however for such assumption as the testator has already prescribed the course of succession by the word 'purusanukromah' in cl. 2. In cl. 3 he was simply stating that on the death of his two grandsons or the failure of the male child of their family (at the time of his death the time of the occurrence of this uncertain event not being stated either expressly or by implication) the property would go to Peary Mohan or his eldest son. Where a clause or a word is susceptible of two meanings it must be interpreted according to that sense to which the law will give effect s. 71, Succession Act of 1865; *Bhooban Mohini Debya v. Hurriish Chunder* (5) at p. 147. If the word 'purusanukromah' be interpreted in the second sense it would not be inconsistent with the provisions contained in cl. 3. The law will give effect to this disposition as creating an absolute estate of general inheritance in favour of Shib Narayan and the words in cl. 4 prohibiting alienation would be rejected as repugnant to this estate. I see no reason, therefore, why I should not interpret the word "purusanukromah" as meaning "generation after generation." I accordingly hold that Shib Narayan got an estate of general inheritance and that the prohibition against alienation of this estate

(5) 5 I A 138 (147); 4 C 23; 2 C L R 339; 3 Sar. 815; 3 Suther 537; 2 Ind. Jur. 430; 1 Shom. L R 241 (P O).

is void in law. The contingency mentioned in cl. 3 has not happened. Shib Narayan, therefore, acquired an absolute interest in the disputed property by Joy Kissen's will. After his death this interest has devolved on defendant No. 1 by inheritance. The Courts below were, therefore, wrong in holding that the defendant No. 1 has got only a life-interest in the disputed property. In view of my decision on the second question, the third question must be answered in the affirmative, *i. e.*, in favour of the appellants. The result, therefore, is that this appeal succeeds. The judgments and decrees of the Courts below are set aside and the suit is dismissed with cost throughout to defendants No. 1 and 2.

Narsing Rau, J.—The main source of the difficulty in this case is the expression “*purusanukromah*” in para. 12 of the will. It is a Bengali expression though derived from Sanskrit, and the interpretation put upon it by the learned Subordinate Judge who tried the suit and the learned Additional District Judge who heard the first appeal—both of them officers whose mother-tongue is Bengali—is entitled to great weight. The Subordinate Judge, after referring to the English translation of paras. 12 to 16 of the will given in the plaint and to the fact that the defendants challenge the correctness of the translation, proceeds to give his own translation of the relevant portion of para. 12 of the will thus:

“Within this land of 3 *bighas* 2 *kottas* I have built a two-storeyed *pucca* building, in the lower storey of which a public library has been established and a *baitthakkhana* in the upper storey My eldest son Haramohan who was *malik* of this building having died, his son Rashbehari has become the owner and possessor (*Sattwadhikari* O *Dakhalkar*) thereof according to previous arrangement; in case Rashbehari dies without male issue, then his brother Shib Narayan and on his death his eldest son will become owner and possessor thereof, generation after generation In the absence of male issue in their line my son Peary Mohan or his eldest son will become the owner and possessor thereof and none of my heirs shall have any right to alienate the aforesaid land and building.”

Thus the Subordinate Judge's rendering of “*purusanukrame*” is ‘generation after generation.’ He repeats this rendering in another part of the judgment; but in stating his conclusion, after considering certain other clauses of the will, he says that the testator has used the word “*purushanukrame*” in its “plain sense of succession by heirs male only of the body of the donees.” The Additional District Judge's translation of this part of para. 12 of the will runs:

“Upon the death of my eldest son Haramohan Mukhopadhaya, who was the *malik* of the said land

and structure, his son Rashbehari Mukhopadhaya has become owner and occupant of the same. God forbid, if at the time of his death he does not leave behind any son, then his brother Shib Narayan Mukhopadhaya and in his absence his eldest son will become owner and occupant in the male line. God forbid, if my aforesaid two grandsons or any male descendant in their line does not survive, then my diving son Peary Mohan Mukhopadhaya or his eldest son will become owner and occupant and will continue to be so, but none of my heirs or anybody else is vested with any power to abolish the library from the lower storey or to transfer the aforesaid land and *pucca* structures.”

Thus the Additional District Judge's rendering of “*purushanukrame*” is in the male line. But in the very next sentence he says:

“All controversies have been centred round the words ‘*Sattwaban* O *dakhalkar*,’ ‘*Purushanukrame*’ and ‘*Uttaradhikai*’ (owner and possessor, for generation and heir).”

Here, therefore, his rendering of the word “*purushanukrame*” is for generations. In a later part of the judgment he states that the words ‘*putra-pautradikrame*,’ ‘*purushanukrame*,’ &c, “are very catching at first sight and they are often taken to imply estates of inheritance.” He repeats this observation on the next page. Still later he says that the undisputed case of both parties was, *inter alia*, that if Rashbehari died without leaving any male issue, then the property would pass to Shib Narayan and in his absence to his eldest son from generation to generation in the male line. (This translation is no longer undisputed.) Again in a succeeding passage he says:

“The expressions ‘*Sattwadhikari*’ ‘*Sattwaban* O *Dakhalkar*,’ and ‘*Purushanukrame*’ are often used in testamentary dispositions and gifts where an absolute estate of inheritance is intended in favour of the legatee or donee.”

Further down he says, speaking of the testator:

“He first stated that the property belonged to his eldest son Haramohan and that he having died, passed to his eldest son Rashbehari. The next provision was that if Rashbehari died leaving (*sic*) any male issue it would pass to the testator's second grandson Sibnarain or in his absence to his eldest son from generation to generation.”

His final conclusion, however, after considering certain other clauses of the will is put thus:

“So there can remain no doubt about the fact that the expression “*purushanukrame*” in this particular case was not used in the sense including the females also, but was totally exclusive of them.”

It is not easy to gather from these judgments what the Courts below considered to be the meaning of the expression “*purushanukrame*” standing by itself and apart from the other clauses of the will. The general effect of the judgments appears to be this: The plain or primary sense of the expression is in the male line, but it has also

acquired in Bengali documents, a secondary meaning, generation after generation, and is often used to convey an absolute estate of general inheritance; but having regard to the other clauses of the will, it appears that in this particular provision the testator has used the word in its plain or primary sense of in the male line. In Wilson's Glossary (1855) the expression "purushanukrame" is translated as "by or in course of succession in the direct or male line." Our attention has also been invited to certain Bengali dictionaries, but as the definitions in those dictionaries repeat the word "purush" which is the source of the ambiguity, meaning either "man" or "generation" they do not seem to be of much assistance.

The net result is that the plain or primary sense of the expression is in the male line, (as stated in Wilson's Glossary and by the Subordinate Judge in his conclusion and as appears from the Additional District Judge's translation of para. 12), but that the expression is often used in Bengali documents in a more general sense to mean generation after generation and to convey an absolute estate of general inheritance (as stated more than once by the Additional District Judge in the judgment and as appears also from the Subordinate Judge's translation of para. 12).

The question now is: In which of these two senses has it been used in this particular provision? On this point, both the Courts below have found that it has been used in the plain or primary sense and not in the more general sense. The main argument on behalf of the appellants before us is this: Even assuming that the expression is ambiguous, s. 84, Succession Act, 1925, which by virtue of s. 57 and Sch. III to the Act, applies to all wills made by Hindus after September 1, 1870 and which therefore applies to the present will, requires that where a clause is susceptible of two meanings according to one of which it has some effect and according to the other of which it can have none, the former shall be preferred. If "purushanukrame" is interpreted as meaning in the male line the effect would be to create an estate in tail male. Such an estate cannot be created by a Hindu testator, so that this interpretation completely destroys the effect of the words, an estate of special inheritance is created, only to be instantly avoided as repugnant to Hindu Law. On the other hand, if the expression is given the more general meaning of which it is capable, namely generation after generation, and is construed as conveying an absolute estate of

general inheritance, the clause will have effect according to its tenor subject to any other valid provision of the will. In these circumstances, the Court ought not to adopt the former construction and create an intestacy when another construction not leading to an intestacy is possible.

In my view, this argument must succeed. We have here an expression which is equally capable, when standing by itself in a Bengali document, of meaning either in the male line of succession or generation after generation. Is there anything in the context which compels us to adopt the former meaning and create an intestacy?

The provisions of the will relied upon for this purpose by the trial Court are: First, that in case Rashbehari leaves no male issue at the time of his death, the property is to go to his brother Sibnarain or his eldest son. Secondly, that in case Rashbehari and Sibnarain and their male descendants are not in existence, the property is to go to Peary Mohan or to his eldest son. Thirdly, that none of the testator's heirs or successors shall have any right to alienate the property. And fourthly, that the testator's heirs and the members of their families would all have a right to use the *baithakkhana* for dances, etc. in connection with any marriage etc. The first three clauses are taken from para. 12 of the will and the fourth from para. 16. It is said that these clauses clearly show that the testator's intention was not to give an absolute estate either to Rashbehari or to Sibnarain or Sibnarain's son Abani.

The argument is hardly convincing. Undoubtedly the testator meant to qualify his gift in certain ways: but this does not show that he did not intend to give an absolute estate subject to those qualifications. In fact, we may look upon the several clauses as so many provisos or exceptions to the disposition indicated in the previous part of the will. Let us, however, examine the clauses more closely. The first clause restricts the estate given to Rashbehari and has no direct bearing on the interpretation of the expression "purushanukrame" which occurs in the will only in connection with the estate given to Sibnarain and his eldest son. The clause, may, however, have an indirect bearing on the question, as showing the character of the estate given to Rashbehari and as suggesting by analogy the nature of the gift to those coming after him. From this point of view it is relevant to observe that the gift to Rashbehari was not of an estate descending entirely in the male line. For example, if Rashbehari had died leaving a son and that son

had predeceased Shibnarain leaving a daughter, there would have been nothing in the will to prevent the daughter inheriting. For, Rashbehari's son would have excluded Sibnarain, and upon that son's death, the estate would have passed to his daughter, because the presence of Sibnarain would have excluded Peary Mohan or Peary Mohan's eldest son. It is thus clear that the estate given by the will to Rashbehari was not an estate restricted to the male line of succession. It may be noticed further that it by any combination of events the estate had passed to Peary Mohan's eldest son under the relevant clause of the will, the estate in his hands would have been an absolute one and would not have descended only to his male heirs, there being no such restriction in the will. Briefly, therefore, the estate given by the will was not, necessarily and always, an estate descending only to male holders whether in Rashbehari's line or in Peary Mohan's line. There is, therefore, no ground for crediting the testator with an intention to restrict the estate male holders in Sibnarain's line alone, and as we shall see presently he has not in fact done so. Let us now turn to the second clause which, literally translated, runs :

"God forbid, if my aforesaid two grandsons or the male descendants of their families are not in existence, then my existing son Peary Mohan Mukhopadhaya or his eldest son will become and remain owner and possessor."

It may be mentioned here that Rashbehari, Sibnarain, Peary Mohan and Peary Mohan's eldest son Rajendra were all in existence at date of the will and Sibnarain's eldest son Abani (defendant-appellant No. 1) had either been born or was *en ventre sa mere*; they were all in existence at the date of the testator's death. Now the clause in question merely says : "If my aforesaid two grandsons, etc., are not in existence" without mentioning any point of time. The testator could not have meant that if the contingency happened at any time, however remote, the estate was to go over to Peary Mohan or his eldest son, for Peary Mohan or his eldest son could not live for ever so as to be able to take the estate whenever the contingency happened. The testator had obviously some point of time in mind, although he has not mentioned it in the will. In these circumstances, we may well presume that the point of time intended was the date of the testator's death, and such a construction, besides being in consonance with the principle of s. 124, Succession Act, 1925 (which is one of the sections applicable to Hindu wills made after September 1, 1870), would accord quite well with the other provisions of the will. The testator first makes

a gift to Rashbehari ; he then provides that if Rashbehari should die without leaving any sons, the estate is to go over to Sibnarain or his eldest son. He then sees that he has made no provision for the contingency of Rashbehari and Sibnarain and their male descendants, all predeceasing himself (the testator). He therefore makes the provision new under consideration. This is at least one possible reading of the will. On this view all that the clause provides or implies is that one or other of certain male holders shall take the estate upon the testator's death, but it imposes no restriction upon the nature of the estate in that holder's hands, once he has taken it. In other words, he takes the whole of the testator's estate without qualification. On the other hand, even if we presume no particular point of time for the happening of the contingency upon which the estate was to pass to Peary Mohan or his eldest son except, of course, that the contingency must happen during the lifetime of Peary Mohan or his son, the clause being otherwise meaningless—the words of the clause do not warrant the assumption of a gift of an estate in tail male. For suppose, as has actually happened, Rashbehari died without leaving a son and thereafter Sibnarain died leaving a son who survives both Peary Mohan and Peary Mohan's eldest son. Suppose later Sibnarain's son leaves a daughter, how can she be excluded from the succession by this clause ? Peary Mohan and his eldest son both being dead the gift to either of them can no longer take effect so that the clause cannot operate to exclude Sibnarain's son's daughter in the case put.

As regards the clause restraining alienation, it is well known that such a clause often occurs in Indian wills even where the testator has by a previous disposition given, in unambiguous terms, an absolute estate. The mere presence of such a clause is therefore no indication that an absolute gift was not intended by the previous disposition. The clause is, of course, of no legal effect. The clause giving a right of use of the *baithak-khana* to all the heirs of the testator and the members of their families on certain special occasions appears to be no more inconsistent with an absolute gift than with an estate in tail male. It follows therefore that none of the clauses relied upon are sufficient to negative the construction of the expression "puru-shanukrame" as meaning generation after generation and as conveying an absolute gift subject to any other valid provisions of the will. It has been contended on behalf of the respondents that in certain other paragraphs

of the will, where the testator was beyond controversy making an absolute gift, he has not used the expression "purushanukrame." It may be that in view of the qualifications or restrictions which he was inserting in the will in respect of the *baithakkhana*, he desired to emphasize the fact that subject to those qualifications or restrictions the estate was to be enjoyed generation after generation. There is nothing in the will which compels us first to cut down the estate to an estate in tail male and then to say in consequence that such an estate, being repugnant to Hindu Law, must be further cut down to a series of life estates, with a resulting intestacy in respect of the remainder. I agree that the appeal must be allowed as directed by my learned brother.

D.

Appeal allowed.

NAGPUR HIGH COURT

First Appeals Nos. 6-B and 5-B of 1934

January 4, 1937

STONE, C. J. AND NIYOGI, J.

SHRIRAM—APPELLANT

versus

Mst. BANYA BAI *alias* GODAVARI—
RESPONDENT

Berar Inam Rules, 1859, rr. 5 (2), 3 — Inams—Succession—Certificate silent as to rule of devolution—Personal law, applicability—Crown Grants Act (XV of 1895), s. 3—Enfranchisement of inam—Burden of proof—Husband of deceased incumbent, if can come in as heir—Devolution—Grantee's co-sharer's lineal descendants becoming extinct—Escheat to Crown—Reversion to representatives of original grantee—Despandia allowance, when inam—Succession thereto—Dastaki, what is—Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Person acquiescing in decree appealed from, whether entitled to benefit of O. XLI, r. 33.

Where the *inam* is a Crown grant it will be governed by s. 3, Crown Grants Act which excludes the application of the personal law. If there is any ambiguity in the *inam* certificate or if the *inam* certificate is silent as to the rule of devolution the question will have to be resolved in accordance with the Inam Rules of 1859. In matters not expressly mentioned in the *sanad* or certificate or other documents evidencing the special terms of the grant in the particular case, devolution and the incidents of an *inam* estate in Berar are regulated by the Berar Inam Rules of 1859. 88 Ind. Cas. 347 (1), relied on. [p. 455, col. 2.]

Whether or not a particular *inam* estate has been enfranchised is a question of fact in each case, the burden of proving which rests on the party who asserts it. 36 Ind. Cas. 518 (2), relied on.

A widow of an *inam* grantee is a member of his family whereas a husband of a woman born in grantee's family is not a member of that family. The grant is made for the benefit of the grantee's family and cannot be enjoyed by any one who is outside that family. [p. 456, col. 1.]

If the share which is assigned to a co-sharer in the *inam* certificate is regarded as a distinct and indepen-

dent grant, it will no doubt escheat to Govt. on extinction of the co-sharer's line. But where it is covered by a major grant, it does not escheat to the Crown but merges in the major grant of which it was a part and reverts to the representatives of the original (major) grantee.

Deshpandia allowance in Berar is an *inam* and is governed by the Inam Rules and succession thereto is prescribed by r. 5-(2). 75 Ind. Cas. 932 (5), relied on.

Under r. 32 of the Rules framed under s. 14 of the Pensions Act, 1872, (Act XXIII of 1871), as applied to Berar, the cash allowance payable to Deshmukhs and Deshpandias in commutation of their emoluments as *expargana* officials is paid to the person whose name has been recorded as *dastaki*. Under r. 36 of the aforesaid rules the *dastaki* is bound to distribute the allowance among all persons who are entitled to any share in it. These allowances are intended for the maintenance of the grantees and their descendants. [p. 458, col. 2.]

Order XLI, r. 33, Civil P. C., confers discretionary power on the Court. That power cannot be exercised in favour of a person who acquiesced in the lower Court's decree passed against him by payment of the decretal amount and bound himself not to appeal from the decree. [*ibid.*]

F. As. from the decree of the Court of the Sub-Judge, First Class, Daryapur, dated September 30, 1933.

Mr. T. L. Sheode, for the Appellant.

Messrs. M. R. Bobde, and A. V. Khare, for the Respondent.

Judgment.—This appeal and First Appeal No. 5-B of 1934 arise respectively out of two suits, Civil Suit No. 107 of 1930 and Civil Suit No. 21 of 1931. The first suit was instituted by the appellant Shriram son of Deorao to recover possession of some fields at Itbarpur with mesne profits for three years 1927-28, 1928-29 and 1929-30 against the respondent's husband Maruti. The second suit was instituted by the aforesaid Maruti against the appellant Shriram and one Udhao to recover possession of five fields at Nandura with mesne profits for three years and also for a share of Lawajama (cash allowances paid by the Govt. to Deshpandes who were prior to the British Govt. hereditary officers) for 11 years. The respondent succeeded in both the suits and these two appeals have been preferred by Shriram.

The villages Peth Itbarpur and Nandura were granted on Palampat tenure by the British Govt. in 1867 to Ganpatrao Narayan and Khusalrao Bajinath and the grant was confirmed by an *inam* certificate delivered to the grantees on June 3, 1875. These two individuals were heads of two different families which had already separated before 1867. Shriram the appellant is now the head of Khusal Bajinath's family (the junior branch of the quondum joint family) and is the *inam* certificate holder. In Khusal's family there were four branches of which

branch No. 3 was represented by Dhondu at the time of the grant in 1867. In the *inam* certificate of 1875 he is shown as a co-sharer holding 1/24th share of the whole *inam*. It is common ground that Dhondu's share was comprised in the eight-anna share granted to Khusal, the head of the junior branch. The dispute relates to the lands comprised in Dhondu's share. Dhondu died in 1888 survived by a daughter named Bani who died on November 5, 1918, without issue. She had been married to Maruti, who subsequent to her death married Bani the respondent. Maruti having died during the pendency of this litigation, is now represented by his widow *Mst* Bani *alias* Godavari. Dhondu's share devolved on his daughter *Mst*. Bani, Maruti's first wife. On his death Maruti took possession of the fields at Itbarpur and Shriram took possession of five fields at Nandura and Udhao of the rest. Shriram is the son of Deorao who was Khusal's daughter's son. Deorao, his father, was adopted by Khusal as his son. The contention as to the validity of his adoption was raised but later waived by reason of the fact that even without the adoption he, being the lineal descendant of Khusal, would be his heir. Shriram was recognised as the lawful heir of Khusal under the Inam Rules and was granted the *inam* certificate.

Shriram founded his claim on his being the head of the Khusal's branch of the family and a certificate holder. He alleged that Bani, the daughter of Dhondu, the recorded co-sharer in the *inam* certificate was only entitled to maintenance and that as her right did not devolve on her husband, Maruti, the lands comprised in her share reverted to him as the representative of the original grantee of the *inam* and also as head of the family who was the *inam* certificate holder. Maruti contended that under the Hindu Law which was applicable to the parties he had succeeded to the share of Bani, his wife, and that even if the *inam* r. 5 (2) governed the succession he was Bani's lineal heir. His contention prevailed in the lower Court which held that Dhondu's share after it vested in Bani became her *stridhan* which would pass as such to her husband as the next heir under the Hindu Law. It also held that even if *inam* r. 5 (2) applied to this case Maruti was the direct lineal of his wife.

The view taken by the lower Court that Maruti was the direct lineal heir of his wife is not supported by the learned Counsel for the respondent in this Court. He, however, sought to justify the lower Court's decree on other grounds, namely, (1) that the devolu-

tion of the property in question is not governed by Berar Inam Rules, 1859, (2) that even if the rules applied the case will be governed by r. 3, and not by rr. 5 (2) and (3) that irrespective of the question whether or not Maruti had title the plaintiff Shriram himself had no title to the property and consequently his suit should be dismissed.

As to the first ground it is urged that the *inam* certificate itself does not impose any limitation on succession. The *inam* certificate in col. 20 says that the grant was to be continued or fixed share to claimants, their descendants and co-sharers in perpetuity deducting Abkari. The argument is that the word "descendants" relates only to "claimants" and not to "co-sharer", and on this interpretation it is contended that the grant made to Dhondu was absolute and not trammelled by any conditions in respect of devolution. If this interpretation prevails, the result would be that a part of the grant will remain subject to the *inam* rules and another part will not be governed by the *inam* rules. An anomalous result like this would not have been contemplated by the grantor. As the grant is one and, so far as the grantor is concerned, indivisible, the whole as well as every part of it must continue to be governed, either by the *inam* rules or by the personal law of the parties. As the *inam* is a Crown grant, it will be governed by s. 3 of the Crown Grants Act (Act XV of 1895) which excludes the application of the personal law. If there is any ambiguity in the *inam* certificate or if the *inam* certificate is silent as to the rule of devolution the question will have to be resolved in accordance with the Inam Rules of 1859. Their Lordships of the Privy Council in *Mir Subhan Ali v Imami Begum* (1) ruled that in matters not expressly mentioned in the *sanad* or certificate or other documents evidencing the special terms of the grant in the particular case, devolution and the incidents of an *inam* estate in Berar are regulated by the Inam Rules of 1859.

Then it is urged that the *inam* had already been enfranchised when it was granted. Whether or not a particular *inam* estate has been enfranchised is a question of fact in each case, the burden of proving which rests on the party who asserts it: *See Krishnaji v. Nilkanth* (2). In the present case the respondent did not even raise the plea in the lower Court that the *inam* was enfranchised.

(1) 21 N L R 117; 88 Ind. Cas. 347; A I R 1925 P C 184; 52 C 971; 52 I A 294; 23 A L J 667; (1925) M W N 535; 30 C W N 122; 50 M L J 136 (P C).

(2) 12 N L R 150; 36 Ind. Cas. 518; A I R 1916 Nag. 55.

An argument is sought to be erected on the basis of a decision reported in *Abdul Latif v. Mansinghrao* (3). That was a case of *inam* which before the settlement was not subject to any quit rent but thereafter was made liable to pay a quit rent under r. 5. In this case it appears from Ex. D-11 that the Govt. demand of the villages was Rs. 1,239 before settlement, and that was the quit rent imposed at the settlement. It would further appear from that document that the grantees were put in a very favourable position inasmuch as the new arrangement left to the grantees a clear surplus of Rs. 490-2-0 in place of Rs. 251-6-3 which before the settlement they had been required to pay to the Govt.

As to the second ground, we are unable to see how the *inam* in question can be brought under r. 3. It is common ground that the grantees of the *inam* were the Deshpandes of the Pergana Daryapur and that the grant made in their favour by former Govts. for service which were being rendered by them in revenue department, was confirmed and continued in their favour although the services were discontinued. The *inams* so granted in lieu of lands or money stipends commonly called *hugs* and *russums* of offices, such as Deshmukh, Deshpandias, and others, the service of which has either been dispensed with or otherwise discontinued, are by r. 5 (2) directed to be disposed of according to cl. (2) of r. 5, if they are hereditary in their terms. In view of the history of the grant, r. 3 of the *inam* rules can have no application. The personal Jagirs regulated by r. 3 are thereby made subject to a legacy duty or succession fee. It is not alleged in this case that any legacy duty or succession fee was ever charged when the grant devolved on any heir. Even on the assumption that r. 3 applies, there is nothing in it to justify the view that a husband of a deceased incumbent is entitled to come in as heir. An ingenious argument is put forward that if a widow can succeed to her husband, there is no reason why a widow cannot succeed to his wife. The argument is specious but not sound because a widow of an *inam* grantee is a member of his family whereas a husband of a woman born in grantee's family is not a member of that family. The grant is made for the benefit of the grantee's family and cannot be enjoyed by any one who is outside that family, Maruti, therefore, could not come in as heir under either r. 5 or

r. 3 of the *inam* rules. Rule 3 is invoked for the reason that there had been adoptions in this family, and that adoptions are permitted by r. 3, whereas they are not permitted by r. 5. It has already been pointed that this *inam* is governed by r. 6, and although cl. 5 of that rule provides for special sanction of the Govt. before the right of adoption is admitted, that right was conceded later in 1863, as will appear from the foot note appended to that clause.

There appears to be no question that the devolution of the *inam* is regulated by r. 5 (2) and the learned Counsel for the respondent concedes that if that rule applies Maruti could not be the heir of his widow. Finding that he has no legs to stand on, he seeks to attack Shriram's title relying on *Sahebrao v. Jaiwantrao* (4). Much stress is laid on that case as a conclusive authority sustaining the respondent's claim and demolishing the appellant's, but on analysis of the facts of that case it would appear that its resemblance to this case is but superficial. That was a dispute between the certificate holder and a co-sharer and not, as here, between a certificate holder and a trespasser. Their Lordships indeed held in that case that the term "co-sharer" found in the *inam* certificate implies ownership and not a mere right to receive maintenance. The certificate holder's suit was dismissed on the ground that he and the ancestors of the co-sharer defendant, had already become separate by a partition before the *inam* was confirmed by the British Govt. and that the *inam* was continued in their favour according to their then existing and ascertained shares. The dispute pertained to Sonaji's 1/4 share which having been included in Yadoji's 8 annas share was taken by Yadoji's adopted son, Jaiwantrao, to the exclusion of Sahebrao who held the other 8 annas share. Their Lordships of the Privy Council did not decide the question whether Jaiwantrao was legally entitled to Sonaji's share. That question which was left undetermined in that case directly arises for decision in the present case where Shriram (appellant) stands in the position of Jaiwantrao and Ganesh Narayan (not a party to this suit) in that of Sahebrao. In the present case Dhondu's line, like Sonaji's line in the Privy Council case, became extinct and the legal consequences arising therefrom have to be examined to see which

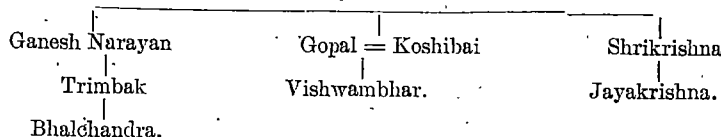
(3) 25 N L R 107; 118 Ind. Cas. 878; A I R 1930 Nag. 24; Ind. Rul. (1929) Nag. 302.

(4) 29 N L R 210, 143 Ind. Cas. 437; A I R 1933 P C 171; 60 I A 231; Ind. Rul. (1932) P C 161; 57 C L J 519; 65 M L J 154; 38 L W 37; 35 Bom. L R 81 (P C).

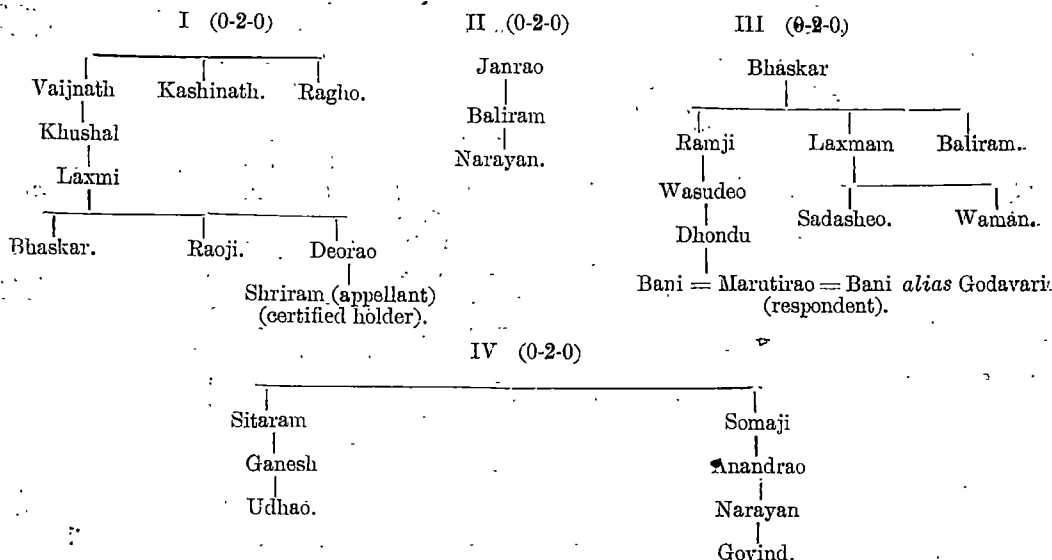
of the two contestants here is entitled to Dhondu's share.

Reference to the following pedigrees will serve to elucidate the situation :

SENIOR BRANCH = 0-8-0



JUNIOR BRANCH = 0-8-0



It will be apparent from the two pedigrees that the two branches are quite independent and that Dhondu was a member of the junior branch.

Now, in view of the Inam Rule 5-(2) which is made applicable by Rule 6 (2) which governs the *inam* under consideration, Dhondu's share could devolve only on Dhondu's lineal descendants. The question is : if the ownership of Dhondu's share becomes vacant consequent on failure of Dhondu's lineal descendants, who will be entitled to it ?

On behalf of the respondent it is contended that

(i) Dhondu's share would be regulated by the rule of succession prescribed by Hindu Law; either it will pass to Maruti, the husband of Dhondu's daughter Bani, or it will go to Dhondu's next reversioners.

(ii) The share would escheat to the Crown, the grantor of the *inam*.

But there is a third alternative which is contended for by the appellant but not con-

ceded by the respondent; it is that it would merge in the grant made to Khushal and would therefore revert to the representative of Khushal to whom the *inam* was primarily granted by the Crown.

The first alternative must be summarily ruled out as it involves negation of the *inam* rules. It must therefore be held that neither Maruti's nor Dhondu's reversioners have any claim to Dhondu's share.

The second alternative merits serious consideration. Rule 5 (2) of the Inam Rules runs as follows :

"If the present incumbent is a descendant of the original grantee, the *inam* will be continued to him hereditarily, subject to the following conditions ;

First—Successions limited to direct lineal heirs and undivided brothers.

Second—The *inam* escheats to Govt. on failure of such heirs."

If the share which is assigned to Dhondu in the *inam* certificate (Ex. P-1) is regarded as a distinct and independent grant, it will no doubt escheat to Govt. but the terms of

the *inam* certificate do not bear that construction. It purports to grant the two villages Nandura and Itbarpur to Ganpat Narayan and Khusal Bajinath and specifies certain persons, including Dhondhu Wasudeb, as co-sharers. The grant to co-sharers of the shares of which they were then in possession was covered by the grant made to Ganpat and Khusal. The minor was therefore comprised in the major grant. The grantor intended primarily to grant the villages to Ganpat and Khusal for the maintenance of the grantees and their descendants and but for the existence of some collaterals at the time of the grant, the grant would have benefited the grantees alone. That the names of co-sharers were not entered in column 1 but in column 23 indicates that the grant of the *inam* was substantially made for the benefit of the grantees named in column 1. It must also be observed that in column 1 the shares of the grantees are not specified in fractions as they would be had the intention been to grant the villages minus the shares recorded in column 23. These considerations warrant the construction that the grant of the villages to those mentioned in column 1 comprised the shares specified in column 23. This construction is fortified by the fact that Govt. did not claim Dhondhu's share by escheat. The *inam* certificate (Ex. P-1) only bears a note that Dhondhu's line has become extinct and that Dhondhu's name has been struck off. The result of this entry is as if the share had never been granted to Dhondhu.

Now if the Crown as the grantor does not claim Dhondhu's share by escheat and Dhondhu's name has been struck off the *inam* certificate, it must logically follow that it would merge in the grant to Khusal and revert to Khusal's representatives, as it was carved out of Khusal's grant. At this stage, a question may well arise whether this merger of Dhondhu's share would enure for the benefit of all the surviving sub-branches of the junior branch represented by Khusal or of Khusal's representative alone. But that question and the subsidiary question of maintenance of those who were in receipt of maintenance out of Dhondhu's share do not directly call for decision and have not been debated at the bar. We therefore think it is unnecessary to pronounce our opinion on them.

The learned Counsel for the respondent spared no angle of attack in his vigorous contest of the appellant's claim. It is contended that although the respondent was a

trespasser the appellant could not succeed merely on the averment that he was Khusal's representative and a certificate holder but that it was imperative on him to set forth the particular capacity *vis-a-vis* Dhondhu, in which he asserted his right to possession of Dhondhu's share, *viz.* whether he was Dhondhu's co-owner or reversioner. There is no substance in the contention which involves a misconception of the nature of the plaintiff's claim. The appellant did not sue either as a co-owner or a reversioner of Dhondhu but he sued on the basis that Dhondhu's share merged in the grant to Khusal whose representative he was. That is a perfectly clear, intelligible and valid claim and it must succeed.

That disposes of First Appeal No. 6-B of 1934, and consequently also First Appeal No. 5-B of 1934. It has been held that Maruti had neither title nor right to possession of the fields comprised in Dhondhu's share; much less would he be entitled to get any share out of Lawajama, that is cash allowance, received by Shriram as the *dastaki* (holder of Pension Payment Order). Under r. 32 of the rules framed under s. 14 of the Pensions Act, 1872, (Act XXIII of 1871) as applied to Berar, the cash allowance payable to Deshmukhs and Deshpandias in commutation of their emoluments as *ex-pargana* officials is paid to the person whose name has been recorded as *dastaki*. It is admitted that Shriram was the *dastaki*. Under r. 36 of the aforesaid rules the *dastaki* is bound to distribute the allowance among all persons who are entitled to any share in it. These allowances are intended for the maintenance of the grantees and their descendants. Maruti was not entitled to any share as he was not a descendant of the grantee. It was held by the Judicial Commissioner's Court in *Chandrabhaga v. Ganesh Kesheo* (5) approving of a ruling of the Financial Commissioner that Deshpandia allowance in Berar is an *inam* and is governed by the Inam Rules and succession thereto is prescribed by r. (5)2. We have heard nothing against the correctness of the view taken in that case.

It is urged on behalf of Udhao who is respondent No. 2 in First Appeal No. 5-B of 1934 that under O. XLI, r. 33, Civil P. C. the benefit of the decision of this appeal should be given to him. Order XLI, r. 33 Civil P. C. confers discretionary power on the Court. That power cannot be exercised in his favour in view of his admission that he acquiesced in the lower Court's decree passed against

him by payment of the decretal amount and binding himself not to appeal from the decree.

The result is that both appeals succeed. The appellant's (Shriram's suit is decreed with costs in both Courts. The parties agreed in the lower Court on June 22, 1932 that the mesne profits claimed for three years amounted to Rs. 1,200. The decree will include the lands described in the plaint, and also Rs. 1,200 as mesne profit. The respondent's suit, namely, Civil Suit No. 21 of 1931, stands dismissed as against the appellant only with costs in both Courts.

D. *Appeals allowed.*

PATNA HIGH COURT

Appeals from Appellate Decrees Nos. 303 and 304 of 1940

February 18, 1941

SHEARER, J.

CHAGGANLAL MARWARI AND OTHERS—
APPELLANTS IN BOTH

versus

INDRA KEOT IN NO. 303 AND BHIM
KEOT AND OTHERS IN NO. 304—

RESPONDENTS

Landlord and tenant—Permanent tenancy — Proof of— Recital in mortgage-deed by tenant that tenancy was permanent — Admissibility — Value of, against landlord—Tenant mortgaging land—He must show that landlord was aware of and acquiesced in the transaction, in order to create inference of permanent tenancy—Inference of permanent tenancy, if can be drawn from mere non-evicting of heirs of tenant—Death of original tenant — Landlord subsequently passing receipts for rent not in names of his heirs but in name of original tenant—Whether shows that landlord wanted to prevent heirs from acquiring permanent rights in land—Mere fact that small portion of land was settled for building house and that house was erected, whether shows that tenancy was intended to be permanent — Failure to demand enhanced rent—Inference as to permanent tenancy — Adverse possession—Notice by landlord to quit disobeyed by tenant — Landlord not taking further steps to evict but accepting rent for more than 12 years—Subsequent suit by landlord for ejectment—Tenant cannot plead that he has acquired right of possession of property by adverse possession—Practice — Non-joinder of parties — Suit cannot be dismissed.

A recital in a mortgage-deed executed by the tenant that the rent payable for the land was fixed permanently is in admissible in evidence in a suit by the landlord for ejectment of the tenant and even if it is admissible it cannot have any weight as against the landlord. [p. 460, col. 1.]

In order, to create an inference that the landlord had made a permanent settlement of the land, it is incumbent on the tenants to show, not merely that the successors of the original tenant and persons who were ready to lend money to them had proceeded on the assumption that the original tenant had permanent rights in the land, but that the landlord, had been aware of and acquiesced in these transactions. The mere fact that the successors of the original tenant had mortgaged the land and the

mortgage-deed recited that the land was permanently settled and the mortgagee had purchased the land in execution of the mortgage-deed is not sufficient to prove the permanent tenancy when there is no evidence to show that the landlord had recognised the mortgagee as his tenant after the mortgagee had purchased an interest in the property in execution of his mortgage decree. [*ibid.*]

Landlord may refrain for one reason or another from evicting the heirs of their tenants and no inference as to the permanency of a particular tenancy can be drawn from such conduct on their part. 85 Ind. Cas. 103 (1), relied on. [p. 460, col. 2.]

Where the landlord of a holding is a lawyer, his conduct in taking care to see that receipts for rent were granted to the original tenant's sons and grandsons; not in their own names, but in the name of the original tenant is, of greater significance and suggests that, while reluctant to evict the original tenant's sons he did not admit that they had and was anxious to prevent their acquiring permanent rights in the land. [*ibid.*]

The mere fact that the land settled with the original tenant was a very small parcel of land, and, very probably, it was intended from the beginning that he should build a house for himself on it and that a house was constructed would not of itself create any strong likelihood that the tenancy was intended to be a permanent one. [*ibid.*]

From the mere failure on the part of the landlord to demand enhanced rent no inference can be drawn that the tenancy was a permanent one.

If a landlord serves a notice to quit on a tenant and, instead of taking further steps to evict him when the notice is disobeyed, accepts rent from him for a period of more than twelve years, the tenant cannot, if the landlord subsequently institutes an ejectment suit, take the plea that he has acquired a right to remain in occupation of the property by adverse possession. 150 Ind. Cas. 555 (4), relied on. [p. 461, col. 1.]

A suit cannot be dismissed *in toto* on the mere ground of non-joinder of parties. [p. 461, col. 2.]

As. from a decision of the Additional District Judge of Manbhum-Singhbhum, dated December 15 and 16, 1939.

Mr. S. C. Mazumdar, for the Appellants in both.

Mr. Girijanandan Prasad for Mr. Ch. Mathura Prasad, for the Respondents in No. 304, only.

Judgment.—These two appeals, which have been heard together, arise out of appellate decrees of the District Judge of Manbhum, dismissing suits in which it was sought to evict the defendants from certain land which was originally settled with their grandfather, one Bisu Keot, some sixty years or so ago. Bisu Keot constructed a house on this land, and, subsequently, his two sons Debakar Keot and Rakhal Keot seem to have partitioned the house between them. For that reason, apparently, two suits were instituted, one against the son of Debakar Keot and the other against the sons of Rakhal Keot. The proprietor of the land in suit was Rai Bahadur R. C. Sinha who, it is said, was at one time the Govt. Pleader at Purulia. In

1924 the Rai Bahadur sold this and other land to the plaintiffs.

The question that arises in each of the appeals is whether or not the Courts below were correct in drawing from the circumstances, which were proved, the inference that the tenancy of Bisu Keot was a permanent tenancy and his grandsons were not liable to be evicted. In one of the suits reliance was placed on the circumstance that Debakar Keot had mortgaged his interest in the property and that in due course this mortgage had been sued upon and a decree obtained. This was in 1905. The mortgaged property was sold in execution of the decree, and, in 1911, was reconveyed by the decree-holder who had purchased it himself, to Rajani Keotani, the wife of Debakar Keot. Later, in 1913, Debakar Keot mortgaged his interest in the property again, and, in 1924, the mortgagee assigned his right under the mortgage to a third person. There is a recital in one of these mortgage deeds that the rent payable for the land in suit was fixed permanently. Clearly, however, this was not, strictly speaking, admissible in evidence at all, and, if it had been, could not have been of any weight as against the landlord. The learned District Judge observed that there was no reason to suppose that the litigation which ended in the mortgage decree passed in 1905 was collusive. That may very well be so. It may be that Debakar Keot, and the persons who advanced money to him on the security of his interest in the property, believed that he and his brother Rakhal Keot had permanent rights in it. In order, however, to create an inference that the landlord had made a permanent settlement of the land, it was incumbent on the defendants to show, not merely that the sons of Bisu Keot and persons who were ready to lend money to them had proceeded on the assumption that Bisu Keot had permanent rights in the land, but that the landlord, had been aware of and acquiesced in these transactions. No evidence was, however forthcoming to show that the landlord had recognised the mortgagee as his tenant after the mortgagee had purchased an interest in the property in execution of his mortgage decree. The learned District Judge ought, I think, to have been the more chary about drawing the inference which he did from the behaviour of Debakar Keot in mortgaging his interest in the property, as it was in evidence that the landlord had not recognised the sons and grandsons of the original tenant, Bisu Keot. Receipts for rent apparently continued to be issued in the name

of Bisu long after Bisu died. It is contended that, if the landlord had not recognized Bisu's heirs as having any rights in the land he would have taken steps to evict them and would not have permitted them, as he did, to continue for many years in possession. As, however, was pointed out by Chakravarty, J., in *Abdul Hakim Khan Chowdhury v. Elahi Baksha Saha* (1), landlords may refrain for one reason or another from evicting the heirs of their tenants and no inference as to the permanency of a particular tenancy can be drawn from such conduct on their part. To my mind, when it is remembered that the landlord of this particular holding was a lawyer, his conduct in taking care to see that receipts for rent were granted to Bisu's sons and grandsons, not in their own names, but in the name of Bisu, is, of greater significance and suggests that, while reluctant to evict Bisu's sons he did not admit that they had and was anxious to prevent their acquiring, permanent rights in the land. Another circumstance, on which the Courts below relied was that Bisu Keot had erected a house on the land which was settled with him. In this connection the learned District Judge relied on *Shaikh Dargahan v. Hafiz Mohammad* (2). The question, however, that arose in that case was whether the circumstance that the buildings standing on certain land were *kachcha* and not *pakka* raised a presumption that the land had not been settled permanently. That question was answered in the negative. The decision has no real application to the facts of the present case. The land settled with Bisu Keot was a very small parcel of land, and, very probably, it was intended from the beginning that he should build a house for himself on it. The mere fact that this was so and that a house was constructed would not of itself create any strong likelihood that the tenancy was intended to be a permanent one. The house does not appear to be of any great value and, although a portion of it is made of bricks it is not clear when this portion was constructed. An attempt to evict the defendants was made as early as 1922 and it is by no means impossible that certain alterations were made to the house then with a view to creating a defence in the ejectment suit which was threatened. Thirdly, the learned District Judge relied on the circumstance that the rent payable for the land was a very low one, namely, four annas a year and

(1) 52 C 43; 85 Ind. Cas. 103; 29 C W N 138; A I R 1925 Cal. 309.

(2) A I R 1938 Pat. 333; 176 Ind. Cas. 562; 4 B R 736; 19 P L T 555; 11 R P 93.

that, although the land was situated in the town of Purulia and land values there were rising, no attempt had ever been made by the landlord to enhance it. In this connection the lower Appellate Court referred to *Bireswar Mookherji v. Troilokhya Das* (3). That was a case in which land in Howrah had been let out for building purposes and, although the value of land there had been rising quite abnormally for some considerable time prior to the institution of the suit, no demand had ever been made for the payment of enhanced rent. It is not clear to me that the circumstances in this case are at all parallel. It may perhaps be that the value of the land in suit has appreciated since Bisu Keot entered into occupation of it, but there does not appear to be any evidence on the record to show that over any considerable period there has been a marked and progressive rise in the value of land in this locality. In any event, failure on the part of the landlord to demand enhanced rent would have to be set against the fact that he contemplated evicting the tenant in 1922, that he did not acquiesce in any of the alienations and that he refused to recognize the heirs of Bisu Keot. In my view the proper inference to be drawn from the circumstances, taken as a whole, is that the tenancy was not a permanent one.

On behalf of the respondents in Second Appeal No. 304 of 1940 it was suggested that they had acquired a right to hold the land in suit permanently on a rent of four annas by adverse possession. This plea was not, however, taken in the Courts below and there is clearly no substance in it. As I said at the outset, there was no very good reason why two suits instead of one were brought. The defendants in both suits are joint tenants, the landlord, it appears, never having recognized the sub-division of the property or accepted rent from each set of defendants separately. The mere fact therefore, that the defendants in the suit out of which Second Appeal No. 304 of 1940 arises may not themselves have paid rent since 1922 when a notice to quit was served on them, is of no importance. The rent has admittedly been paid by some of the joint tenants. If a landlord serves a notice to quit on a tenant and, instead of taking further steps to evict him when the notice is disobeyed, accepts rent from him for a period of more than twelve years, the tenant cannot, if he subsequently institutes an ejectment suit, take the plea that he has acquired a right to remain in occupation of the property by ad-

(3) 30 C W N 709; 96 Ind. Cas. 315.

verse possession. (*vide Datto Shivram v. Babasaheb Malhar*) (4). Second Appeal No. 304 of 1940 will be allowed to this extent that it will be declared that the defendants are liable to be evicted. As, however, it was not proved that a proper notice to quit had been duly served, it will be necessary for the plaintiffs to institute another suit. The suit out of which Second Appeal No. 303 of 1940 arises was dismissed not only on the merits but also on the ground of non-joinder of parties. The person, who it was said, ought to have been joined in that suit was Bhim Keot who was a defendant in the other suit. The suit ought clearly not to have been dismissed *in toto* on such a ground. Second Appeal No. 303 of 1940 will be allowed and the suit will be decreed. The appellants are entitled to recover costs throughout except that in this Court I would not allow any hearing fee as there was no contest except by the guardian *ad litem* of the minor respondents in one of the two appeals.

Order accordingly.

(4) 58 B 419 (426); 150 Ind. Cas. 555; 36 Bom. L R 359; A I R 1934 Bom. 194; 7 R B I.

SIND CHIEF COURT

First Appeal No. 40 of 1938

October 18, 1940

DAVIS, C. J. AND TYABJI, J.

MULCHAND CHANDUMAL AND ANOTHER

—DEFENDANTS NOS. 1 AND 2—

APPELLANTS

versus

HARKISHINDAS PARMANAND AND
OTHERS—PLAINTIFFS NOS. 1-4 AND DEFENDANT
No. 3—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 92—Point that suit instituted under section was not validly instituted as it was not instituted by all those to whom consent was given, when can be raised for first time in appeal—Applicability of s. 92 whether depends upon whether defendants had or had not objected to form of suit—Consent to institute suit given to certain individuals—Suit instituted by some of them only, whether validly instituted—“Two or more persons”, meaning explained—Practice—Pleadings—Plaint returned for presentation to proper Court—Subsequent representation to same Court—Plaint re-admitted without giving old number—True copies of written statement of old plaint put on record—No objection by plaintiff—They held must be taken to have admitted these as pleadings of defendant.

If the facts are in dispute, the point that the suit was not instituted by all those to whom consent was given to institute the suit by the Collector under s. 92 read with s. 93, Civil P. C., and therefore was not validly instituted, should not be allowed for the first time in appeal. But where there is no dispute about the facts the point can be allowed to be raised for the first time in appeal. [p. 462, col. 2.]

The applicability of s. 92, Civil P. C., does not depend upon whether the defendants had or had not taken objection to the form of the suit. The form of the suit is laid down by law. The Legislature requires that if a suit of this kind is to be instituted it must be instituted in a particular way, and it is not open either to the plaintiffs or to the defendants, as it were, to contract themselves out of this section and to say in effect "we do not mind if the law in this matter is or is not observed." [p. 464, col. 1.]

Where consent has been given to two or more persons, only some of those persons, even if they are more than two, cannot institute the suit. A condition precedent to the valid institution of the suits is the fulfilment of the conditions of the consent which has been given. The section does not do contemplate that some of those persons should institute a suit as plaintiffs while others who, after consent is given, have changed their minds, should be joined as defendants. 174 Ind. Cas. 870 (1), explained. 124 Ind. Cas. 220 (3), relied on.

The phrase in s. 92, Civil P. C., "two or more persons" means, two or more individuals who are named or so described in the consent that they can be identified.

The plaint was at first returned to the plaintiffs for presentation to the proper Court and was then re-presented to the same Court when it was re-admitted without giving to the suit on re-admission the same number as was given to the proceeding in the old suit, when the written statement already filed by the defendants in the first suit would automatically have become part of the record of the proceedings in the second. However, true copies of the defendants' written statement in the first proceedings were put upon the record in these proceedings, and neither plaintiff nor the defendant objected: [p. 462, col. 2.]

Held, that it must be taken that they accepted these true copies of these written statements as the pleadings of the defendants in the case.

F. A. against the judgment and decree of the First Class Sub-Judge, Hyderabad, dated July 7, 1938.

Mr. Kimatrai Bhojraj, for the Appellants.

Mr. Fatehchand Assudomal, for the Respondents.

Davis, C. J.—This is an appeal against the judgment of the First Class Subordinate Judge at Hyderabad who decreed the plaintiffs' suit under s. 92, Civil P. C., praying for the removal of the two defendants by name Mulchand and Hassomal from the position of trustees of a public charitable trust for the benefit of the *panchayat* of the Hindu Punjabis of the Darya caste of Hyderabad, and certain others, beneficiaries in the trust, and for an injunction restraining the defendants from alienating, interfering or damaging the trust property. It appears from the outset that there was some doubt as to the Court in which this suit should be instituted. For instance, the learned Judge points out that there was on the record no written statement of the defendants, for the plaint was at first returned to the plaintiffs for presentation to the proper Court and was

then represented to the same Court when it was re-admitted without giving to the suit on re-admission the same number as was given to the proceedings in the old suit when the written statement already filed by the defendants in the first suit would automatically have become part of the record of the proceedings in the second. However, true copies of the defendants' written statement in the first proceedings were put upon the record in these proceedings, and neither plaintiff nor the defendant objected. Therefore it must be taken that they accepted these true copies of these written statements as the pleadings of the defendants in the case.

There appears however to have been a more serious irregularity in the institution of the suit to which objection was taken in the memorandum of appeal but to which no objection was taken by the defendants in the suit in the trial Court, and it is urged before us by the learned Advocate for the respondents that the defendants should not be allowed in appeal to take this point for the first time, this point being, that the suit was not instituted by all those to whom consent was given to institute the suit by the Collector under s. 92 read with s. 93, Civil P. C. Were the facts in any way in dispute, we might have said that though s. 92 is clearly to be strictly construed, we have before us, raised for the first time in an appeal, a mixed question of law and fact, that this was a case on facts of which the other side should have had due notice and time to meet, and that we would not allow such a case to be raised in appeal for the first time. But there is no dispute about the facts in this case. It is not disputed that a petition to the Collector to give his consent under s. 92, Civil P. C., to the institution of this suit was made by five persons, and that as, after consent was given, one of the five persons was unwilling to be a party to the institution of the suit, he was joined as a party as defendant No. 3. But we do not think that when s. 92, Civil P. C., permits consent to be given to certain individuals, to institute a suit relating to a matter of public concern, that the section contemplates that some of those persons should institute a suit as plaintiffs while others who, after consent is given, have changed their minds, should be joined as defendants.

Reference has been made in arguments before us to a case of the Privy Council reported in *Ali Begam v. Badra-ul-Islam*

Alikhan (1), and it was urged on behalf of the respondents, who are the plaintiffs, that according to this judgment, the absence of one plaintiff from the record as a plaintiff does not matter if he is upon the record as a defendant. It is true that in the Privy Council case one of the persons to whom consent was given for the institution of the suit, and who was joined as a plaintiff in the institution of the suit, was in the appeal joined as a respondent. But the meaning and effect of their Lordships' judgment, as we read it, is not that the plaintiff to whom consent among others was given to institute a suit and who changed his mind thereafter should be joined as a defendant, but only that provided the suit was properly instituted, what happened thereafter was not affected by the provisions of s. 92, Civil P. C. Their Lordships say (p. 754*):

"Where the consent in writing of the Advocate-General or Collector has been given to a suit by three persons as plaintiffs the suit cannot validly be instituted by two only. The suit as instituted must conform to the consent. On the other hand, if the three persons join as plaintiffs and two of them die pending suit, the suit does not become defective or incompetent: *Anand Rao v. Ramdas Daduram* (2). There is no provision whatever in the Court for recourse being had to the Advocate-General or Collector during the course of a suit or of any proceedings in appeal. As sub-s. (2) of s. 92 sufficiently shows, the consent in writing is a condition of the valid institution of a suit and has no reference to any other stage. When once validly instituted it is a representative suit subject to all the incidents affecting suits in general and representative suits in particular."

We do not think that the judgment can be read as an authority for the argument that s. 92, Civil P. C., should not be strictly construed, conferring as it does upon certain individuals certain rights which they would not otherwise possess. We may also refer to a case reported in *Pitchayya v. Venkatakrishnamacharlu* (3) where it is laid down that

"a suit under s. 92, Civil P. C., must be instituted by all those who obtain sanction; if not, it is invalid and the defect cannot be cured by impleading such of those who have not joined as plaintiffs, as defendants to the cause."

(1) 32 S L R 749; 174 Ind. Cas. 870; A I R 1938 P C 184; 65 I A 198; I L R (1938) Lah. 383; 1938 O L R 278; 1938 A L R 430; 10 R P C 290; 4 B R 593; 42 C W N 845; 67 C L J 266; 40 P L R 740; (1938) 2 M L J 1; 48 L W 1; (1938) M W N 757; 1938 O W N 698; 40 Bom. L R 835; 1938 A L J 825 (P C).

(2) 48 I A 12; 62 Ind. Cas. 737; A I R 1921 P C 123; 48 C 493; 17 N L R 37; 3 L W 318; (1921) M W N 24; 25 C W N 794; 30 M L T 194 (P C).

(3) 53 M 223; 124 Ind. Cas. 220; A I R 1930 Mad. 129; 58 M L J 39; Ind. Rul. (1930) Mad. 652; 30 L W 954; (1929) M W N 911.

*Page of 32 S L R—[Ed.]

The Judges in that case referred to two other Madras cases, *Bagavannarayana v. Perumallacharyulu* (4) and *Venkatesha Maia v. Ramayya Hegade* (5). The learned Judges in that case refer to "sanction," but reference to s. 92, Civil P. C., itself will show that what is to be given is not sanction but consent, the word "sanction" being used in a different sense in s. 93, Civil P. C. But this makes no difference to the judgment in that case. In that case the learned Judges pointed out how necessary it is that s. 92, Civil P. C., should be strictly interpreted, for the consent given by the Advocate-General or by the Collector is a consent given after a consideration of the many factors involved in the proper granting of a consent, and one most important factor must be the character and position of those who apply for the consent to institute what is really a representative suit relating to a matter of public interest and importance. The object of requiring consent for the institution of the suit is, as the learned Judges pointed out, not only to safeguard the rights of the public, but also to safeguard the rights of the institution and the trustees. The suit being a representative one, it is necessary to see that persons who come forward are persons having an interest in the trust properties and persons who can safely be trusted with the conduct of the suit. Even though the public are technically parties, still the plaintiffs who file the suit have very large powers in the shaping and the conduct of the suit. As a matter of general experience such suits will be left by those whom the plaintiffs represent to the plaintiffs themselves. Further, the consent required by s. 92, Civil P. C., is a protection to the trustees and the institution. It prevents the trustees being involved in litigation and expense for reasons of enmity or by persons of no substance. If, as the learned Judges pointed out, two out of three persons, to whom consent was given, could file a suit, the third person may well be just that substantial person whose presence induced the Advocate-General or the Collector to give the necessary consent.

It is true that in this case the defendants themselves did not object to the fact that one of those to whom consent was given would not join as a plaintiff to the suit, for this fact was stated in the plaint, and to the paragraph in which this fact was stated the defendants took no objection. We do not

(4) 29 M L J 231; 31 Ind. Cas. 236; A I R 1916 Mad. 762.

(5) 38 M 1192; 26 Ind. Cas. 202; A I R 1915 Mad. 127; 27 M L J 211.

think the applicability of s. 92, Civil P. C., depends upon whether the defendants had or had not taken objection to the form of the suit. The form of the suit is laid down by law. The Legislature requires that if a suit of this kind is to be instituted it must be instituted in a particular way, and we do not think it is open either to the plaintiffs or to the defendants, as it were, to contract themselves out of this section and to say in effect "we do not mind if the law in this matter is or is not observed." While it is true that the purpose of the section is to protect the trustees from vexatious suits, it is also to protect the interests of the public. The interests of the public are quite as important as the interests of the trustees, and the interests of the public should be protected in the manner the Legislature has by s. 92, Civil P. C., provided. We do not think therefore that s. 92, Civil P. C., can be construed loosely that where consent has been given to two or more persons, only some of those persons, even if they are more than two, may institute this suit. A condition precedent to the valid institution of the suits is the fulfilment of the conditions of the consent which has been given.

In this case the consent given by the Collector, as it stands, might be construed loosely as consent given to Bhai Harkishindas Parmanand, Mukhi of the Punjabi Pan-chayat and others who should join with him as plaintiff. But the order of the Collector makes it clear that when he gave his consent to the institution of the suit by Bhai Harkishindas Parmanand and others in the form of an endorsement upon the petition, those others must be the other petitioners who were joined with Harkishindas Parmanand in asking for consent. The order of the Collector cannot be construed to mean that consent is granted to Bhai Harkishindas Parmanand and any others whom he might like to join with him; and the phrase in s. 92, Civil P. C., "two or more persons" means, we think, two or more individuals who are named or so described in the consent that they can be identified. We do not suppose that the Collector ever contemplated that the words of his order should be read apart from the petition to which it relates and in response to which it was made. That petition was made by Bhai Harkishindas Parmanand and four others, who signed the petition as parties to it, one of whom was defendant No. 3 and Bhai Harkishindas Parmanand and those others should have instituted the suit. They did not do so, but one of them Bhai Khiomal Motumal desired

to take no part in the institution of the suit after consent was given by the Collector to him, among others, and he was therefore joined as defendant. We do not think therefore that this suit was validly instituted, and we think that the appeal must be allowed on this ground, and the suit of the plaintiffs should be dismissed. We think that as the point comes before us as a point of law, it is open to us in first appeal to consider it. It is the duty of Courts to conform strictly with the provisions of s. 92, Civil P. C. As however the point was raised for the first time in appeal, we think we should make no orders as to costs. We accordingly allow the appeal but make no order as to costs.

D.

Appeal allowed.

PATNA HIGH COURT

Miscellaneous Judicial Case No. 42 of 1939

April 28, 1941

HARRIES, C. J. AND FAZL ALI, J.

KANIRAM GANPAT RAI—ASSESSEE—
PETITIONER*versus*COMMISSIONER OF INCOME-TAX,
BIHAR AND ORISSA—OPPOSITE PARTY

Income-tax — Estoppel — Income-tax Authorities coming to conclusion in previous year that certain debts had not become bad—If can come to conclusion in next accounting year that those debts had become bad long before—Income Tax Act (XI of 1922), s. 66 (3)—Finding of fact—Question whether debt is bad is a question of fact.

Where income-tax officials have, after enquiry, proceeded to assess the assessee on a certain basis, though they may be entitled to reopen the enquiry, they cannot arbitrarily change the assessment simply on the ground that the succeeding officer does not agree with the preceding officer's finding. But if he wants to do so, there should be facts which would entitle him to do it. If fresh facts come to light which on an investigation would entitle the Income-tax Officer to come to a different conclusion from that of his predecessor he is entitled to reopen the question. The Commissioner of Income-tax is justified under the law to disallow the claim of the assessee in respect of the alleged bad debts on the ground that these debts had become bad long before the accounting year, though previous to the accounting year the claim was disallowed on the ground that it was premature and that the debts had not become bad till then, provided fresh materials and facts come to the knowledge of the Income-tax Authorities on the second occasion. 126 Ind. Cas. 273 (1), followed.

Whether the debt had become bad long before is a question of fact, and the High Court cannot in reference disturb the finding where there was evidence in support of the finding.

Misc. Judi. Case by the Commissioner of Income-tax, Bihar and Orissa, dated October 10, 1939.

Messrs. S. K. Majumdar and Vishnudeva Narain, for the Petitioner.

Mr. S. M. Gupta, for the Opposite Party.
Harries, C. J.—This is a reference made by the Commissioner of Income-tax, Bihar and Orissa, under s. 66 (3), Indian Income Tax Act.

To appreciate the points involved, it will be necessary shortly to set out the facts of the case:—

For the assessment year 1935-36 the assessee claimed that a large number of debts had become bad and that he was entitled to write off the same. Amongst these debts were: (1) Rs. 159-6-0 said to be due to the assessee from Raja Ram Khora; (2) a sum of Rs. 1,524 said to be due from Ramjatan Ram; and (3) Rs. 1,220 said to be due from Charitar Ram of Ramkunda. The Income-tax authorities rejected the assessee's contention that these debts had become bad in the accounting year. They found that the debts had long before become bad and the claim should have been made very much earlier.

It appears that the assessee made a similar claim in respect of these three debts for the year 1934-35. On that occasion the Income-tax Officer disallowed the claim on the ground that the debts had become bad long before that accounting year. On appeal the Assistant Commissioner, though upholding the decision of the Income-tax Officer, disagreed with the grounds for such opinion. He disallowed the claim to write off these debts in the year in question not on the ground that they had become bad long before but on the ground that the claim was premature, that is that the debts had not become bad. The learned Commissioner upheld the view of the Assistant Commissioner, and, therefore, we find that in the year 1934-35 the Income-tax authorities had come to the conclusion that these three debts were not bad and that a claim that an allowance should be made in respect of them in that accounting year was premature. In the following year we find the Income-tax authorities coming to an entirely different conclusion and holding that these debts had become bad long before the accounting year 1935-36, and, therefore, no allowance could be made in respect of them in that accounting year. Having regard to these conflicting findings of the Income-tax authorities, this Court directed the Commissioner to state a case upon the following question:

"Was the Commissioner of Income-tax justified under the law to disallow the claim of the petitioner in respect of the alleged bad debts due from Raja Ramkhora, Ramjatan Ram and Charitar Ram of Ramkunda (items Nos. 18, 20 and 21 of his judgment) on the ground that these debts had become bad long before the accounting

year, though previous to the accounting year the claim was disallowed on the ground that it was premature and that the debts had not become bad till then."

In the case stated by the Commissioner the relevant portion of the various orders of the officers concerned are set out, and the Commissioner expresses the view that as there is no bar by way of *res judicata* in income-tax proceedings it was open to the authorities in 1935-36 to come to a conclusion contrary to the conclusion arrived at in 1934-35.

It is conceded that the principle of *res judicata* does not apply in income-tax proceedings; but it is said that in such proceedings an Income-tax Officer should not differ from a previous decision on the same matter unless new facts have been placed before him. Reliance was placed by Mr. Majumdar, who has argued this case very fully, upon the case of *T. M. M. Sankaralinga Nadar v. The Commissioner of Income-tax, Madras* (1), in which a Full Bench laid down that though an Income-tax Officer is not bound by the rule of *res judicata* or estoppel by record, yet he can re-open the matter of assessment only if fresh facts come to light, which, on investigation, would entitle the officer to come to a conclusion different from that of his predecessor. At p. 434* their Lordships observed:—

"The next question is whether even assuming that the matter is not *res judicata*, it would not create an estoppel by record against the income-tax officials.

In this connection the argument of Mr. Krishnaswami Ayyangar is that even treating the income-tax officials as a quasi-judicial body and not a Court, the principles of natural justice and expediency ought to prevent Income-tax Officers from going back on their previous decisions. Reference has been made to the passage in Halsbury's Laws of England which I have already quoted.

It seems to us that where income-tax officials have, after enquiry, proceeded to assess the assessee on a certain basis, though they may be entitled to reopen the enquiry, they cannot arbitrarily change the assessment simply on the ground that the succeeding officer does not agree with the preceding officer's finding. The position is just like the position of any two parties who have proceeded on a certain basis in their relations. It may be open to one party to reopen the matter. But if he wants to do so, there should be facts which would entitle him to do it. If fresh facts come to light which on an investigation would entitle the Income-tax Officer to come to a different conclusion from that of his predecessor he is entitled to reopen the question. But if there are no fresh facts, it is difficult to see how he can arbitrarily go behind the finding of his predecessor. The same principles of natural justice or judicial dealing, which Courts impose upon Income-tax Officers, would prevent them capriciously setting aside the orders of their predecessors based on enquiry."

That the Income-tax authorities in the year 1935-36 differed from the authorities in

(1) 53 M 420; 126 Ind. Cas. 273; A I R 1930 Mad. 209; 58 M L J 260; 31 L W 738; Ind. Rul. (1930) Mad. 833 (F B).

*Page of 53 M.—[Ed.]

the previous year is clear as in 1934-35 it had been held that the debts had not yet become bad, whereas in 1935-36 it was held that they had become bad long before that accounting year. Following the principles laid down in the Madras Full Bench decision, with which I respectfully agree, it is necessary to consider whether the Income-tax authorities in 1935-36 had any fresh facts before them which would permit them to come to a different conclusion from their predecessors.

It would appear as if the assessee's claims with regard to these three debts do not seem to have been seriously pressed. For the year 1935-36 the Assistant Commissioner said so in so many words and disallowed the claim. The Commissioner was not satisfied that the claim with regard to these three debts was abandoned and called for a report from the Assistant Commissioner, and that report also makes it clear that it was not strenuously urged that these debts were not old and bad a long time before. In any event, the Commissioner on the second occasion went into the matter thoroughly. The assessee appeared before him with his Advocate. The assessee submitted notes of accounts to the Commissioner, and he took each item separately and came to the conclusion that each of the three debts in question was old and had become bad many years before the assessee first made the claim. There can be no doubt that on this last occasion the Commissioner's inquiry was a thorough one conducted in the presence of the assessee and his lawyer, and his finding is based on material supplied to him at that hearing by the assessee or his lawyer. There is nothing to show that these materials were before the authorities on the previous occasion. That the point was not free from difficulty appears to be clear. On the first occasion the Income-tax Officer had held that the debts had long since become bad, whereas his superiors, the Assistant Commissioner and the Commissioner had come to a different view. It is, therefore, not strange that when the matter is further investigated and fresh material produced the Assistant Commissioner and the Commissioner on the second occasion should have come to a different conclusion from that of their predecessors. As there were fresh materials on this second occasion, it cannot be said as a matter of law that the Income-tax authorities were not entitled to come to a different conclusion. Whether the debt had become bad long before is a question of fact, and as there was evidence to support it this Court cannot

disturb the finding. In my judgment the finding of the Income-tax authorities upon this point in their assessment for the year 1935-36 is not vitiated by any illegality, and I would answer the question submitted in the affirmative. In all the circumstances, I would make no order as to costs beyond permitting the Commissioner to retain the sum of Rs. 100 which has been deposited by the assessee.

Fazl Ali, J.—I agree.

D,

Order accordingly.

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Civil Revision No. 427 of 1939

January 23, 1941

ALMOND, J. C. AND MIR AHMAD, J.

Mst. KUNTI DEVI—DEFENDANT

—PETITIONER

L. BHOLA RAM—PLAINTIFF—RESPONDENT

Civil Procedure Code (Act V of 1908), Sch. II, para. 1—Suit for restitution of conjugal rights, if can be referred to arbitration.

The question whether a person should be given a decree for restitution of conjugal rights against his wife is a matter in difference between the husband and wife in suits for restitution of conjugal rights and there is no legal bar in Sch. II, Civil P. C., to its being referred to arbitration. Hence, there is nothing to prevent a reference of the whole suit for restitution of conjugal rights to arbitration and to a decree being passed in accordance with the award.

[Case-law discussed.]

C. R. from an order of the Sub-Judge, First Class, Peshawar, dated October 28, 1939.

Mr. Wazir Chand, for the Petitioner.

Mr. P. C. Kapur, for the Respondent.

Mir Ahmad, J.—In this case Bhola Ram respondent sued, *Mst. Kunti Devi*, the petitioner, for restitution of conjugal rights. The marriage was not denied but certain circumstances were pleaded as a bar to the grant of a decree for restitution of conjugal rights. The parties appointed *R. S. Pandit Mool Chand* as an arbitrator. The arbitrator gave his award to the effect that the plaintiff should be given a decree subject to certain conditions. The trial Judge passed a decree in accordance with the award. *Mst. Kunti Devi* has come up on revision to this Court. The learned Counsel for the petitioner has raised the point that a suit for restitution of conjugal rights could not be referred to arbitration. He quoted *Hira v. Dina* (1), (a Division Bench ruling), *Kala-*

batu v. Prabhdial (2), (a Single Judge ruling), *Faiz Ali v. Ashraf Khatun* (3), (a Single Judge ruling), *Malka v. Sardar* (4), (a Single Judge ruling) and *Nathu v. Sarnun* (5), (a Single Judge ruling). Counsel for the respondent quoted *Rup Narain v. Nandrani* (6), (a Division Bench ruling). As an interesting question of law was involved, the case was placed before a Bench of this Court. In the case reported in *Hira v. Dina* (1), the point which really persuaded the Judges to set aside the reference was that the parties were minors and that the Court had not given a sanction under O. XXXII, r. 7, Civil P. C., for reference to arbitration. A general remark was, however, made that the Court was not competent to delegate to the arbitrators the question whether or not a claim for custody of a wife should be decreed, such question, especially when either party is a minor, being entirely one for the discretion of the Court. Their Lordships remarked :

"This is a function which cannot be delegated to arbitrators, and the present case therefore was particularly one in which it was not for the benefit of the minor that the adjudication of the case should be entrusted to a tribunal not subject to ordinary rules of procedure, and whose decisions are final."

The head-note of the case reported in *Kalabatu v. Prabhdial* (2), which was decided by a Single Judge is to the following effect :

"It is entirely within the discretion of the Court to grant or refuse a decree for restitution of conjugal rights but the Court cannot delegate the decision of the entire suit to arbitrators, although it is open to it to refer any particular matter to arbitration. Where therefore in a suit for restitution of conjugal rights, the Munsif delegated the entire suit to persons appointed by parties as their arbitrators :

Held, that the Court could not delegate its function to arbitrators and the case should be tried on its merits."

The discussion is very short and *Hira v. Dina* (1), has been relied upon. In *Faiz Ali v. Ashraf Khatun* (3), the head note runs thus :

"In a suit for restitution of conjugal rights the question as to the validity of a marriage can be referred to arbitration."

The principle enunciated is the *ipse dixit* of the Judge. *Kalabatu v. Prabhdial* (2), was distinguished. In *Malka v. Sardar* (4),

the head note is in the following terms :

"A criminal complaint cannot be referred to arbitration and therefore the award following it cannot be made a rule of a Civil Court. The question of restitution of conjugal rights cannot be referred to arbitration as that matter must be decided by the Court itself."

It was during the inquiry under s. 202, Criminal P. C., of a criminal complaint instituted by the husband against the wife that a reference to arbitration was made and the reference was set aside, because a criminal complaint could not be referred to arbitration. The other general remark was therefore only by way of *obiter*. The Judge who decided *Nathu v. Sarnun* (5), did not give his own reasons and depended on *Hira v. Dina* (1) and *Malka v. Sardar* (4), in laying down that a suit for restitution of conjugal rights could not be referred to arbitration. In *Rup Narain v. Nandrani* (6), the view taken was that a suit for restitution of conjugal rights may be referred to arbitration but the Judge may not accept the award in the matter of the exercise of discretion in granting the decree. The head-note is to the following effect :

"Although it is entirely within the discretion of the Civil Court to grant or refuse to grant a decree for restitution of conjugal rights, a suit for conjugal rights can be referred to arbitration as such suits come within the purview of para. 1, Sch. II. The function of the Court to grant or refuse to grant a decree for restitution of conjugal rights is not delegated to arbitrators when such a suit is referred to the decision of arbitrators under the provisions of Sch. II. The Court has ample powers to remit the award for reconsideration to the arbitrators or to refuse to make the award a decree of the Court. Even if it be deemed that to some extent the discretionary powers of the Civil Court to grant or refuse to grant a decree for restitution of conjugal rights have been taken away from it, when such a suit is referred to arbitration, in the absence of any provision to that effect, it comes within the purview of para. 1, Sch. II."

Now para. 1 of Sch. II, Civil P. C., runs thus :

"(1) Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference."

There is no restriction in this paragraph as to the matter which can be referred to arbitration. Every matter in dispute could be so referred, and the subsequent paragraphs lay down the procedure which the Court as a supervising authority has to adopt. Under para. 16, the Court has to proceed to pronounce judgment according to the award if the award is not open to any of the objections laid down in the previous paragraphs of the schedule. The question whether a person should be given a decree for restitution of conjugal rights against his

(2) A I R 1918 Tah. 357; 45 Ind. Cas. 163; 78 P L R 1918.

(3) A I R 1929 Lah. 177; 118 Ind. Cas. 4645 30 P L R 600; Ind. Rul. (1929) Lah. 768.

(4) A I R 1929 Lah. 394; 116 Ind. Cas. 215; 30 P L R 122; Ind. Rul. (1929) Lah. 471.

(5) A I R 1933 Lah. 532; 144 Ind. Cas. 179; 34 P L R 282; Ind. Rul. (1933) Lah. 421.

(6) A I R 1934 Oudh 494; 152 Ind. Cas. 90; 10 Luck. 228; 11 O W N 1203; 7 R O 187.

wife is a matter in difference between the husband and wife in suits for restitution of conjugal rights and there seems to be no legal bar in Sch. II, Civil P. C., to its being referred to arbitration. We have given the gist of the rulings referred to. The learned Judges of the Lahore High Court have not applied themselves to this aspect of the matter at all. The Judges of the Oudh Court have, however, pointed out that the statute does not debar such reference to arbitration. In our opinion, there is nothing in the statute to prevent a reference of the whole suit for restitution of conjugal rights to arbitration and to a decree being passed in accordance with the award. We therefore hold that the reference in this case is legal. There is no ground for interference in the decree of the lower Court otherwise. The petition is dismissed with costs.

S.

Petition dismissed.

PATNA HIGH COURT

Miscellaneous Appeal No. 34 of 1940 with

Civil Revision No. 8 of 1940

April 8, 1941

ROWLAND AND SHEARER, JJ.

Smt. MAHAMAYA OJHAIN—

APPELLANT.

versus

THE LAHERIA SARAI CENTRAL
Co-OPERATIVE BANK, LTD.

—RESPONDENT

Bihar and Orissa Co-operative Societies Act (VI of 1935), ss. 24-A, 24-A (3)—Scheme sanctioned—Creditor of bank subsequently obtaining decree—He cannot execute decree but must obtain satisfaction of his dues in manner provided by scheme—Order of District Judge on appeal from Registrar's order sanctioning scheme—No question of jurisdiction involved—Order of District Judge is final.

A composition arrived at in pursuance of the provisions of a statute such as the Bihar and Orissa Co-operative Societies Act does not stand on the same footing as a private agreement. Where a person who is a party to the scheme, obtains subsequently a decree against the bank, the decree is not executable and the decree-holder must obtain satisfaction of his dues only in the manner provided in the scheme.

[Case-law referred to.]

Where no point of jurisdiction arises an order of the District Judge on appeal from the Registrar's order sanctioning the arrangement is under s. 24-A (3) final.

Misc. A. and C. R. from the order of the District Judge of Darbhanga, dated September 22, 1939.

Sir M. N. Mukherji and Messrs. R. K. Choudhury and A. C. Roy, for the Appellant.

Messrs. B. N. Mitter and Ajit Kumar Mitter, for the Respondents.

Rowland, J.—This miscellaneous appeal and application in civil revision have been heard together. The appellant who is also the applicant, was the plaintiff in a money suit. She had deposited Rs. 2,500 with the defendant bank. The bank is a registered society under the Bihar and Orissa Co-operative Societies Act. She brought her suit on August 10, 1937 claiming the principal and interest and future interest. The claim at the date of suit was laid at Rs. 3,494-9-6. Substantially except for a trifling difference in the figures, the claim was admitted by the bank. During the pendency of the suit the bank which had stopped payment proposed to the Registrar of Co-operative Societies an arrangement for composition with its creditors. A meeting of creditors was convened and held and a scheme was adopted which the Registrar approved on June 1, 1938. The amount of the appellant's dues was settled at Rs. 3,483 and the terms provided for deferred payment and reduced interest. The plaintiff, however, continued with her suit and obtained a decree on August 23, 1938 for a sum of Rs. 3,649 to carry future interest at 6 per cent. On September 14, 1938 she commenced execution for the sum then due said to be Rs. 4,183 and prayed the Court to bring to sale the bank's buildings and certain furniture. The bank objected that in face of the composition effected under the Co-operative Societies Act, the decree was not executable and the lady must obtain satisfaction of her dues only in the manner provided for in the scheme. The Munsif on April 29, 1939 allowed this objection and held that the execution could not proceed. This decision was affirmed on September 22, 1939 by the District Judge. It is from this decision that the second appeal is presented. The application in civil revision arises out of the composition scheme itself. The order of the Registrar approving the scheme on June 1, 1938 was taken in appeal to the District Judge who dismissed the appeal on July 11, 1939 and it is against that order of dismissal that this application is presented.

It has been argued in support of the appeal that the scheme is an arrangement by way of compromise or agreement between the parties which the judgment-debtor attempted to set up in the executing Court as a bar to the execution of the decree and the first suggestion made is that such an adjustment comes within O. XXI, r. 2 of the Civil P. C. and the Court ought not to take any notice of

it as it has not been certified to the Court in accordance with O. XXI, r. 2. Alternatively it is said that the agreement or composition having been effected before the decree in the suit was passed might be regarded as an agreement coming within O. XXIII, r. 3 and in that case the defendant ought to have put it forward in the suit itself so that the Court might have passed a modified decree in accordance with the agreement arrived at. Failing this the decree must prevail. We have been shown cases in which agreements between private parties whether come to during the pendency of a suit or after the passing of a decree with the object of restraining the decree-holder from executing the decree or from executing his decree for the full amount are not to be given effected to by the executing Courts; for instance, in *Butchaia Chetti v. Tayar Rao Naidu* (1), it was observed that it would be dangerous to allow a decree itself to be attacked in execution. But before acting on this principle we have to see whether a composition arrived at in pursuance of the provisions of a statute such as the Bihar and Orissa Co-operative Societies Act stands on the same footing as a private agreement. The answer to that question seems to be in the negative. Section 24-A of the Act reproduces with only verbal modifications the provisions of s. 153 of the Indian Companies Act 1913 in the form in which that section stood before the Amending Act of 1936, and Sir M. N. Mukheji in a very ingenious and interesting argument has contended that we ought to look to the decided cases on s. 153 of the Companies Act and apply the law in accordance with the decisions of the Calcutta High Court bearing on the interpretation of that section. He admits that it has been held that where a meeting of creditors has resolved to accept a certain scheme, that scheme is binding on all creditors of that class; but it is argued here that a creditor who has obtained a decree for the realization of his debt is not a creditor of the same class as a depositor who has not sued or obtained such a decree. Conflicting opinions have been expressed in the Calcutta High Court on this point. The most recent case, which we are shown is that in *Rajshahi Banking Corporation v. Surabala Debi* (2), where it was held that a depositor who holds a decree and a depositor who does not hold a decree are not creditors of the same class. That decision

however even assuming it to be correct is of little advantage to the appellant, because the appellant's decree was not in existence on the date when the meeting of creditors was held or on the date when the Registrar gave his approval to the composition arrived at. According to the Calcutta decisions themselves it seems to me that the plaintiff or decree-holder must be held to have been at the date of the composition a creditor of the same class as any other fixed depositor. The principle applicable in such a case arising under the Indian Companies Act was worked out in *Raghubar Dayal v. The Bank of Upper India, Ltd.* 32 Ind. 451 (3) of which the decision in India is reported in *Raghubar Dayal v. The Bank of Upper India, Ltd.* 32 Ind. Cas. 451 (3) and the decisions of their Lordships of the Privy Council in appeal is reported at *Raghubar Dayal v. The Bank of Upper India, Ltd.* (4). It was clearly held that the plaintiff's decree having been granted to him after the meeting at which the resolution and the scheme had been agreed to, the plaintiff was bound by the scheme. If we had felt inclined to accede to Sir Manmatha Nath Mukherji's contention, had the matter been *res integra*, nevertheless it would hardly be open for us to do so in view of the decision of this High Court in *Buxar Central Co-operative Bank Ltd. v. Akhourri Bindhyachal Prasad Singh* (5), in which a Division Bench of this Court considered a case which appears to be on all fours with the one before us and overruling the decision of the Court below which had ordered execution to proceed, allowed the appeal and held that execution was clearly barred. It has been pointed out to us that in *Raghubar Dayal's case* (3), the High Court had allowed the decree-holder to execute his decree to the extent of the costs awarded to him in the suit, while holding that he could not execute it for the amount of his deposit itself, and it is suggested that we should follow that precedent and permit the decree-holder to execute his decree for the costs of the suit. The propriety of that portion of the order of the High Court did not come under the consideration of their Lordships of the Privy Council and we do not know what opinion their Lordships

(3) 32 Ind. Cas. 451; 18 O. C 272; A I R 1916 Oudh 276.

(4) 23 C W N 697; 50 Ind. Cas. 429; 36 M L J 526; 17 A L J 533; 21 Bom. L R 481; 22 O C 106; (1919) M W N 500; 1 U P L R (P C) 51; 30 C L J 214; 16 M L T 178; 10 L W 374; 6 O L J 423; A I R 1919 P C 9 (P C.)

(5) 21 P L T 173; 185 Ind. Cas. 606; 6 B R 222; 12 R P 387; A I R 1940 Pat. 261.

(1) 54 M 184; 129 Ind. Cas. 818; 32 L W 919; (1930) M W N 1152; Ind. Rul. (1931) Mad. 338; A I R 1931 Mad. 399; 60 M L J 721.

(2) 40 C W N 1104.

would have taken regarding it had it been in controversy.

It seems to us that there are some difficulties in the way of permitting the decree to be executed piecemeal or in part or in saying that without amendment of the decree it can be treated as a decree for a different amount from that named in the decree itself or as a decree for two debts of different classes, and the safer course appears to be to follow the decision of this High Court which I have just cited and to say no more than this that the scheme adopted and accepted is a bar to the execution sought by the decree-holder. This is sufficient to dispose of the miscellaneous appeal.

As regards the civil revision, we are asked to hold that the proceedings at the meeting of the creditors were irregular so that the scheme is invalid. Two or three grounds for so holding have been argued before us but I do not think it necessary to enter into them because the proper place for agitating those grounds was before the District Judge. They were in fact raised before him and he considered and negatived them. No point of jurisdiction arises and s. 24-A (3) is very definite that the order of the District Judge on appeal from the Registrar's order sanctioning the arrangement shall be final.

I would therefore dismiss the appeal as well as the application in revision with costs. Hearing-fee in the civil revision two gold mohurs.

Shearer, J.—I agree.

D. Appeal dismissed.

MADRAS HIGH COURT Full Bench

Letters Patent Appeal No. 51 of 1939
December 2, 1940

LEACH, C. J., VENKATARAMANA RAO AND
KRISHNASWAMI AYYANGAR, JJ.
CHELIKANI KONDAYYA RAO
AND OTHERS—APPELLANTS

versus

UPPALAPATI NAGANNA AND OTHERS—
RESPONDENTS

Madras Estates Land Act (I of 1908 as amended in 1936), ss. 3 (2), 181, 77, 3 (10)—Lands admitted to be kambattam within Mokhasa village—Village, if "estate" within meaning of Act before amendment—Land-holder possessing private land within estate selling kudivaram right—Landlord must be deemed to have converted land into ryoti land—Additional terms, if alter nature of transaction or whether void—Instrument held converted kambattam land into ryoti land—Additional terms stipulating for payment of fixed rent, interest on rent arrears, making rent first charge

on land and entitling land-holder to trees standing on land at date of contract, held not inconsistent with ryoti tenure—Deed—Construction—Rule of—Part, when to be rejected—Intention—Duty of Court.

Where the lands are admitted to be kambattam lands within a Mokhasa village, it follows that the village was an "estate" within the meaning of the Mad. Estates Land Act, even before the amendment in 1936. [p. 471, col. 1.]

Where a landholder possesses private lands within an "estate" and sells the *kudivaram* right in those lands but retains the *melwaram* right he must be deemed to have converted the lands into *ryoti* lands, and additional terms will not alter the nature of the transaction. The additional terms will stand, provided that they are not inconsistent with what the statute states shall apply to *ryoti* tenure. To the extent that the additional terms are inconsistent with *ryoti* tenure they must be regarded as being void. 60 Ind. Cas. 15 (1), not approved. [p. 472, col. 2.]

The *khat* executed by the vendee embodying the terms of the contract, after reciting that the land-holder had agreed to sell to him the *kudivaram* right in the lands for Rs. 33,492 and that they had received the purchase consideration, proceeded: You have hereby sold to us all the rights possessed by you in the said lands, excepting the *melwaram* rights thereto. Therefore, in the matter of our enjoying the said lands henceforth from son to grandson and so on in succession with powers of alienation by way of gift, exchange, sale, etc., you or your heirs shall never raise dispute either with us or with our heirs. Then followed the other terms relating to the sale, stipulating for the payment of a fixed rent and for the payment of interest at ten annas per cent. per mensem on arrears of rent. The *cist* payable to the land-holder was to be a first charge on the land, and the land-holder was to be entitled to the trees standing on the land at the time of the contract, but trees grown after that date were to belong to the vendees:

Held per Full Bench (Krishnaswamy Ayyangar, J., contra).—That the document read as whole operated to convert the kambattam lands into *ryoti* lands and that the additional terms were not inconsistent with *ryoti* tenure.

Per Krishnaswamy Ayyangar, J.—In construction of a deed the question is obviously one of intention to be deduced or inferred from a consideration of the entire deed, bringing into action every part of it and rejecting none, unless the expressions are contradictory and incapable of being reconciled, or there is a repugnancy which calls for the rejection of one part in order to more effectually to carry into effect the real intention of the parties gatherable from the part retained. Rejection should be the last resort, after every means to reconcile are exhausted. The Court should rather lean towards a construction which would give a meaning and effect to every one of the clauses in a deed than towards one which would result in a nullification of anyone or more of them in the end. *Gyoo Gwyn v. Neath Canal Navigation Co.* (2), relied on. [p. 474, col. 1.]

L. P. A. against the judgment of Mr. Justice Wadsworth, reported in 188 Ind. Cas. 312.

Mr. V. Rangachari, for the Appellants.

Mr. K. Kameswara Rao, for the Respondents.

Leach, C. J.—The appellants are the *mokhasadars* of a village falling within the jurisdiction of the Subordinate Judge

of Masulipatam. On October 7, 1920 they sold to respondent No. 1 the *kudivaram* right in their *kambattam*, or home farm lands, on conditions to which I shall refer in some detail presently. On March 31, 1934 the appellants filed a suit in the Court of the Subordinate Judge of Masulipatam for the recovery of the rent due by the sale of the lands. It was contended by the respondents that by the deed of October 7, 1920 the appellants had converted the lands from *kambattam* into *ryoti* lands and consequently the Revenue Court, not the Civil Court, had jurisdiction. Before the Subordinate Judge the appellants admitted that the village was an "estate" within the meaning of the Mad. Estates Land Act, 1908, as amended in 1936, but they averred that the village was not an estate within the meaning of the Act as it stood at the time of the contract with respondent No. 1, and an issue was framed on the question. It is however impossible for the appellants to maintain this contention. By admitting that the lands in suit are *kambattam* lands within a *mokhasa* village it follows that the village was an "estate" within the meaning of the Mad. Estates Land Act, even before the amendment in 1936, and the appeal must proceed on this basis. The Subordinate Judge upheld the respondents' contention that there had been a conversion and dismissed the suit. On appeal to this Court, Wadsworth, J., concurred in these decisions and this appeal is from his judgment.

Section 181, Mad. Estates Land Act, before the amendment of the Act, stated that nothing in ss. 6, 8, 10, 11, 12, 19 and 46 should confer a right of occupancy in, or should apply in any way to, a land-holder's private land. Then followed a proviso to the effect that nothing contained in the section should prevent a land-holder from converting his private land into *ryoti* land. Until private land was converted into *ryoti* land the land-holder could deal with it as he liked and that is still the position, although the wording of the section has been altered. Section 19 has throughout been to the effect that except as provided in the Act, the relations between a land-holder and a tenant of his private land are not regulated by the Act. There was nothing in the Act as it stood before 1936, nor is there anything in it now, which prevents a land-holder from leasing his private land on whatever terms he may think fit, but, of course, if he leases on terms which imply a conversion of the land into *ryoti* land all the provisions of the Act with regard to *ryoti* land will apply and will overrule any

provisions in the lease which are in conflict with the provisions of the Act. I may here mention that apart from s. 181 the amended Act is on all fours with the measure as it stood before 1936 so far as this case is concerned.

In *Devi Garu v. Yellappa Rama Naidu* (1), a Division Bench of this Court had to consider the terms of a conversion of private land into *ryoti* land and the judgment appears to go to the length of saying that the terms of a conversion can be enforced even if they are inconsistent with *ryoti* tenure. It was observed that s. 181 contemplated a conversion from home farm land into *ryoti* land, but that the Legislature had not made any special provision with regard to the terms on which the conversion might be made. It was on this line of reasoning that the Court held that the contract between the parties was enforceable. In my opinion this is going much too far. When there is a conversion of private land into *ryoti* land the terms of the contract which are not inconsistent with *ryoti* tenure can be enforced, but once the conversion has taken place the tenant has all the rights given to a *ryot* by the Act, and if the rent fixed is unfair the remedies contemplated by the Act are open to him. The sole question in this case is whether the instrument of October 7, 1920 operated to convert the appellants' *kambattam* lands into *ryoti* lands. The *khat* executed by vendee embodying the terms of the contract, after reciting that the appellants had agreed to sell to him the *kudivaram* right in the lands for Rs. 33,492 and that they had received the purchase consideration proceeds:

"You have hereby sold to us all the rights possessed by you, in the said lands excepting the *melwar* rights thereto. Therefore, in the matter of our enjoying the said lands henceforth from son to grandson and so on in succession with powers of alienation by way of gift, exchange, sale, etc, you or your heirs shall never raise dispute either with us or with our heirs."

Then follow the other terms relating to the sale and these are set out in clauses numbered 1 to 10. It is only necessary to refer to cls. 1, 2, 3 and 9, as the others have not been referred to in argument and obviously have no bearing on the question under discussion. Clause 1 stipulates for the payment of a fixed rent and cl. 2, for the payment of interest at ten annas per cent, per mensem on arrears of rent. Clause 3, provides that the *cist* payable to the land-holder shall be a first charge on the land, and cl. 9 states that the appellants shall be

(1) 39 M L J 565; 60 Ind. Cas. 15; A I R 1920 Mad. 517; 12 L W 600.

entitled to the trees standing on the land at the time of the contract, but trees grown after that date shall belong to respondent No. 1. It is suggested that these terms are inconsistent with *ryoti* tenure and therefore the document cannot be read as converting the land into *ryoti* land, but only as a special contract relating to private land. The document must be read as a whole in order to gauge its effect and when this is done I consider that it must be held that there has been a conversion.

The main characteristic of *ryoti* tenure is the permanent vesting in the tenant of the *kudivaram* right and the permanent retention of the *melwaram* right by the land-holder. That is the position here. By virtue of the contract the *kudivaram* right was transferred absolutely to respondent No. 1 and he obtained permanent rights of occupancy on the terms set out in the contract. It is conceded by the learned Advocate for the appellants that if the document had stopped at the sale of the *kudivaram* right there would have been a conversion within the meaning of s. 181. I can see nothing in cls. 1, 2, 3 and 9 which alter the position. If the document had stopped merely with the sale of the *kudivaram* right it would still have been necessary to fix the rent payable to the appellants as the possessors of the *melwaram* right, and the fact that the rent was fixed in the contract without contemplation of any change in the rate does not alter the position. The land-holder and the tenant may agree on a permanent rent, but if they do this it does not take away the right of the tenant to sue or apply for a reduction of the rent if the lands have been converted into *ryoti* lands. Section 187 (1) (c) says so. Nor is the provision with regard to the payment of interest inconsistent with *ryoti* tenure. The payment of interest on arrears of rent is expressly provided for in the Act. Under s. 61 an arrear of rent shall bear simple interest at the rate of one half per cent. per mensem from the date on which the arrear fell due until it is liquidated. Therefore cl. 2 of the additional terms is in full accord with the Act, except that the rate is higher. Again this contingency is expressly provided for. Sub-s. (2) of s. 187 says that nothing in any contract between a land-holder and a *ryot* made after the passing of the Act shall affect the provisions of s. 61 relating to interest payable on arrears of rent so as to increase the amount payable. The only comment that the learned Advocate for the appellants has to make on cl. 3 is that the *cist* payable to

the appellants is made a first charge on the lands only and not on the lands and produce which the Act would allow. The freeing of the charge on the produce is however a concession to the tenant and there is nothing in the Act which prevents a land-holder making a concession to his tenant. The appellants receive no help from cl. 9. The trees belonged to the appellants and without this clause would have passed to respondent No. 1. The Act does not prohibit a tenant conceding to the land-holder the right to the trees on the land, and on a conversion of private lands into *ryoti* lands the parties can contract as they please so far as the trees are concerned.

In my opinion, where a land-holder possesses private lands within an "estate" and sells the *kudivaram* right in those lands but retains the *melwaram* right he must be deemed to have converted the lands into *ryoti* lands, and additional terms will not alter the nature of the transaction. The additional terms will stand, provided that they are not inconsistent with what the statute states shall apply to *ryoti* tenure. To the extent that the additional terms are inconsistent with *ryoti* tenure they must be regarded as being void. The arguments which has been advanced that this interferes with the right of the land-holder to contract freely with regard to his private lands seems to me to be beside the question. The land-holder does not need to enter into a contract which will have the effect of converting his private lands into *ryoti* lands, but if he does contract and the tenure which he creates amounts to *ryoti* tenure he must accept all the consequences of his action. The appellants here could have sold the lands in suit to respondent No. 1 absolutely or they could have leased them at any rent they might have agreed upon without separating the *kudivaram* right from the *melwaram* right, but as they chose to separate the *kudivaram* right from the *melwaram* right and grant a permanent right of occupancy on the basis of the payment of rent relative to the *melwaram* right they must, in my judgment, be deemed to have converted the lands in the *ryoti* lands. For these reasons I would dismiss the appeal with costs.

Venkataramana Rao, J.—I agree.

Krishnaswami Ayyangar, J.—With much reluctance, I feel myself obliged to differ from the opinion expressed by my learned colleagues. The question with which we are faced in this case relates to the true construction of a *khat* or counterpart of

a lease, embodying the terms of a contract entered into between the appellants and the respondents on October 7, 1920. By that contract, the appellants, who owned a parcel of private land in an estate belonging to them, sold to the respondents, the *kudivaram* interest alone in it retaining the *melwaram* interest for themselves. There are in the deed certain other terms and conditions to some of which a reference is necessary for a correct decision, but there can be no doubt that the dominant object in the mind of the parties was to convey to the respondents the *kudivaram* right in the land. This is not indeed disputed, but what is disputed is, whether there has been a conversion effected by the instrument of what was admittedly the appellant's private land into *ryoti* land so as to confer on the respondents those rights and privileges which are recognized by the Mad. Estates Land Act, 1908, as inhering in a *ryot* holding *ryoti* land in an estate.

That the legal incidents which appertain to private land in an estate essentially differ from those annexed to *ryoti* land is too plain for argument; in fact it is a matter of concession. The differences are fundamental, the Act drawing a sharp distinction between the two classes of land. Private land is to borrow a word from the English Law of real property, the free-hold of the land-holder over which he has absolute unrestricted dominion. He can deal with it in any manner, he likes, enter into any kind of contract he chooses and create any form of tenure in it he pleases. Section 19 of the Act preserves to him an unfettered freedom of contract as regards this class of land, a privilege not recognized in respect of any other class of land within the estate. It declares in explicit terms that the relations between a land-holder and a tenant—and be it noted, not a *ryot*—of his private land are not to be regarded as regulated by the provisions of the Act. Language cannot be plainer. Even the name "*ryot*" is here avoided when referring to the person who cultivates the private land, and the colourless term tenant seems deliberately to be adopted. The only way by which the land-holder can make those provisions applicable, is by converting his private land into *ryoti* land and conferring occupancy right in the land so converted. Such a course was permitted by s. 181 as it stood before the amendment made by Act VIII of 1934. The section ran as follows :

"Nothing in ss. 6, 8, 10, 11, 12, 19 and 46 shall con-

fer a right of occupancy in or shall apply in any way to a land-holder's private land :

Provided that nothing contained in this section shall prevent a land-holder from converting his private land into *ryoti* land."

"Of the sections enumerated here all except s. 19 relate to the acquisition or transfer of occupancy rights, or to the limitations subject to which these rights are to be enjoyed in lands other than private lands. Section 19, as already seen, was enacted to preserve the rights of the land-holder in the latter category of land. Reading s. 181 together with its proviso the meaning is clear that the land-holder could if he choose convert his private land into *ryoti* land with a view to confer occupancy right in it, and could also confer such a right. It was the same meaning that has been made plainer by the amendment introduced into the section in 1934. The effect of the amendment is not to make a change in the law, but only to make the meaning more explicit than before, and this was not denied at the bar during the arguments. The section as now amended enacts that :

"A land-holder shall be at liberty to convert his private land into *ryoti* land and confer occupancy right in land so converted."

On a literal interpretation, two steps or processes seem to be necessary before the tenant can claim the rights and privileges of a *ryot*, in land which was originally private land; first a conversion from the one class to the other and second the grant of occupancy right in the land after conversion. The amended section which may well be regarded as merely declaratory of the law as it was before the amendment thus appears to warrant the view that the mere grant of occupancy right in private land does not by itself suffice to alter its character unless it is preceded by an act of conversion. There is no objection, however, to the conversion and the grant being made by one and the same instrument provided the intention is made sufficiently clear. The real question then is not whether permanent rights of occupancy have been granted by the *khat* which of course it does, but whether the land-holder had also fulfilled what appears to me to be a necessary condition precedent, namely the conversion of his private land into *ryoti* land. It is necessary in my view to keep the two things separate in order to avoid falling into a possible error. On a question of this kind, there is no presumption one way or the other and it therefore lies on the party who sets up a case of conversion to make it out. If he wholly fails or only succeeds to the extent of creating a

doubt, he derives no benefit out of it, and must fail. The question is obviously one of intention to be deduced or inferred from a consideration of the entire deed, bringing into action every part of it and rejecting none, unless the expressions are contradictory, and incapable of being reconciled, or there is a repugnancy which calls for the rejection of one part in order the more effectually to carry into effect the real intention of the parties gatherable from the part retained. The rule is thus stated by Kelly, C. B. in *Gyoo Gywn v. Neath Canal Navigation Co.* (2), at p. 215 :

"The result of all the authorities is that when a Court of Law can clearly collect from the language within the four corners of a deed, or instrument in writing, the real intentions of the parties, they are bound to give effect to it by supplying anything necessarily to be inferred from the terms used and by rejecting as superfluous whatever is repugnant to the intention, so discerned."

Rejection should be the last resort, after every means to reconcile are exhausted. There is ample authority also for the proposition that the Court should rather lean towards a construction which would give a meaning and effect to every one of the clauses in a deed than towards one which would result in a nullification of anyone or more of them in the end. These are some of the principles of general application which I should bear in mind in approaching the construction of a written instrument. It is to be observed at the outset that in the deed in question there are no doubtful words or ambiguous expressions, no terms of technical import and no repugnant clauses. The language is plain, and the meaning is clear; and the intention behind each one of the clauses whether taken separately or in combination is easily gathered and creates no difficulty. Nor have I any doubt that the parties intended to make all of them equally operative, and binding so that their future relations may wholly be governed by them. We should hesitate to accept a construction which will result in that intention being abrogated in whole or in part. I readily grant that a necessity for such a course may arise in the class of cases envisaged by Kay, J. in *Pawsey v. Armstrong* (3), at p. 705 where he observed :

"The truth is that there are certain legal relations which are entered into by agreeing to certain conditions, and when those conditions are agreed to, it is quite idle for people to superadd, or to attempt to superadd, a stipulation that the necessary legal conse-

quences of those conditions shall not follow from the arrangement."

Such a stipulation may have to be ignored but not before fully satisfying ourselves that the necessary conditions are made out for the excision. An illustration of this principle is to be found in the case where the relationship of partners must be held established by law between persons who have agreed to share the profits of a business carried on by all or any of them acting for all in spite of the superimposition of a contrary term in the articles. The proposition however can have no application except in a case where all and not some only of the conditions requisite for constituting the relationship are present. If the conditions fall short or are of a character, which indicates a different relationship, the proposition cannot apply. I am quite unable to agree that the governing consideration lies in the fact that the land-holder has in the case on hand parted with the *kudivaram* right in the land retaining with himself the *melvaram* interest only. Had the expression *kudivaram* been declared by statute to connote *ryoti* tenure or if I could persuade myself that it is a technical word, a term of art, having the same legal import. I should readily assent to the proposition. That however is not the case. It is quite clear that the word has been used in the Act (e. g. s. 3 (2) (d)), in a non-technical sense to denote the kind of tenure held by a tenant who has a permanent right of occupancy. In its literal sense the word *kudivaram* only means the cultivator's share of the produce, the word *melvaram* meaning the land-holder's share: *Suryanarayana v. Patanna* (4) and *Venkata Sastrulu v. Devi Seetharamudu* (5), at p. 171. It is customary however to speak of the ownership of land in this province as being composed of the *kudivaram* and the *melvaram* interest, or as the ownership of both *warams*. By a process akin to a metonymic user, the expression *kudivaram* interest is frequently employed to denote the species of interest which a tenant has in the land in his permanent occupancy, whether that land lies in an estate or outside it. This being the ordinary, popular sense, it must be taken that the word was used in this

(4) 41 M 1012; 48 Ind. Cas. 689; A I R 1918 P C 169; 45 I A 209; 25 M L T 30; (1918) 2 M W N 859; 23 C W N 273; 9 L W 126; 29 C L J 153; 1 U P L R (P C) 11; 36 M L J 585; 21 Bom. L R 547; (1919) M W N 463 (P C).

(5) 43 M 166 (171); 51 Ind. Cas. 304; A I R 1919 P C 111; 46 I A 123; 17 A L J 725; 37 M L J 42; 21 Bom. L R 925; 26 M L T 175; 50 C L J 441; 10 L W 663; 24 C W N 129 (P C).

(2) (1868) 3 Ex. 209 (215); 37 L J Ex. 122; 18 L T 688; 16 W R 1209.

(3) (1881) 18 Ch. D 698 (705); 50 L J Ch. 683; 30 W R 469.

sense in the document. What is important to remember in this connection is that *kudivaram* interest and *ryoti* tenure are not convertible terms having the same legal significance.

When we speak of *ryoti* land or *ryoti* tenure, the picture that is called up to our mind is the picture of that peculiar species of cultivable land in an estate, defined in the Act, to which, and to the holding of which, an entire body of mostly new and special rules have been annexed by force of the estate. Among the incidents which since the Act, attach to this species of land, the most important no doubt is the permanency of the tenure and the fixity of the rent, guaranteed to the tenant under stringent safeguards, subject however, to certain conditions to which it is unnecessary to refer for the present purpose. But the other incidents, whatever their relative importance, do exist, and should not be ignored when seeking to obtain a knowledge of the true measure and the real nature of that right. To put it in a simple form, *kudivaram* is only a part though a major part of the whole. But 15 annas do not make a rupee, nor 19 shillings a pound. To say so is not arithmetic. Neither is it in my opinion law and yet this is in substance the argument of the respondents. With all respect therefore, I am unable to assent to the proposition that the conveyance of that species of right known as the *kudivaram* interest amounts to the creation of a *ryoti* tenure in the land conveyed. To examine the matter still further, it is to be observed that this document came into existence more than twelve years after the passing of the Mad. Estates Land Act. The expressions, *ryoti* and *ryoti* land which were newly coined by the Act, to replace the words "tenant" and his "interest" in the holding, in order probably to emphasize the permanent character of that interest, had by the time of the deed become quite familiar to all, and yet it is somewhat strange, that these words have been studiously, as I think, avoided in the conveyance. It was in fact suggested that the deed was drawn up with a knowledge of the decision reported in *Devi Garu v. Yellappa Rama Naidu* (1). If in these circumstances the parties had really bargained for a conversion of the private land into *ryoti* land, it is not a little remarkable that language well known to denote that meaning should not have been employed instead of another, and at all events, a less decisive expression. There is, it may be observed, no suggestion

of any overreaching by the one party over the other in this case.

Apart from any such narrow consideration, when one comes to look at the entire document, it becomes, in my opinion, very difficult to resist the conclusion that the land-holder was not here seeking to convert his private land into *ryoti* land. I have earlier in this judgment endeavoured to recapitulate the rules which have to be brought to bear on this question. One of those rules is that the intention of the parties is to be collected from the whole of the document, not ignoring any part. If, on this principle, the conditions of the contract, contained in "the particulars of the remaining terms relating to the sale" as described in the instrument are considered, there are at least two which definitely militate against the theory of a conversion. Clauses 1 and 4 of these particulars taken together have the effect of fixing a permanent immutable rent payable year after year by the lessees, irrespective of the failure of, or a diminution in the yield, from whatever causes due. Clause 2 again provides that arrears of rent should carry interest at the rate of ten annas per cent. instead of at the rate of eight annas fixed by s. 61. These two terms which were specifically agreed to and undoubtedly intended to be operative, annex to the tenure created by the deed incidents which are not only foreign to a *ryoti* tenure under the Act, but materially opposed to it. Remembering that it is open to the land-holder to create any kind of derivative tenure not opposed to the general principles of law, I find it difficult, nay impossible to attribute to him an intention to bring into being one tenure, when the very terms of the contract clearly point to the parties having had in mind a different one, with different incidents. It is not for the Court to evaluate the terms for the purpose of accepting some and rejecting other. On the contrary, every rule of law and every rule of equity would seem to prohibit its so doing.

That there is a fundamental divergence between the terms of the contract in question here and the incidents annexed to a *ryoti* tenure under the Act, will appear plainly from a perusal of s. 187. A *ryot's* right to sue, or apply for a reduction of the rent on the grounds stated in cls. (a) and (b) of sub-s. (1) of s. 38 or sub-s. (3) of s. 32, or on the ground mentioned in cl. (c) of sub-s. (1) of s. 38 is by s. 187 (1) preserved as an inviolable privilege not to be destroyed or overridden by any contract to the contrary whether made before or after the Act.

Similar in effect is s. 187 (2) in so far as the rate of interest fixed by s. 61 is sought to be enhanced. With these inconsistent provisions contained in the deed before us, I consider that it is not open to the Court to infer that it was the appellant's intention to convert his private land into *ryoti* land. The other clauses in the deed are indecisive and I agree that they do not materially affect the construction. What presses on my mind is that it is not correct for a Court to infer a tenure by taking into account some only of the terms of the contract ignoring others, when it is possible, and I think it permissible to give effect to all the terms by treating it as a special contract and one not entered into for the purpose of impressing a *ryoti* tenure on the land comprised in the *khat*.

I may add a word about the decision reported in *Devi Garu v. Yellappa Rama Naidu* (1). That was a case where a *ryoti* tenure had been either expressly created by contract, or admitted to have been so created on the pleadings, and, the question arose whether terms and conditions repugnant to such a tenure should be recognized. The Court held that the conditions were valid and enforceable. The ground of the decision is to be found in the concluding sentences in the judgment where the learned Judges say that the Legislature has not made any special provision as regards the terms on which a conversion may be made, and that in the absence of such a provision, the contract of the parties on the basis of which the conversion was made, should prevail. If the learned Judges here meant to lay it down, that there is no objection in law to the superimposition by contract of terms alien to a *ryoti* tenure; after once creating such a tenure, I must with great respect, dissent from that view, which I think is a view which runs counter to the rule stated by Kay, J. The position here is however different. The question is not as to the validity of terms added which detract from the quality of a tenure created and intended to be created but whether there has been an effectual creation of the tenure itself. For the reasons explained, I regret, I am unable to share the opinion of my learned colleagues. I consider that the appeal should be allowed with costs throughout.

N.-D.

*Appeal dismissed.***PATNA HIGH COURT**

Criminal Revision No. 715 of 1940

April 17, 1941

DHAYLE, J.

BECHAN JHA AND OTHERS—PETITIONERS
versus

EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), ss. 295, 379, 144, 143, 425—Hut on agricultural land, if could be turned, without knowledge of landlord into mosque—Saying of prayers—Whether gives any sacred character to such hut—Pulling down of such hut by persons other than landlord—Offence, if falls under s. 295—Conviction under ss. 420-144—Charge under s. 379 referring to individual accused—No finding that any of accused individually took away materials—Conviction held cannot be sustained—Criminal trial—Revision—Sentence—Altering finding but maintaining sentence—Powers of Court.

The use of a hut on an agricultural land, without the permission of the landlord, as a public mosque with the *azan* or public call to prayers is entirely unwarranted; and if, the hut is not a mosque but a particular community were only attempting to convert it into one, it is clearly not "a place of worship" under the law. Where none of the members of the community was in a position validly to make the implied dedication a mere fact of saying *azan* does not make it a public mosque. The hut cannot also be regarded as "any object held sacred by any class of persons" within the meaning of s. 295. Nothing of religious reverence, no sacred character, could attach to the hut apart from its attempted conversion into a mosque as this attempt itself is contrary to law; to allow any sacred character to the hut would be to enable the community under the guise of religion to vest the shed as a public mosque in the religious body for whose observance it was to be used, to the detriment of the landlords, who had only settled the land with the tenant for agricultural purposes. Where the *azan* or public call to prayers is found to have begun only about a year before, the landlords do not lose by prescription their right to eject the tenant for the attempted perversion or misuse of the land, rendering it unfit for the purposes of the tenancy. Though this would not entitle others some of whom are amongst the landlords of the village, to take the law into their hands, yet their destruction of the hut does not constitute an offence under s. 295. The conviction under this section is bad in law. [p. 478, cols. 1 & 2.]

[Case-law relied on.]

That the hut standing on this land, though it was destroyed, was not a mosque properly so called does not mean the failure of the charges under ss. 144 and 143. Where the common object of destroying the mosque makes no reference to s. 295, and the destruction of the hut, even if it was not a mosque, clearly amounts in the circumstances to mischief as defined in s. 425, I. P. C., it follows that the unlawful assembly must be taken to have had the common object of committing mischief in respect of the hut. The conviction under ss. 144 or 143, as the case may be is proper. [p. 478, col. 2.]

Where the charges under s. 379 did not refer to the common object of the unlawful assembly. But the charges of theft were intended by the Magistrate to refer to the acts of individual accused apart from their doings as members of the unlawful assembly and there was no finding that any of the accused individually took away any of the materials of the hut, the conviction under s. 379 against the accused cannot be sustained. [*ibid.*]

A Court of Revision has the power of the Court of Appeal to "alter the finding maintaining the sentences or with or without altering the finding, reduce the sentence", and, therefore, to pass sentences under ss. 143 and 144 in a case, while setting aside the convictions under ss. 295 and 379, provided the sentences do not exceed those passed by the lower Appellate Court. [p. 479, col. 1.]

Cr. R. from an order of the Additional Sessions Judge of Darbhanga, dated August 30, 1940.

Messrs. *Hareshwar Pd. Sinha* and *P. Jha*, for the Petitioners.

The Govt. Pleader, for the Crown.

Order.—The 12 petitioners, along with 3 other men who were acquitted on appeal by the Additional Sessions Judge, were convicted by the Sub-Divisional Magistrate of Madhubani of an offence under s. 295, I. P. C. in that they destroyed a place of worship, to wit, the mosque of the Kunjras of Belhwar, "with the intention or with the knowledge that you would thereby insult the religion of the Kunjras in particular and of the Musalmans in general." They were also convicted under s. 379, I. P. C. of theft of the materials of the mosque, and further, of being members of an unlawful assembly with the common object of destroying the mosque, 9 of them under s. 143 and the remaining 6 (who were armed with *bhalas*) under s. 144, I. P. C. The Magistrate sentenced them all to six months' imprisonment under s. 295 and to one month's imprisonment under s. 379, I. P. C. the two sentences to run consecutively, and passed no separate sentence under ss. 144 and 143. On appeal the Additional Sessions Judge acquitted 3 of the 15 men (including one alleged to be armed with a *bhala*) and reduced the sentence on the remaining 12 to three months' rigorous imprisonment under s. 295 and further made the sentence of one month's imprisonment under s. 379, concurrent with it.

According to the prosecution, the structure destroyed had been erected as a mosque ten years before the occurrence, and Abdul Waheed, P. W. No. 5, who had been married to the sister of Kari Kunjra, P. W. No. 2, came to the village about a year before the occurrence as a *maulvi* or tutor for the children of the Kunjras and started a *madrasa* in the mosque and also began to call the *azan* there. The Magistrate was not prepared to believe that the structure was used as a mosque since the very day of its construction, but found that there was "some sort of structure existing since long" which apparently on the *maulavi's azan* "came to be regarded by the Kunjras as a mosque" and

was thus "to all intents and purposes" a mosque. The learned Additional Sessions Judge definitely rejected the prosecution claim that the structure was a mosque: according to the defence it was only a dilapidated cattle-shed. The learned Judge below considered it

"quite clear, under the circumstances, that the hut in question was not a mosque, but was attempted to be converted into such, after the *maulvi* was appointed to teach the Kunjra boys."

It is quite obvious, under the circumstances, he said further,

"that the hut in question was not a mosque and that only recently the Kunjras took to saying prayers and calling *azan* there, that the Hindus rightly or wrongly became apprehensive that the hut might be converted into a mosque, and cow-sacrifice resorted to in the village. This appears to me to be the reason, which led to the recent outburst of temper on the part of the Hindus, who took into their heads to do away with the structure."

He nevertheless upheld the conviction of the petitioners under s. 295

"because no particular period is required by law to establish an object as one of religious reverence and the house in question was held sacred by the Kunjra community from the time they began to say prayers and call *azan* there."

It has been urged on behalf of the petitioners that s. 295, can have no application to the case if, as the learned Judge has found, the hut was not a mosque.

"A mosque becomes consecrated for public worship either by delivery to a *mutwalli*, or on the declaration of the *waqif* that he has constituted it into a *musjid*, or on the performance of prayers therein...with *azan* and *ikamat*."

see *Adam Sheikh v. Isha Sheikh* (1)—and every Muhammadan has the legal right to enter a mosque so consecrated, and perform his devotions there according to his own tenets so long as the form of worship is in accord with the recognised rules of Muhammadan Ecclesiastical Law (per Mahmood, J. in *Queen Empress v. Ramzan* (2)). But the subject-matter of a dedication under the Muhammadan Law must be the lawful property of the *waqif*, or the *waqf* will not be valid (Ameer Ali's Muhammadan Law, Volume I, pp. 201-02). In the present case the old hut stood on the *belagan* land of Buchi Mian, P. W. No. 6, one of the Kunjra cultivators of the village. It is admitted by Dukha Mian, P. W. No. 1 the Kunjra who lodged the first information in the case, that before the building of the mosque the Kunjras used to say their *nemaz* in their houses and that at that time there was a *khalihan* on this *belagan* plot. It is not pretended that the landlord's permission was taken for erecting any public mosque on the plot, and Buchi Kunjra's tenancy being agricultural, the use of the

(1) 1 C W N 76.

(2) 7 A 461.

plot for the purpose of a public mosque would be so inconsistent with the purpose for which the land was let as to render the tenant liable to be ejected from the whole of his holding, as was held by Karamat Hussain, J. in *Allah Dia v. Munshi Sada Nand*, 8 Ind. Cas. 732 (3), see also *Basa Mal v. Ghayas-ud-din* (4) and *Sawan v. Mehr Din*, 45 Ind. Cas. 963 (5). This aspect of the matter seems to have escaped notices in the lower Courts. The use of the hut as a public mosque with the *azan* or public call to prayers was entirely unwarranted; and if, as the learned Judge below has found, the hut was not a mosque but the Kunjras were only attempting to convert it into one, it was clearly not "a place of worship" under the law. It is also not pretended that the landlord knew anything about the alleged use of the shed for private prayers; in the pre-*maulavi* days and while the point of the prosecution story is that the *azan* made it a public mosque, it is clear that none of the Kunjras was in a position validly to make the implied dedication. The question, therefore, arises whether the hut can be regarded as "any object held sacred by any class of persons" within the meaning of s. 295. The learned Judge took it to be "an object of religious reverence", "held sacred by the Kunjra community from the time they began to say their prayers and call the *azan* there." It is, however, just as obvious that nothing of religious reverence, no sacred character, could attach to the hut apart from its attempted conversion into a mosque as that this attempt itself was contrary to law: to allow any sacred character to the hut would be to enable Buchi Kunjra under the guise of religion to vest the shed as a public mosque in the religious body for whose observance it was to be used, as it was put in *Basa Mal's case* (4), to the detriment of the landlords, who had only settled the land with him for agricultural purposes. As the *azan* or public call to prayers is found to have begun only about a year before the occurrence, the landlords had not lost by prescription their right to eject Buchi for the attempted perversion or misuse of the land, fendering it unfit for the purposes of the tenancy. This would not entitle the petitioners, some of whom are amongst the landlords of the village, to take the law into their hands, but I am now considering whether their destruction of the

hut constitutes an offence under s. 295. In my opinion, it does not. The conviction under this section must therefore be set aside as bad in law.

It has also been urged that the conviction of the petitioners under s. 379 is bad in law because there is no finding by either of the Courts below as to any of the individual petitioners taking away the materials of the mosque. The charges under s. 379, did not refer to the common object of the unlawful assembly, which was moreover stated to be merely the destruction of the mosque and not also the theft of its materials. The charges under s. 295, show that the intention underlying the destruction was insulting the religion of the Kunjras etc. but not theft. It is, therefore, clear that the charges of theft were intended by the Magistrate to refer to the acts of individual accused apart from their doings as members of the unlawful assembly. There is, however, no findings that any of the accused individually took away any of the materials of the hut. The learned Govt. Pleader, has, therefore, not been able to support the conviction under s. 379. This conviction must accordingly be also set aside.

The petitioners were, as already stated, further convicted, 5 of them under s. 144 and the rest under s. 143, I. P. C. The common object of the unlawful assembly was stated in the charges to be "destroying the mosque of the Kunjras"...standing on the *belagan* last of Buchi Kunjra. That the hut standing on this land, though it was destroyed, was not a mosque properly so called does not mean the failure of these charges. According to the defence the structure was a cattle-shed; and Buchi Kunjra's right to have it on the *belagan* land has not been questioned. Its attempted conversion into a mosque did not, as I have already said, entitle the accused to take the law into their own hands and go in a body to destroy it. But the common object of destroying the mosque made no reference to s. 295, and the destruction of the hut, even if it was not a mosque, clearly amounted in the circumstances to mischief as defined in s. 425, I. P. C. It follows that the unlawful assembly must be taken to have had the common object of committing mischief in respect of the hut. The conviction of the petitioners under s. 144 or 143, as the case may be, must, therefore, remain. The lower Courts did not pass any sentence upon the petitioners under these sections because of the sentences passed under ss. 295 and 379. As the convictions under these latter sections have been

(3) 8 Ind. Cas. 732.

(4) 27 A 356; 2 A L J 27; A W N 1904, 276.

(5) 45 Ind. Cas. 963; A I R 1918 Lab. 117; 109 P W R 1918: 94 P R 1918.

found to be untenable, it becomes necessary to pass sentences under s. 144 or 143. A Court of Revision has the power of the Court of Appeal to "alter the finding maintaining the sentences, or with or without altering the finding, reduce the sentence", and therefore to pass sentences under ss. 143 and 144 in this case, while setting aside the convictions under ss. 295 and 379, provided the sentences do not exceed those passed by the lower Appellate Court. No violence was offered to any of the Kunjras, and the structure described by the prosecution as a mosque does not seem to have had even one pucca wall. The Kunjras had also no right whatsoever to attempt to convert the shed into a public mosque. Taking all the circumstances into account, I consider that it will be sufficient in the ends of justice if in upholding the convictions under s. 144 or 143, I sentence the petitioners to rigorous imprisonment for the period already suffered by them together with fines of Rs. 50 each under s. 144 and Rs. 25 each under s. 143, as the case may be with one month's rigorous imprisonment in default. Ordered accordingly.

D.

Order accordingly.

PATNA HIGH COURT

Appeals from Appellate Decrees

Nos. 153 and 154 of 1940

April 23, 1941

MANOHAR LALL, J.

NISAR MOHAMMAD KHAN—

AND OTHERS—APPELLANTS

versus

TAUQUIR AHMAD AND OTHERS—

RESPONDENTS

Bengal Public Demands Recovery Act (III of 1913), s. 7—Certificate sale—Accounts opened in name of co-sharers—Quota of arrears dues paid—Certificate sale of entire estate for arrears—Liability—Certificate against dead person—Effect on interest of legal representatives—S. 29, applicability—Section assumes that certificate was in proper order—Bar of suit contemplated by s. 46—Question between auction-purchaser and representatives of certificate debtor—No bar.

Where separate accounts had been opened in the name of plaintiffs-co-sharers on November 7, 1933, their share is liable for the cess for the January and March *kist* of 1933, even though they had paid their quota, when the certificate proceedings had been started to realise the dues from all the co-sharers who were then alive not only for their quota but also on account of the quota of the other co-sharers who were in default. The payment by the plaintiffs of their quota does not do away with the liability of the entire estate to pay the arrears which were due from the whole estate. [p. 480, col. 2.]

The entire proceedings based upon the certificate issued against a dead person are wholly inoperative to affect the heirs of the deceased. It is open to the

Certificate Officer under s. 11 to amend the certificate by addition, omission or substitution of the name of the certificate-debtor. In the absence of such amendment the heirs are wholly unaffected by the certificate sale. [p. 481, col. 2.]

• Section 29, Public Demands Recovery Act, assumes that the certificate was a proper certificate where the certificate issued in the name of a dead person was never altered and no substitution was made by bringing in the names of the legal representative upon the record. Section 29 has no application. The heirs without bringing a suit to set aside sale can bring a suit for declaration that the sale does not affect their interest. [p. 482, col. 1.]

Where the question is between the auction-purchaser and the representatives of the certificate debtor and not between the certificate holder and the certificate debtor or their representatives s. 46 has no application. [*ibid.*]

The concurrent findings of the Courts below that the sale in the certificate proceedings was not vitiated by fraud is a finding of fact and binds the High Court in second appeal. [p. 480, cols. 1 & 2.]

A. from a decision of the Subordinate Judge of Third Court, Gaya, dated May 29, 1939.

Messrs. Rai T. N. Sahai and K. N. Varma, for the Appellants.

Messrs. S. Jafar Imam, H. R. Kazimi and Sarjoo Prasad, for the Respondents.

Judgment.—These two appeals are by the plaintiffs and arise out of one suit instituted by them for a declaration that a certain sale held on April 16, 1934, for recovery of arrears of cess did not affect their interest in village Ekamba, and for recovery of possession of that share.

The facts necessary for understanding the questions raised may be shortly stated.

The plaintiffs' case is that they have title to the extent of 6 annas, 10 dams and odd in village Ekamba, Tauzi No. 6918, and in order to safeguard their interest, due to the deliberate default of the other co-sharers, they applied to the Collector on June 26, 1933, to open a separate account for them. On September 16, 1933, the office reported to the Deputy Collector that there was an arrear of Rs. 11-8-6 on account of cess and asked the applicants to pay their share; and on October 17, 1933, the applicants did not pay the entire arrears but only the amount due on account of cess for their shares. That being done on November 7, 1933, the Deputy Collector ordered that a separate account should be opened in the name of the applicants. These separate accounts were to take effect from January 1934. In the meantime the estate was in arrears on account of cess due for the *kist* of January and March 1933. Thereupon a certificate proceeding was started on August 24, 1933, in order to recover the arrears from all the co-sharers including the plaintiff-

iffs without serving notices in a proper manner as required by the Public Demand Recovery Act and without complying with some of its provisions the sale was held in April, 1934. The plaintiffs having come to know of the sale instituted the present suit on April 14, 1936, challenging the entire sale as fraudulent. They further assailed the validity of the sale on the ground that Gulfam and Qoraisa Bibi having died before the service of the notice under s. 7 of the Act their shares remained unaffected by the sale, and lastly, that the share of Zinoor Ahmad Khan, plaintiff No. 4, was wholly unaffected by the sale.

The trial Court came to the conclusion that the plaintiffs have been unable to establish their allegations of fraud, but he held that Gulfam died on July 4, 1928, and Qoraisa Bibi died on September 24, 1933, and that their shares remained wholly unaffected by the sale. He also granted relief to the plaintiff No. 4 on the ground that he was no party to the certificate proceedings and fixed his share at 18 dams, 12 *krants* and odd. In the result he held that the shares of Gulfam, Qoraisa Bibi and plaintiff No. 4, that is to say, 5 dams, 8 *krants* and odd as recorded in serial No. 8, 1 anna 2 dams and odd as recorded in serial No. 11 and 18 dams, 12 *krants* and odd as recorded in serial No. 12 of Register D, amounting in all to 2 annas, 6 dams and odd, were not affected by the sale. He accordingly ordered that the plaintiffs were entitled to take possession of these shares—the amount of mesne profits to be determined in subsequent proceedings.

Against this decision passed on April 12, 1938, both the parties by preferred an appeal to the learned District Judge. Those appeals were disposed of by Maulavi Mohammad Ibrahim on May 29, 1939. He affirmed the findings of the learned Munsif on the question of fraud and as to the non-validity of the sale with regard to the shares of Bibi Qoraisa and Gulfam, but he reversed the decision of the learned Munsif as to the non-validity of the sale with regard to the share of the plaintiff No. 4 and held that Zinoor Ahmad Khan had no interest in the shares but that Jaunser Mohammad Khan who was so described in Register D and also in the certificate proceedings was co-sharer of this 5 annas and 2 dams share. Against this decree the two appeals have been preferred by the plaintiffs.

The learned Advocate for the appellants could not seriously challenge the concurrent findings of the Courts below that the sale

in the certificate proceedings was not vitiated by fraud. That finding is a finding of fact and binds this Court.

But he strenuously argued that after the separate accounts had been opened on November 7, 1933, on realising from the plaintiffs their quota of the arrears of cess due from this estate for the *kist* of January and March, 1933, the certificate proceedings which were started on August 24, 1933, must be held to be without jurisdiction so far as the shares of the plaintiffs were concerned. But the fallacy in the argument is that the certificate proceedings had been started to realise the dues from all the co-sharers who were then alive not only for their quota but also on account of the quota of the other co-sharers who were in default. It is true that the plaintiffs paid their own quota but that did not do away with the liability of the entire estate to pay the arrears which were due from the whole estate. In the order bearing No. 16 dated February 19, 1935, in the certificate proceeding in question I find that this question was raised before the certificate officer when he was asked to set aside the sale on account of the shares of some of the co-sharers, but the certificate officer correctly rejected the application on the ground that as a separate account was opened on November 7, 1933, and the demand was for the cess for January and March *kist* of 1933, the applicants were liable for these *kists* even though they had paid their quota. For these reasons I overrule the first contention.

It was next argued that the lower Appellate Court was wrong in holding that the share of plaintiff No. 4 was affected by the sale. The trial Court found as a fact that this plaintiff has got a share entered in serial No. 12 of Register D and that in the original certificate, in the notices under s. 7 and r. 25 and in the sale proclamation Zinoor Ahmad Khan is not shown as a party; on the other hand Jaunser Ahmad Khan is shown as a party. No evidence was adduced before the learned Munsif to show that Jaunser and Zinoor was one and the same person. He, therefore, held that the share of plaintiff No. 4 was not affected by the sale certificate and then, as I have already stated, he found his share to be 18 dams, 12 *krants* and odd and not 5 annas and 2 dams. The learned Appellate Court, however, observes that

"the plaintiffs Nos. 1 to 6 are Nisar Mohammad Khan, Siraz Mohammad Khan, Anwar Ahmad Khan, Zinoor Ahmad Khan and Zainul-ab-din Khan as sons and *Mst.* Biban Bibi as daughter of Yiar Mohammad Khan. They are holders of 5 annas 2 dams and odd share.

In the certificate (Ex. 19) the holders of these 5 annas 2 dams and odd share have been mentioned. They are the same as in the plaint except that instead of Zinoor Ahmad Khan, Jaunsar Mohammad Khan was written. It is urged by the side of the plaintiffs that Jaunsar Mohammad Khan is not a co-sharer of 5 annas 2 dams share; the contesting defendants on the other hand urge that Jaunsar Mohammad Khan... is the real co-sharer and not Zinoor Ahmad Khan. In the Register D I do not find the name of Zinoor Ahmad Khan but in that register Jaunsar Mohammad Khan is written as co-sharer of this 5 annas 2 dams share. Certificate is thus in accordance with the Register D."

He accordingly held that the holders of this 5 annas and 2 dams share were all parties to the certificate proceeding and, therefore, the sale in respect of this share was ordered to stand. The learned Subordinate Judge appears to have made a mistake. I have examined the certified copy of Register D regarding this share. Item No. 8 distinctly mentions the name of the proprietor as Babu Gulfam Ahmad Khan-minor, and in the third column his father's name is put down as Zinoor Ahmad Khan. Again in Item No. 12 the entry in column 2 is Nisar Mohammad Khan, Siraz Mohammad Khan, Anwar Ahmad Khan, Zinoor Ahmad Khan, Zainul-ab-din Khan and Mst. Biban Bibi. I do not find any name as Jaunsar Ahmad Khan. It is true that the first 'o' after Zinn may be read as 's' but it appears that the copyist was trying to write Zannur Ahmad Khan. Whatever doubts there may be on this point are removed by the entry in column 3 where the parentage of Gulfam is shown as Zanoor Ahmad Khan.

For these reasons I set aside the decision of the learned Subordinate Judge on this point and restore the decision of the learned Munsif and hold that the share of plaintiff No. 4 was also unaffected by the certificate sale of April 1934. This disposes of the two appeals so far as the plaintiffs are concerned.

But the defendants have also filed a cross-appeal or cross-objection and Mr. Jafar Imam appearing on their behalf argues that the Courts below should not have granted any relief regarding the shares of Gulfam and Qoraisa Bibi also. He also argues generally that the whole suit was not maintainable by reason of s. 46 of the Act when it has been found that there was no fraud in the certificate proceedings or in the conduct of the sale.

To take up the case of Gulfam first. Gulfam was a minor who died on July 4, 1928 leaving his father Zinnoor Ahmad Khan, plaintiff No. 4, and his mother, Hakim Bibi, plaintiff No. 8 as his heirs. The extent of his share was 5 dams and odd which is not in dispute. It is clear, therefore that when the certificate

was issued on August 4, 1933 it was issued against a dead person. It is common ground that no order for substitution of his heirs has ever been passed in this certificate proceeding. It is alleged that as one of the heirs of Gulfam, namely his father, plaintiff No. 4, was himself a party to the proceedings in his own right the proceedings however irregular they may be, cannot be held to be not binding upon his estate which has been so represented. By s. 52 it is provided that where a certificate debtor dies before the certificate has been fully satisfied, the certificate officer may, after serving upon the legal representative of the deceased a notice in the prescribed form, proceed to execute the certificate against such legal representative; and the provisions of this Act shall apply as if such legal representative were the certificate debtor and as if such notice were a notice under s. 7. This section has no application to the present case because the original certificate was issued against a person who was dead. It is not a case where the certificate-debtor died after the issue of the certificate and before the certificate was fully satisfied. It seems to me, therefore, that the entire proceedings based upon the certificate so issued against a dead person are wholly inoperative to affect the heirs of Gulfam. It was open to the Certificate Officer under s. 11 to amend the certificate by addition, omission or substitution of the name of the certificate-debtor, but he never did so. The proviso to that section provides that when an amendment is made a fresh notice shall be issued as provided in s. 7. For these reasons I agree with the Courts below that the heirs of Gulfam are wholly unaffected by the certificate sale. It may also be observed here that the father was no party to the certificate proceedings because I have already held, in agreement with the learned Munsif, that Zinnoor Ahmad was not a party to the certificate proceedings but one Jaunsar Ahmad Khan.

With regard to the case of Qoraisa Bibi the facts are that a certificate was properly issued against her. She died on September 24, 1933 leaving her father, her mother, her husband, plaintiff No. 2, and her daughter, a minor, who is plaintiff No. 7 as her heirs. By s. 52 the Certificate Officer was empowered to serve upon these legal representatives of Qoraisa Bibi a notice which would be deemed as a notice under s. 7. No such notice was ever served although the peon had reported that Qoraisa Bibi had died on September 24, 1933, in his service report. As already stated plaintiff No. 7 was one of

the heirs and was a minor on that date. Therefore, the Certificate Officer ought to have proceeded under s. 50, namely that he should have appointed a proper person to represent the minor daughter, but no such thing was done. The result, therefore, was that three of the heirs of Qoraisa Bibi, namely her father, her mother and her daughter were never upon the record. But it is argued that as her husband, plaintiff No. 2, was upon the record in his own capacity the representation of the heirs of Qoraisa Bibi was complete. No notice, however, was issued against the plaintiff No. 2 that he was to be proceeded against as the heir of Qoraisa Bibi. For these reasons I am unable to agree with the learned Counsel for the respondents that the share of Qoraisa Bibi was at all affected by the certificate sale.

It was then argued that the proper remedy of the heirs was to proceed under s. 29 by applying to have the sales set aside on the ground of non-service of notice or for any other irregularity. But that section assumes that the certificate was a proper certificate. Here the certificate was never altered and no substitution was made by bringing in the names of the legal representatives upon the record. Moreover under that section the Certificate Officer has power to set aside the sale on the ground that notice was not served under s. 7 or on the ground of other material irregularities. But here the plaintiffs do not want that the sale should be set aside. All they want is that in the events that have happened the sale should be held not to affect their interest.

It was then argued that s. 46 was a complete bar for the trial of this question which was a question that arose between the certificate holder and the certificate debtor or their representatives and relating to the making, execution, discharge or satisfaction of a certificate duly filed under this Act. But the question here is between the auction-purchaser and the representatives of the certificate debtor and not between the certificate holder and the certificate debtor or their representatives.

For these reasons I hold that the sale held did not affect the share of Gulfam and of Qoraisa Bibi and that the judgments of the Courts below are correct.

In the result the appeal of the plaintiffs is allowed to the extent of the share of plaintiff No. 4; in other respects the appeal is dismissed. The cross-appeal of the respondents is also dismissed. In the

circumstances there will be no order for costs of this Court.

D.

Order accordingly.

RANGOON HIGH COURT

First Appeal No. 61 of 1940

August 19, 1940

ROBERTS, C. J. AND MOSELY, J.

U SIN—APPELLANT

versus

MA MA LAY—RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1, s. 11, O. II, r. 2—Leave to file fresh suit can not be granted on its dismissal—Previous suit by wife for divorce—No alternative plea for declaration that she is not wife—Subsequent suit for such declaration, if barred—O. II, r. 2 does not apply to joining of different causes of action in same action—Burmese Buddhist Law—Marriage—Law of divorce.

A Judge cannot give leave to a plaintiff to file a fresh suit upon the dismissal of an earlier suit but only upon its withdrawal. 91 Ind. Cas. 280 (1), relied on, [p. 483, col. 2.]

It cannot be said that a person petitioning the Court for a divorce as a husband or wife ought to add an alternative plea asking for a declaration that he or she is not a husband or wife at all, because the marriage has long ago ceased to exist. The matters are so dissimilar that their union not only might but must certainly lead to confusion. Consequently the failure of the wife in earlier suit for divorce to raise alternative plea for declaration that her marriage has ceased to exist will not bar a subsequent suit for such declaration. [p. 484, col. 1.]

Order II, r. 2, Civil P. C., is not directed to the inclusion in one and the same action of different causes of action even though they arise from the same transactions. 26 Ind. Cas. 228 (5), relied on, [ibid.]

A husband who believes his wife to be guilty of adultery may obtain her admission of guilt and the dissolution of marriage may take place by mutual consent on the footing that the husband retains the *hnazon* property. If he cannot do this and a separation ensues by reason of his own desertion, then he has three years in which to bring a suit for a decree of divorce, but if by reason of their differences his wife has deserted him, he has only one year. In the suit for a decree of divorce he may, if he can, prove the factum of adultery, but unless he does so the dissolution of marriage becomes effective at the expiration of one or other of these periods whichever may apply. He is no longer a husband and he cannot "prove the adultery" in a suit for divorce brought by him. Nor can he bring a suit for a declaration that the dissolution of the marriage tie was effected in circumstances that his former wife has been guilty of adultery. And, if he cannot bring a suit of this kind, he cannot raise a defence of this kind in a suit brought against him. [p. 485, col. 2; p. 486, col. 1.]

F. A. against the decree of the High Court, in C. R. S. No. 140 of 1938, dated April 24, 1940.

Mr. U Ze Ya, for the Appellant.

Mr. U Maung Maung for Mr. U E Maung, for the Respondent.

Roberts, C. J.—This suit (Civil Regular No. 140 of 1938) was brought by the respon-

dent against the appellant to whom she had been married, and was for a declaration that the status of husband and wife had ceased to exist between them on January 20, 1935, owing to the husband's alleged desertion three years prior to that date, followed by absence of communication between the parties, and the failure of the defendant to maintain the plaintiff; or alternatively that the marital tie was severed on January 20, 1932, on the wife's desertion one year before that date: the plaintiff also prayed for an order directing accounts to be taken of the property of the marriage and for possession of her lawful share. The respondent had filed an earlier suit (Civil Regular No. 51 of 1937) on the footing that she was at the date of filing it a married woman. In that suit she asked for a decree of divorce on the ground of cruelty and the cruelty alleged was the bringing of a false charge of adultery against her by her husband, and turning her out of the house. The husband pleaded in his written statement that the plaintiff was no longer a married woman, he admitted that they had parted on January 21, 1931, and had lived separately ever since. If the separation amounted to desertion on the part of the wife the marital tie would be severed one year later; if it were desertion on the part of the husband it would be severed three years after he refused to take her back on January 20, 1932, and, it is contended on the part of the appellant, that if the separation was in consequence of the wife's adultery it would sever the marriage tie at once. At all events, the point taken by the defence in the first suit was that the plaintiff was not the defendant's wife at the time of bringing her action.

At the trial the wife sought leave to amend her pleading; she wanted to bring an action for a declaration that the marriage was no longer subsisting. Leave to do this was refused her, the learned Judge pointing out that she was seeking to substitute a new and entirely different cause of action against the defendant. The wife thereupon offered no evidence in support of her suit for divorce and it was dismissed because she did not choose to pursue it on the unamended plaint. It is not quite right to say, as we were asked to do, that it was dismissed on the footing that the marriage had already been dissolved. There was no finding to that effect; it was dismissed for want of prosecution. The learned Judge was asked to give leave to the plaintiff under O. XXIII, to file a fresh suit. He stated that if it was necessary for him to give leave (which he doubted) he would do so. It seems that no authorities on this point

were cited to him, but a trial Judge cannot give leave to a plaintiff to file a fresh suit upon the dismissal of an earlier suit but only upon its withdrawal. The plaintiff here did not withdraw her suit, but it was dismissed. And having had it dismissed she could not bring a fresh suit on the same cause of action: *Fateh Singh v. Jagannath Baksh Singh* (1). There was however nothing to prevent her bringing a suit against the same person on a different cause of action provided the provisions of s. 11, Civil P. C., were not infringed. Broadly stated, the rule in s. 11, is a simple one. When a matter has been directly and substantially in issue in one suit and has been heard and finally decided by the Court, the parties to that litigation cannot get the matter tried again in a subsequent suit but are bound by the final judgment. The parties to the litigation who are bound include their representatives in interest or persons claiming under them. Parties to former litigation are not, however, bound, when in a subsequent suit they are suing in a different capacity. And, in a subsequent suit, a decree can only be pleaded as *res judicata* when the Judge by whom it was made had jurisdiction to try and to decide the subsequent suit itself. These qualifications, however, do not apply to the appeal before us. I only mention them lest it should be thought that the broad statement of the rule is exhaustive.

If, therefore, the matter in dispute in the present suit was directly and substantially in issue in the former suit, and was heard and finally decided by the Court, the doctrine of *res judicata* would apply. The learned Advocate for the appellant contends that it was directly and substantially in issue. He says that it falls under Expl. IV, to s. 11, because it was matter which "might and ought to have been made ground of attack" in the former suit and must therefore be deemed to have been a matter directly and substantially in issue in that suit. In *Denobundhoo Chowdhry v. Kristomonee Dossee* (2), a father had conveyed some land to his daughter as *stridhan*. After the daughter's death, her mother brought a suit to recover the property saying that the gift deed was a forgery; it was held that the deed was genuine and the suit was dismissed. The mother then brought a second suit claiming the land as her daughter's heiress and it was held that the second

(1) 52 I A 100; 91 Ind. Cas. 280; A I R 1925 PC 55; 47 A 158; 27 O C 334; 48 M L J 64; 2 O W N 25; 12 O L J 117; L R 6 A (P C) 50; 27 Bom. L R 725; 29 C W N 749; 23 A L J 739; 22 L W 58 (P C).

(2) 2 C 152.

suit was barred. Kemp, J. observed (at p. 173*) that the mother had to make out a title to possession and the title she set up in the second suit was one which she could and should have set up in the first suit, as the father and daughter were already dead; she had not changed her cause of action. In *Gudappa v. Tirkappa* (3), the plaintiffs had first sued the defendant as surviving members of a joint family; their suit was dismissed. They then brought a second suit claiming to be entitled as reversioners on the death of the widow of the former owner. Jenkins, C. J., in considering Expl. IV, to s. 11 said they ought to have made this second contention a ground of attack in the former suit and remarked (at p. 193†):

"Where matters are so dissimilar that their union might lead to confusion the construction of the word 'ought' would become important; in this case the matters was the same."

These very words were evidently taken from the judgment of Lord Morris, in *Kameshwar Pershad v. Rajkumari Ruttan Koer* (4), at p. 85. But how can it be said that a person petitioning the Court for a divorce as a husband or wife ought to add an alternative plea asking for a declaration that he or she is not a husband or wife at all, because the marriage has long ago ceased to exist? These matter appear to me to be so dissimilar that their union not only might but must certainly lead to confusion. The causes of action, which a married woman brings for divorce, and which a woman no longer married brings for a declaration that the marriage has long ago ceased to subsist, are surely inconsistent and ought not to be brought together. And again, not only are the causes of action incongruous but the date at which partition must be reckoned if the plaintiff were successful would be different. A reference to O. II, r. 2, makes it clear that a plaintiff must include the whole of the claim which he is entitled to make in respect of his cause of action, and that he cannot afterwards sue for a relief in respect of the same cause of action which he has omitted to claim. The rule is not directed to the inclusion in one and the same action of different causes of action even though they arise from the same transactions: see *Saminatha Chetty v. Palaniappa Chetty* (5). In that case the first action was on two promissory notes, so long as they were outstanding there could not

be right of action by the plaintiff except upon them. This action having been dismissed on the ground that there had been material alterations in the notes plaintiff then claimed upon an award under which the promissory notes were given; it was held that it was impossible to say that this claim was the same cause of action as the claim upon the notes and ought to have been included in the prior action.

The conclusion at which I have arrived is that the present suit by the appellant was not barred by s. 11, Civil P. C., or by the provisions of O. II, r. 2, and the matter now in dispute cannot be deemed to be *res judicata*. In the present suit, the appellant pleaded that the marriage was dissolved owing to the plaintiff's adultery, and the question arises whether a husband can at this stage raise any such plea—it is contended by the respondent that a husband can only aver and prove the adultery of his wife in an action brought by him for divorce on the ground of her adultery. It seems necessary to enquire what may happen under Burmese Buddhist Law when a husband suspects that his wife is guilty of adultery. First, of course, he may disregard his suspicions; or, nonetheless entertaining the conviction that she is guilty he may condone the offence. That aspect of the matter does not arise here. Secondly, he may ask in the Courts for a decree of divorce; that does not arise here either. Thirdly, he may succeed in getting a divorce by mutual consent; the wife, whilst not admitting her guilt, may agree to this; and I am disposed to think, though it is unnecessary for me to decide, that she might whilst either admitting or denying her guilt submit to her dismissal on the footing that her husband was to retain the *hnapazon* property in the circumstances of the case. But, fourthly, it is contended that the husband may put her away. The following passage of Manugye Chap. XII (43 has been cited):

"Concerning putting away a woman who does not conform to the habits of her class, but addicts herself to low habits, it is thus said: If a woman, without regard to the credit of her family takes a paramour, or without the knowledge of her husband steals, or conceals his property, it is not said the husband shall only cease connubial intercourse with her; her habits are bad; she has certainly no regard to the honour of her family. For this reason, let him take all the property, and have a right to put her away."

Shortly stated, this lays down that if the wife takes a paramour the husband may put her away and retain the *hnapazon* property. We have been urged that this is Buddhist Law and there is no law which, in a matter of

(3) 25 B 189; 2 Bom. L. R 872.
(4) 20 C 79 (85); 19 I A 234; 6 Sar. 241 (P. C.).
(5) 41 I A 142; 26 Ind. Cas. 228; 18 C W N 617; 83 L J P C 131; (1914) A C 618; 110 L T 913; 17 New Law Reports 56 (P. C.).

* Page of 20—[Ed.]

† Page of 25 B—[Ed.]

this kind, can abridge or alter it. I have the greatest sympathy with this contention, and if it were capable of application I should have no hesitation in applying it. But who is to decide whether the wife has taken a paramour or not? As I have remarked, her submission to being "put away" on this ground may conclude the matter. But in many cases she may not, and in the present case she does not at all, admit her guilt; here there was no divorce by mutual consent on the footing of admitted adultery. I cannot think that the husband can be judge in his own cause in such a matter. One can imagine a husband who had no ground for suspicion at all but a desire to rid himself of his wife for some quite different reason, turning out his wife and invoking this provision of the law as though he had only to make a charge which everyone knew was groundless in order to (justify his action; or it is possible to think of a jealous husband who has had quite groundless fears as to his wife's fidelity "putting her away" under this provision; is he, although she is quite guiltless, to be allowed to retain all the *hnazon* property? The appellant's Advocate, with wisdom, has not pretended that a wife may be cast adrift in this way upon a baseless charge.

It would not suffice to try and interpret the provision in *Manugye* by saying that if the husband had reasonable grounds for believing the wife to be guilty he could put her away under this section. For one thing the laws of Menoo do not say that at all; for another, it would be impossible to hold that a divorce took place on one day because the husband mistakenly and on reasonable grounds believed his wife to be guilty of misconduct, and that his discovery of his error amounted to a remarriage of the parties. Much might have happened in the meantime. This drives me to the conclusion that although the provision cited is good law it certainly does not mean that a husband who merely suspects his wife of adultery can put her away. He can only put her away without her consent if in the words of *Manugye* "she takes a paramour"; nobody can ever know whether she has done so or not till it is proved in a Court of Justice. Therefore, when I remarked at an early stage in this judgment that it was contended on the part of the appellant that if the separation was in consequence of the wife's adultery it would sever the marriage tie at once, I had in mind that it would be difficult to show in any particular case that the separation took place because the wife

had in fact committed adultery unless proof were given in a Court of Justice of this fact; although it might be easy to show that separation took place because the husband thought, or said he thought, that his wife had committed adultery. This being, as I understand it, the law, we are obliged to consider the husband's position according to it. If he does not disregard his suspicions, or condone the offence, or obtain a divorce by mutual consent, he has to decide whether he will put his wife away or whether he will resort to the Courts to prove his wife's adultery and thus obtain a decree of divorce.

It is clear that if he puts his wife away in circumstances which do not, through lack of proof of the factum of adultery, entitle him to retain the *hnazon* property the marriage nevertheless becomes dissolved by efflux of time owing to the separation. In such a case the desertion must be that of the husband and at the expiration of three years the marital bond is severed. At any time before the expiration of that period the husband may ask the Court for a decree of divorce, and will obtain it if he can prove adultery; but if he does not choose to come to Court with such a prayer within three years his right to tender such proof is at an end, for he ceases to be a husband. He has then chosen not to bring his petition within the period of coverture, and it is plainly too late to do so afterwards. In *Ma Dun Mai v Maung San Tun* (6), a Bench decision, Dunkley, J. said (at p. 234*);

"In the present case, the husband not having brought an action for divorce against the appellant on account of her adultery, the marriage was brought to an end by the appellant's desertion and not by her adultery, and therefore the rights of the appellant and her deceased husband's heirs to the joint property of the marriage must be decided in accordance with the law for the division of that property on the marriage becoming dissolved by desertion," and at a later stage of his judgment he remarked:

"In my opinion even if there is an allegation of adultery against the wife, the joint property must be divided on the footing that the marriage has been dissolved by desertion, unless the husband has proved the adultery in a suit for divorce brought by him."

We have been asked to direct that this decision may be considered by a Full Bench of not less than three Judges, but I respectfully agree with what the learned Judge there stated. A husband who believes his wife to be guilty of adultery may obtain her admission of guilt and the dissolution of marriage may take place by mutual consent (6) 1938 Rang. 229; 177 Ind. Cas. 492; A I R 1938 Rang. 168; 11 R Rang. 132.

on the footing that the husband retain the *hnapazon* property. If he cannot do this and a separation ensues by reason of his own desertion, then he has three years in which to bring a suit for a decree of divorce, but if by reason of their difference his wife has deserted him, he only has one year. In the suit for a decree of divorce he may, if he can, prove the factum of adultery, but unless he does so the dissolution of marriage becomes effective at the expiration of one or other of these periods whichever may apply. He is no longer a husband and he cannot "prove the adultery in a suit for divorce brought by him." Nor, in my judgment, can he bring a suit for a declaration that the dissolution of the marriage tie was effected in circumstances that his former wife has been guilty of adultery. Accepting the authority cited as good law, the time has gone by for that. To hold otherwise would be to permit the disputed question of the wife's adultery to be examined into many years after the marriage had been dissolved and when the husband had omitted to seek to put an end to coverture by proving the truth of his suspicions in a Court of Justice. And, if he cannot bring a suit of this kind, it seems to me to follow that he cannot raise a defence of this kind in a suit brought against him.

Some attempt has been made to show, as against the respondent, that one Maung Hla Tin was convicted of adultery with the appellant's wife in 1922. The respondent had no opportunity of showing that she had not committed adultery with him, and these proceedings are not relevant to any issue between the present parties. As, in the Court below, the admission was made on behalf of the wife that she would accept the view that her conduct amounted to her own desertion, the learned trial Judge was in my respectful opinion, right in considering that the marriage became dissolved on January 21, 1933. The learned trial Judge remitted the case to the Deputy Registrar for amendment of pleadings in order that issue might be framed on which a decision could be reached as to share to which the plaintiff was entitled. The appeal against his decisions in all these matters must be dismissed and the appellant must pay the costs, Advocate's fee in this Court 25 gold *mohurs*.

Mosely, J.—I agree. Manugye, Chap. XII, para. 43 at p. 358 has been quoted for the appellant. It is to be noted that para. 3 at p. 345 is much less uncompromising. It says that if the wife really has a paramour and admits that she has or goes with him, the

husband may take possession of all the property. In my opinion *Maung Tok v. Ma Kin* (7) is still good law, and unaffected by the decision here or by *Ma Dun Mai v. Maung San Tun* (6), *Maung Tok v. Ma Kin* (7) was a case where the wife eloped when the husband was suffering from an illness from which he did not recover. The husband, of course, could not sue for divorce. It was, therefore, following s. 276, of the Attathankepa and Manugye, Chap. XII, paras. 3 and 43 in a suit between the wife and an heir of the husband, that the wife had forfeited all interest in the husband's property by her misconduct.

D.

Appeal dismissed.

(7) (1892-96) 2 U B R 116; 36 Ind. Cas. 3; 10 Bur. L. T 225.

MADRAS HIGH COURT

Appeal No. 275 of 1936

September 15, 1939

WADSWORTH, J.

On difference between

BURN AND STODART, J.J.

Sri Sri Sri NANDAKISHORE ANANGA

BHIMA DEV KESARI GAJAPATHI,

ZAMINDAR OF SANNOKHEMEDI

REPRESENTED BY Sriman VISWANADHA

DAS MAHASAYO—APPELLANT

versus

SUSI IAMALA PATTÀ MAHADEVI

AND OTHERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), ss. 144, 145—Order, under s. 144, if can be passed against surety—Allowance ordered by Court to be paid to parties out of suit property must be deemed to have been paid on condition of their being refunded by party ultimately proving unsuccessful—Application for mesne profits—Claim to set-off not put in trial Court cannot be raised in appeal—Words "place the parties in the position which they would have occupied but for such a decree," construction—Possession of Receiver is possession of party ultimately declared successful—Plaintiff succeeding in Court of first instance in suit for possession—Defendant's appeal to High Court—Appointment of Receiver—High Court allowing appeal—Defendant getting possession from Receiver—High Court's decree reversed by Privy Council—Receiver's possession—Plaintiff held entitled to restitution and mesne profits.

Per Burn and Stodart, J.J.—In proceedings under s. 144, Civil P. C., no order for restitution can be made against sureties. There is of course no objection to the sureties being made parties in such proceedings, as they are vitally interested in the amount that may be found due by way of restitution. If the principal is found liable to pay anything to the applicant by way of restitution, it will be for the applicant to enforce that order against the sureties by proceedings under s. 145, Civil P. C., and the liability of the sureties can only be determined in such proceedings. 55 Ind. Cas. 550 (2), referred to. [p. 488, col. 2; p. 489, col. 1.]

No interim order of the Court could operate to give away the revenues of the estate absolutely to one of the contesting parties. The allowances paid *pendente lite* must be deemed to have been paid on condition that they should be refunded by the party who ultimately proves unsuccessful. *Mallikarjuna Prasada Naidu v. Durga Prasad Naidu* (10), relied on. [p. 499, col. 2.]

Even in case of an impartible estate the widow of an undivided co-parcener is *prima facie* entitled to maintenance. 60 Ind. Cas. 534 (12), 150 Ind. Cas. 545 (13) and 189 Ind. Cas. 123 (14), relied on, 47 Ind. Cas. 354 (11), referred to.

Per *Stodart, J.*—When in an application for mesne profits under s. 144 the opposite party fails to put forth the claim for set-off, he cannot be allowed to raise this plea for the first time in appeal.

An order for the payment of mesne profits to the person who would have been in possession but for the decree which has been reversed is in the words of s. 144, an order which is properly consequential on such "reversal." [p. 497, col. 1.]

Per *Wadsworth, J.*—There are three ways possible in interpreting the words "place the parties in the position which they would have occupied but for such a decree," occurring in s. 144, Civil P. C. The words might mean that the parties are to be put in the position they would have occupied had the right decree been passed instead of the wrong decree; or, secondly, they may mean that the parties are to be put in the position that they would have occupied had no decree at all been passed; or the words may mean simply that the parties are to be put in the position which they would have occupied had it not been that a wrong decree had been passed. The last interpretation is the correct one. There is nothing in the words of s. 144 to justify the conclusion that it was the intention of the Code to give to the person claiming restitution and better position than that which he occupied at the time when the wrong decree was passed and this is what has to be inferred if he has to be put in the position which he would have occupied had the right decree been passed. The correct procedure is to take the position as it stood immediately before the wrong decree, to find out what would be the position of the ultimately successful party as on that date, having regard to the fact that the proceedings terminated and to award to the successful party restitution in the shape of any profits wrongfully received under the erroneous decree or as a direct consequence thereof. [p. 507, col. 2.]

Per *Wadsworth and Stodart, J.J., Burn, J., contra.*—The possession of a Receiver *pendente lite* must be deemed to be the possession of the party who is ultimately declared successful.

Plaintiff's suit for possession was decreed. The defendant went in appeal to the High Court. A Receiver was appointed by the Court during the pendency of the appeal. High Court allowed the appeal and the defendant took over possession from the Receiver. In the meantime the plaintiff went in appeal to the Privy Council who reversed the decree of the High Court and restored the decree of the Court of first instance. In the application by the plaintiff under s. 144, Civil P. C.:

Held, per *Wadsworth and Stodart, J.J., Burn, J., contra.*—(1) that the Receiver's possession must be deemed to be the possession of the plaintiff who must be deemed to have been dispossessed when the defendant took over possession from him in pursuance of the erroneous decree of the High Court and hence the plaintiff was entitled to possession and mesne profits during the period he was out of possession by way of restitution under s. 144. 108 Ind. Cas. 89 (3), relied on.

[Case-law distinguished.]

(2) that the fact that the plaintiff was refused a decree for mesne profits by the Court of the first instance and the High Court did not deprive him of his right to claim the same under s. 144 from his opponent after his dispossession by the latter in consequence of High Court's decree which was subsequently reversed. 104 Ind. Cas. 768 (17), explained and distinguished.

A. against an order of the Sub-Judge, Berhampore, dated February 24, 1936.

Mr. B. Jagannadha Dass, for the Appellant.

Mr. B. V. Ramanarasu, for the Respondents.

Burn, J.—This is an appeal from an order passed by the learned Subordinate Judge of Berhampore in an application for restitution under s. 144, Civil P. C. The applicant before the learned Subordinate Judge was the plaintiff in O. S. No. 46 of 1920 in the Court of the Subordinate Judge of Berhampore. He sued to recover the estate of Chinnakimedi alleging that he was the son of the last holder of the estate, Brojo Kishore Deo. The defendant Kunja Bihari Deo was the grandson of the plaintiff's grandfather's younger brother. The suit was subsequently transferred to the Additional Subordinate Judge of Ganjam and tried as O. S. No. 10 of 1922. On December 20, 1922, the suit was decreed in favour of the plaintiff in so far as possession of the estate and certain movable properties was concerned. But the plaintiff's claim for mesne profits both before and after suit till date of delivery was disallowed, the learned Subordinate Judge stating in his judgment that,

"no issues were framed in the matter of past and future profits and the question relating to the profits must therefore be deemed to have been given up."

Both the plaintiff and the defendant appealed to the High Court, the defendant from the Subordinate Judge's decree awarding the possession to the plaintiff, and the plaintiff from the Subordinate Judge's decree refusing him mesne profits. These appeals were numbered 25 and 261 of 1923. Pending disposal of the appeals a Receiver was appointed in 1923. He took possession on some date in 1923, (the date does not appear from the papers printed on behalf of either party in this appeal and it is not important for the purposes of this appeal).

The judgment of the High Court was pronounced on March 30, 1928, allowing the defendant's Appeal No. 25 of 1923 and dismissing the plaintiff's suit with costs in both Courts. Consequently, the plaintiff's Appeal No. 261 of 1923 for mesne profits was dismissed with costs. The plaintiff applied for

leave to appeal to the Privy Council against both these decrees, and pending disposal of his appeal, he prayed that the Receiver who had been appointed in 1923 might be continued until the appeal to the Privy Council should be disposed of. The main ground upon which that application was based was that the respondent was a woman incapable of managing the estate, that she was in the hands of one Raghunatha Padhi, and that if she was put in possession, she would alienate and wrongfully dispose of the income. It is to be noticed here that during the pendency of the appeals in the High Court, the defendant Kunja Bihari Deo died in December 1925; and his widow had been brought on record as his legal representative. The High Court in its order of August 17, 1928, held that the plaintiff would be amply protected if the respondent was prevented by an injunction from alienating any of the properties of the estate without the consent or sanction of the Subordinate Judge of Berhampore and if she were also required to give security to the extent of Rs. 60,000 for any loss that she might cause to the estate and might be accountable for if eventually the petitioner should succeed in his appeals to the Privy Council. This amount of security was subsequently reduced to Rs. 41,000. Security for that amount was furnished by April 1929; and in that month the Receiver handed over possession of the estate with the small balance of cash then in his hands, and with all the records pertaining to the estate to the respondent.

The appellant was successful in his appeal from the decree of the High Court in A. S. No. 25 of 1923. The judgment of the Privy Council was pronounced on November 1, 1932, and is reported at p. 1 of 64 M. L. J. *Ananga Bhima Deo v. Suseela Mala Patta Mahadevi* (1). The judgment of the Privy Council shows that the decree of the High Court dated March 30, 1928, was set aside and the decree of the Subordinate Judge dated December 20, 1922, restored. The respondent, i. e., the defendant, was ordered to pay costs of the appellant both in the High Court and before the Privy Council. The actual order in Council has not been printed in these proceedings by either party. It would appear that the plaintiff did not pursue his appeal to the Privy Council from the decree of the High Court in A. S. No. 261 of 1923 in which his claim for mesne profits was disallowed. The plaintiff executed the decree

of the Sub-Court, restored by the order in Council, and got possession of the estate in execution proceedings on March 10, 1933.

On August 10, 1933, the plaintiff put in his application for restitution quoting ss. 144, 145 and 151, Civil P. C. He named as respondents in his application not only Kunja Bihari Deo's widow and legal representative, but also one Raghunatha Padhi Mahasayo alleged to be her agent, and nine other persons, sureties, who had executed the security bonds in pursuance of the orders of the High Court in 1929. The plaintiff claimed that counter-petitioner No. 1, (whom it will be convenient to call the defendant), should be ordered to restore one lakh of rupees or such sum as the Court might find due from her on account of the moneys drawn by her as allowances from the estate funds between 1922 and 1928. His second prayer was that both the defendant and her agent, counter-petitioner No. 2, should be ordered to restore the sum of Rs. 1,50,000 representing the amount wrongly appropriated by them during the period commencing with April 2, 1929, and ending with December 13, 1932. A further prayer was that all the records and accounts taken from the Receiver might be directed to be delivered to the plaintiff and a fourth prayer was that the sureties, counter-petitioners Nos. 2 to 11 might be ordered to pay the plaintiff the sums covered by their security bonds.

In this appeal, we are not concerned with the first and the third prayers, since they were not pressed on behalf of the plaintiff before the learned Subordinate Judge, and learned Counsel for the plaintiff has not attempted to press them before us. With regard to the fourth prayer, it is quite clear that in proceedings under s. 144, no order for restitution can be made against sureties: *vide Raghubar Singh v. Jai Indra Bhahadur Singh* (2). There is of course no objection to the sureties being made parties in such proceedings, as they are vitally interested in the amount that may be found due by way of restitution. In the present appeal as my learned brother has said, we have been invited to say whether the security bonds can be enforced against the sureties in respect of mesne profits. In my opinion, this question does not arise, and although learned Counsel for the sureties had addressed us on this point, I, with respect, decline to deal with it. If the defendant is found liable to pay anything to the plaintiff by way

(1) 64 M. L. J. 1; 141 Ind. Cas. 1; A. I. R. 1933 P. C. 20; Ind. Rul. (1933) P. C. 7; 37 L. W. 57; 10 O. W. N. 89; 56 O. L. J. 522; 37 C. W. N. 237 (P. C.).

(2) 42 A. 158; 55 Ind. Cas. 550; A. I. R. 1919 P. C. 55; 46 I. A. 228; 22 O. C. 212; 6 O. L. J. 682; 38 M. L. J. 302; 18 A. L. J. 263; 22 Bom. L. R. 521; 13 L. W. 82 (P. C.).

of restitution, it will be for the plaintiff to enforce that order against the sureties by proceedings under s. 145, Civil P. C., and the liability of the sureties can only be determined in such proceedings.

In my view, therefore, we are only concerned in this appeal with the second of the prayers put forward by the plaintiff. Now with regard to this, the grounds of the plaintiff's claim were somewhat obscurely stated in the affidavit sworn to by the plaintiff's agent. He alleged that during the time when the estate was in the hands of the Receiver the defendant had drawn several amounts out of the estate funds from the Receiver under the orders of the High Court, as allowances for maintenance and other purposes. He said that these sums amounted to about one lakh of rupees. He also alleged that counter-petitioner No. 2 (defendant's agent) had collected "during the period," (but what period is not indicated), not less than $5\frac{1}{2}$ lakhs of rupees, and that there ought to have been a net surplus of at least $1\frac{1}{2}$ lakhs of rupees, after meeting all reasonable charges such as establishment, etc. Counter-petitioner No. 2, he said, had drawn Rs. 12,000 from the estate funds as a gratuity for managing the estate in addition to his monthly salary of Rs. 500. He alleged also that the sureties had drawn from the estate a substantial portion of the amounts for which they had given security. His claim therefore was that he was entitled by way of restitution to the amount of at least $2\frac{1}{2}$ lakhs of rupees, out of which more than $1\frac{1}{2}$ lakhs was to be made good by counter-petitioner No. 2 jointly with counter-petitioner No. 1.

The learned Subordinate Judge overruled the objection made on behalf of the defendant and the other respondents, that no restitution could be awarded under s. 144, Civil P. C. in this case. He held that s. 144 would authorize him to direct the defendant to restore the surplus profits of the estate for the period from April 2, 1929 to December 13, 1932. But he considered that in so far as the defendant was concerned, she had not drawn from the funds of the estate for herself more than she was authorized to draw by the orders of this High Court. But the learned Subordinate Judge held that the payment of Rs. 12,000 made by the defendant to the second counter petitioner, her agent, as compensation for the loss of his practice at the bar during the period of his service under her, was not justifiable. He held therefore that the defendant and the second counter petitioner were liable to make good that

amount to the plaintiff. The rest of the plaintiff's claim the learned Subordinate Judge dismissed. The plaintiff has preferred this appeal from the order dismissing his claim. The defendant and the second counter petitioner have appealed from the order directing them to restore Rs. 12,000, but we are not concerned with that appeal, since it was preferred after the District of Ganjam was transferred to the Province of Orissa and it is now pending, we understand, before the High Court of Patna.

Before us, learned Counsel for the appellant has argued two items together amounting to about Rs. 1,30,000. Item No. 1 is Rs. 65,577-1-5 appropriated by the defendant out of the profits of the estate after she received possession of it from the Receiver. The defendants claim to this was based upon an order of the High Court passed by Krishnan, J. on April 11, 1923 by which the Receiver was directed to pay Rs. 1,500 per mensem each to the plaintiff and the defendant. There were subsequent changes in the orders passed by this Court but they do not seem to be material. At the time in April 1929, when the defendant took possession from the Receiver, this allowance was in arrears to the extent of Rs. 65,577-1-5, and the defendants claim is that she was entitled to pay herself this sum out of the profits of the estate as they accrued during the period she was in possession. The other item is Rs. 64,500, the amount taken by the defendant out of the profits of the estate during the period between April 1, 1929 and the beginning of November 1932, at the rate of Rs. 1,500 per mensem. The learned Subordinate Judge has held that the defendants' action in paying herself Rs. 65,500 on account of arrears cannot be said to be wrongful, and that she was justified in paying herself at the rate of Rs. 1,500 per mensem during the period this estate was in her possession. The contention of the learned Counsel for the plaintiff is that the learned Subordinate Judge is wrong on both these points.

In my opinion, the learned Subordinate Judge was partly right and partly wrong. He was wrong, I consider, in holding that s. 144, Civil P. C. had any application to this case, but he was right, I think in holding that even if it had, the plaintiff could not recover any portion of either of the two sums now in dispute. The plaintiff, I think, entirely misconceived his remedy. After the judgment of the Privy Council declaring him to be entitled to possession of the estate, he had, in my view, cause of action for a suit for mesne profits for any period within the bar of limita-

tion. But he had no ground for applying for mesne profits in the guise of restitution. The doctrine of restitution under s. 144 is simple. I may quote from Sir Dinshaw Mulla's commentary on s. 144—(considering the matter from the point of view of the party to whom restitution is due):

"The word 'restitution' in this section means restoring to a party, on the variation or reversal of a decree, what has been lost to him in execution of the decree or directly in consequence of that decree. The section does not apply unless the property was lost in execution of the decree or directly in consequence of that decree"

and again, (looking at the matter from the point of view of the party who has to make restitution)

"the doctrine of restitution contemplates the case where property has been received by a decree-holder in execution of a decree, and the decree or part thereof is subsequently varied or reversed on appeal by the judgment-debtor."

In the present case, the decree, the reversal of which has given rise to the plaintiff's claim, is the decree passed by the High Court in A. S. No. 25 of 1923. As I have already said, neither party has filed the decree before us, but from the judgment, it would seem that it was merely a decree dismissing the plaintiff's suit with costs in both the Courts. If so, there is nothing in the decree affecting the question of possession of the estate. It cannot be said that the decree of the High Court directed that possession of the estate should be taken from the plaintiff and given to the defendant. The plaintiff never had possession of the estate until he got it in execution of the Order in Council in 1933. The reversal of the High Court's decree by the judgment of the Privy Council therefore has nothing, in my opinion, to do with the question of possession of this estate and nothing to do consequently with mesne profits. The Privy Council's judgment, as I have already said, was that the decree of the Subordinate Judge should be restored, the decree of the High Court being set aside. It seems to me that learned Counsel for the defendant is on firm ground when he says that in so far as the High Court's decree is concerned all the restitution that could be made to the plaintiff upon its reversal was effected by the Order in Council.

Before the High Court's decree was passed, the position was that the plaintiff had in his favour a decree of the Subordinate Judge that he should be put in possession. That decree was set aside by the High Court, and the position then was that the plaintiff had no decree in his favour. When the High Court's decree was set aside by

the Privy Council and the Subordinate Judge's decree restored, the plaintiff thereby came back to the position in which he had been before the High Court's decree was passed. The contention of learned Counsel for the plaintiff is that when the estate was put in possession of a Receiver in 1923, the Court was taking possession of this estate for the benefit of the true owner, and that therefore the possession of the Receiver must be deemed to have been the possession of the true owner. The true owner has now been declared by the Privy Council to be the plaintiff. Therefore, when the Receiver was in possession, he was in possession on behalf of the plaintiff; this is equivalent to saying that plaintiff was in possession and when the defendant took possession in 1929, she was dispossessing the plaintiff. Learned Counsel for the plaintiff relies upon the case reported in *Bisheshwar Pratap v. Chandreshwar Prasad* (3). There the learned Chief Justice has said:

"Where disputes arise between claimants as to possession of immovable property and the property is placed in the hands of a Receiver by the Court before the determination of the question of title the Court takes possession through its Receiver on behalf of the party who may ultimately establish his title and from the moment the title is determined the possession must be deemed to have been the possession of the lawful owner whose title has been established."

The learned Judge goes on to refer to the judgment of Mukerjee, J. in *Dwijendra Narain v. Joges Chandra* (4). In considering that case, it is, I think, necessary to bear in mind that that was a case in which a dispute under s. 145, Criminal P. C., arose with regard to possession of certain properties. The Magistrate held that nobody was in actual possession and attached the properties under s. 146, Criminal P. C., and a Receiver was then appointed by the Criminal Court pending decision of dispute between the parties. In the trial Court the plaintiffs got a decree for possession in their favour and in execution of the decree were put in possession. When that decree passed by a Sub-Judge was reversed by the High Court it was held that the defendants could apply for possession by way of restitution under s. 144. I can see no difficulty in applying the principle of restitution in that case, but I do not see that has any bearing on the facts of this case. The important point about that case is that the plaintiffs in the suit got a decree for possession which they executed, and

(3) 7 Pat. 319; 108 Ind. Cas. 89; A I R 1928 Pat. 260.

(4) 39 O L J 40; 79 Ind. Cas. 520; A I R 1924 Cal. 600.

which was afterwards reversed on appeal. Therefore fully in accord with what I have to be the doctrine of restitution, on the reversal of the decree in their favour, they should be compelled under the decree to give up what they had got in possession of that decree. Nothing of that kind is to be found in the case with which I am now dealing as I have already said. The defendant in this case did not get from the High Court a decree for possession. What she got from the High Court was a decree setting aside the Subordinate Judge's decree for possession in favour of the plaintiff. As soon as the Subordinate Judge's decree was set aside, it followed that the Receiver who had been appointed during the pendency of the appeal, could no longer be left in charge of the property.

The High Court had decided that the defendant was the proper owner, and consequently the Receiver's appointment had to come to an end. When it came to an end, the only person to whom he could be directed to hand over possession was the person declared by the High Court to be the rightful owner, namely the defendant. It is quite impossible, in my opinion, to say that delivery of possession was made to the defendant in pursuance of, or in execution of, or directly in consequence of the decree of the High Court. It is quite impossible, I think, to argue that the decree of the High Court was in any manner fulfilled or carried out or obeyed by the delivery of the property to the defendant. The only executable part of the High Court's decree, as I imagine, must have been a direction that the plaintiff must pay the defendant's costs. The portion of the decree which said that the Subordinate Judge's decree was set aside was not a provision which could be put in execution at all. It is therefore not, in my opinion, possible to say that the defendant got possession from the Receiver in pursuance of or in execution of or directly in consequence of the High Court's decree. Delivery of possession by the Receiver to the defendant was a consequence of the High Court's decree, no doubt, but it was an indirect consequence and not a direct consequence. I have not been able to find—and learned Counsel for the appellant has not cited—any case in which restitution in the shape of possession or mesne profits has been ordered where the decree reversed had not given possession. For these reasons, I think the plaintiff entirely misconceived his remedy, that his remedy lay in a suit for accounts and mesne profits and not in an ap-

plication by way of restitution. Further, if I am wrong with regard to this point, I nevertheless think that the learned Subordinate Judge was right in holding that the plaintiff could not recover from the defendant any portion of the Rs. 1,30,000 which has been the subject of argument before us. Supposing that s. 144, can be applied, then the duty of the Court as set out in s. 144, is to

"cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed."

Now that, in my opinion, means that the plaintiff is entitled to ask the Court to put him and the defendant back into the positions which they occupied immediately before the High Court's decree was passed. That position was a position in which the Receiver was in possession and under orders of the High Court was making payments of Rs. 1,500 per mensem both to the plaintiff and to the defendant so far as the funds available allowed. What would have been the position, but for the decree of the High Court? It seems clear to me that but for the decree of the High Court, the position would have continued to be the same. The High Court's decree was passed, as I have already said, on March 30, 1928. If the High Court's decree had not been passed on March 30, 1928, the appeal would still have been pending, and it would have continued to be pending until the High Court passed some decree or other.

The plaintiff's claim, in my opinion, amounts to this; that he is entitled to be "restored" to the position which he would have occupied if the High Court's decree passed on March 30, 1928, had been in his favour. Now no doubt, if the High Court on March 30, 1928, had dismissed the defendant's appeal and confirmed the Subordinate Judge's decree, the Receiver would then have been directed to deliver possession to the plaintiff, and the plaintiff would thereafter have enjoined the profits of the estate. But, it seems to me, there is a great difference between the claim to be put in the position which the plaintiff would have occupied if the High Court's decree had been in his favour, and the claim to be put in the same position that he would have occupied if the High Court's decree had never been passed. Section 144, Civil P. C., authorizes the latter proceeding but not the former. If the High Court's decree had not been passed and if the appeal had gone on pending, the Receiver would have gone on making payments both to the plaintiff and the defend-

ant, and it would have been quite within his authority to pay out to the defendant, when the funds of the estate allowed, the arrears due to her to the extent of Rs. 65,500 and the periodical payments of Rs. 1,500 per mensem during the whole period of his Receivership. I therefore consider that the learned Subordinate Judge is right in holding that the plaintiff cannot recover by way of restitution any portion of the sum of Rs. 1,30,000.

We heard a long argument on the question whether the defendant is entitled to maintenance out of the estate. Learned Counsel for the appellant contends—and I think rightly—that this question was not properly raised in the pleadings before the learned Subordinate Judge. It is an interesting question but it is one on which any remarks that we can make must be *obiter*, and I therefore respectfully excuse myself from making any pronouncement on the question whether defendant is or is not entitled to maintenance out of this estate. The question, in my view, can only be properly tried in other proceedings. The plaintiff could have recovered from the defendant by way of restitution the amount of the costs awarded to her by the High Court's decree in A. S. No. 25 of 1923, if she had executed against him the High Court's decree for costs, but there was no allegation on this point in the affidavit of the plaintiff's agent, and as I have already noticed, the decree of the High Court has not been produced before us. No argument was addressed to us on this subject by learned Counsel for the appellant. I agree with my learned brother that the allowances ordered to be paid to the defendant during the pendency of the appeal cannot be considered as giving the defendant an absolute right to those sums irrespective of the result of the litigation. They were explicitly orders of a temporary nature, and the sums drawn by the defendant would, in my opinion, be sums for which the defendant would be accountable in the event of the plaintiff's success in his appeal to the Privy Council. In my view the appeal should be dismissed with costs.

Stodart, J.—This appeal arises on an application made under s. 144, Civil P. C., to the Subordinate Judge. Ganjam by the plaintiff in O. S. No. 10 of 1922 on the file of the Additional Subordinate Judge, Ganjam. Plaintiff filed that suit in 1920 in the Subordinate Judge's Court for the possession of the Zemindari of Chinnakkimedi against the then Zemindar Kunji Behari

Deo. In December 1922 the learned Subordinate Judge decreed the suit in plaintiff's favour. Kunji Behari filed an appeal in Court and obtained stay of execution. He was not allowed to remain in possession. A Receiver appointed by the Court placed in the possession of the estate by order made by Krishnan, J.—(as he then was) on April 11, 1923. Kunji Behari Deo died in December 1925, before his appeal came on for hearing, and his widow, the present defendant, was brought on the record as his representative-in-interest and she continued the appeal. The appeal was decided on March 30, 1928, in the defendant's favour. Plaintiff filed a further appeal to the Judicial Committee of the Privy Council and applied for stay of execution in this Court. Stay was refused, but defendant was directed to furnish security for Rs. 60,000 (afterwards reduced to Rs. 41,000) before taking possession of the estate. She was not able to find the required security till April 2, 1929, when the estate was delivered to her by the Receiver.

Plaintiff's appeal in the Privy Council was decided on November 1, 1932. The appellate decree of this Court was reversed and the decree of the Subordinate Judge was restored. Plaintiff was given possession of the estate on March 10, 1933. In the application now under appeal plaintiff prayed that the defendant be made to restore to him the profits of the estate which she had received from April 2, 1929, when the Receiver handed over possession to her up to December 13, 1932. He also prayed for the restitution of certain sums which the defendant, and before her, her husband, had been paid during the time when the Receiver was in charge, and which were made payable to the defendant by the aforesaid order of this Court. Plaintiff did not press his claim under the latter head however, so that the only amount with which we are now concerned is the amount of the profits enjoyed by the defendant during the time she was actually in possession of the estate under the appellate decree of this Court, namely from April 2, 1929, to December 13, 1932, on which latter date she was appointed Receiver under the Court pending delivery to the plaintiff. The other respondents to this appeal are the persons who in 1929 furnished security on behalf of the defendant. It is conceded now by the plaintiff that sureties cannot be made liable under s. 144. It is only when the principal is adjudged liable to pay an ascertained sum that proceedings can be taken against the sureties under s. 145.

One of the sureties, respondent No. 2, has in the order now under appeal been declared liable on his bond for Rs. 12,000 and directed to pay that amount to the plaintiff. But that order is not before us in this appeal since respondent No. 2 has appealed against it in the High Court of Judicature at Patna to which Court jurisdiction over the subject-matter of the suit was transferred on April 1, 1936. The sureties, all of whom have been impleaded in this appeal, have invited us to determine once for all whether their bonds make them liable for the profits of the estate enjoyed by the defendant while she was in possession of it. Agreeing with my learned brother I do not think that question is properly before us. The amount of the profits is not now in dispute. The defendant has filed an abstract statement which I would like to be read as part of this judgment showing the aggregates of expenditure under different heads during her tenure of the estate. The balance is Rs. 1,30,476. This includes a sum of Rs. 11,212 shown by the defendant as expenditure which sum was not actually spent and to which I shall have occasion to refer later. It is now agreed that the sum claimed by the plaintiff is Rs. 1,30,476 as found in this statement of account. This is the actual surplus remaining after all expenditure has been incurred. The learned Subordinate Judge held that under s. 144 the plaintiff in the circumstances of this case could not recover these profits. Hence this appeal.

In the course of the appeal the defendant has claimed that even if she is liable under s. 144 to restore the profits of the estate nevertheless out of those profits she is entitled to retain the major portion on two separate and distinct grounds, namely (a) as the aggregate of sums directed to be paid to her by certain orders of this Court, (b) as the amount which she would otherwise be entitled to receive as maintenance from the revenues of the estate as the widow of an undivided co-parcener of the Zamindar. The amount claimed by the defendant is very nearly Rs. 1,30,476 on either computation. Thus there are three questions for our decision in this appeal, namely: I. Is the lower Court wrong in holding that the profits enjoyed by the defendant are not in the circumstances of this case liable to be restored to the plaintiff under s. 144; II. Even if they are, is the defendant entitled to retain the major portion of them under the orders passed by this Court; III. Or as maintenance.

In order to understand the finding of

the learned Subordinate Judge it is necessary to explain what the orders of this Court were. The first is the order passed by Krishnan, J., (as he then was) on April 11, 1923 when he placed the estate in the custody of a Receiver. That order has not been printed and we have to gather its import from references made to it in subsequent orders of this Court. The matter then before Krishnan, J., was the motion of the defendant for stay of delivery of possession to the plaintiff pending defendant's appeal in this Court. It is sufficient for the present purpose to state that Krishnan, J. directed that the estate be put in the hands of a Receiver—which was forthwith done—and that out of the surplus revenues of the estate the Receiver should pay to each party for their maintenance and for the expenses of the litigation a sum of Rs. 1,500 a month. Subsequently, at some date in 1924, on the Receiver reporting that the surplus revenues of the estate were not sufficient to enable him to pay those allowances, Krishnan, J. directed that whatever surplus there was after meeting the necessary expenditure, should be divided equally between the parties. This second order is not now before us either. Now, in April 1929, when the Receiver handed over the estate to the defendant there were very substantial arrears of this allowance due to both parties. I shall have occasion later to refer to the arrears due to the plaintiff and how they were dealt with. The arrears due to the defendant were about Rs. 65,000. The Receiver had less than Rs. 11,000 in his hands and of this he paid Rs. 10,000 to the plaintiff a few days before handing over the estate to the defendant. Learned Counsel are agreed that that was the state of affairs in April 1929.

The finding of the learned Subordinate Judge is to the following effect. In proceedings in restitution under s. 144, what the Court has to do is to put the parties in the position they occupied at the time of the decree which has been reversed, in the present case, at the time of the appellate decree of this Court. At that time a Receiver was in possession of the estate. The position of the parties, if the Receiver is regarded as being in possession, and if there had been no appellate decree of this Court, was that he owed the defendant Rs. 65,000 as arrears to allowance and that he had to go on paying her further allowance up to the date of the Privy Council decree. These sums, both the arrears and the current allowance would have to be paid to defendant out of the revenues of the estate realized by the Receiver after the date

of the appellate decree and up to the date of the Privy Council decree. And it so happens that the aggregate of the sums which would have been payable to the defendant on this hypothesis is very nearly equal to Rs. 1,30,476, the amount of the surplus profits which defendant actually enjoyed. To take this money away from her would be to change her position for the worse, a thing which in the opinion of the learned Subordinate Judge cannot be done under s. 144. In my opinion the learned Subordinate Judge's finding cannot be supported on the grounds stated by him. His reasoning is fallacious. Section 144 is:

"Where and in so far as a decree is varied or reversed, the Court of first instance shall on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will as far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed, and for this purpose the Court may make any orders, including orders for the refund of costs and for the payment of mesne profits which are properly consequential on such variation or reversal."

The position of the parties according to the learned Subordinate Judge but for the appellate decree of this Court would be that a Receiver would be in possession of the estate and would continue in possession. But clearly if the appellate decree had not been passed on the date it was passed, the Receiver could in no imaginable circumstances have been continued in possession. If that decree had not been passed there was nothing whatever to prevent the plaintiff entering on the estate. It would have been the plaintiff therefore who would have enjoyed the surplus profits of the estate from the date of the appellate decree and he was under no liability—so far as the subject-matter of the suit was concerned—to pay defendant anything, whether by way of arrears of allowances or as current allowances. The fact remains that during her tenure of the estate the defendant received and enjoyed the profits which but for the appellate decree of this Court the plaintiff would have enjoyed.

A digression must be made here to correct a mistake made by the learned Subordinate Judge which may have influenced his mind in arriving at the above conclusion. Interpreting a certain order dated November 20, 1928, made by this Court (Ex. 6) after the appellate decree was passed but before the estate was handed over to the defendant, he construed it as containing a direction by this Court to the Receiver to pay to the defendant the arrears of allowance due to her under Krishnan, J.'s order of April 1923, and which according to the learned Subordi-

nate Judge amounted to Rs. 65,577. But Ex. 6 has nothing to do with the arrears of allowance due to the defendant or the payment of those arrears. On the contrary, it relates to the arrears due to the plaintiff. It was passed on C. M. P. No. 4146 presented by the plaintiff and C. M. P. No. 4834 presented by the defendant. Plaintiff prayed amongst other things that the Receiver be directed to pay him the arrears of allowance computed at Rs. 1,500 a month as ordered by Krishnan, J. in 1923 instead of at Rs. 1,000 which was the rate adopted in a previous order of this Court dated August 17, 1928. Defendant prayed that on the contrary arrears due to the plaintiff should be computed at Rs. 500 a month only. The order of this Court was that there were no grounds to vary the original order of 1923, awarding an allowance to the plaintiff at the rate of Rs. 1,500 a month. No question arose then or could arise on those petitions, of the arrears payable to the defendant, who by that time had become entitled to be in possession of the estate and so entitled to the revenues out of which such arrears could be paid.

I now come to the grounds on which the learned Subordinate Judge's finding is sought to be supported by learned Counsel for the defendant. His first argument is that if the plaintiff is put back in the position he would have occupied but for the decree which has been reversed, he would be merely in the position of a successful plaintiff who has still to execute his decree. His second argument is that under s. 144, a party cannot be put in possession of that of which he was never dispossessed. These arguments are both based on the fact that the plaintiff was not actually in possession on the date of the appellate decree but a Receiver was in possession. But, in my opinion, and in this my learned brother differs from me, a complete answer to these arguments is furnished by the principle that the possession of a Receiver *pendente lite* must be deemed to be the possession of the party who is ultimately declared successful. Here the plaintiff had succeeded in the Court of first instance. He was then declared to be entitled to immediate possession of the estate. He applied to the Court to be put into possession. That application was stayed. Nevertheless the defendant was not allowed to remain in possession. A Receiver was appointed and put in charge of the estate. But the estate is a profit yielding concern and the Receiver had strictly to account for the profits. On whose behalf did he hold these profits? The

answer, must be, in my opinion, on behalf of the party ultimately declared successful. And if he had to account for the profits to that person he should be deemed to have held the estate on behalf of that person. Virtually therefore when the defendant took over the estate from the Receiver she dispossessed the plaintiff. And if the appellate decree had not been passed then at the date of that decree the order of the Court dated April 11, 1923 staying plaintiff's application for delivery of possession would have become automatically discharged and the Receiver would forthwith have put the plaintiff into possession. In my view, the effect of the decree which has been reversed was to dispossess the plaintiff. On the reversal of that decree plaintiff is entitled under s. 144 to restitution of the estate and of the profits which accrued during the time he was out of possession.

The rule that the possession by a Receiver must be deemed to be the possession of the person who is ultimately declared entitled, is illustrated by the procedure adopted in suits for immovable property which at the time of filing the suit is in the custody of a Receiver—for example a Receiver put in possession by a Magistrate under s. 146, Criminal P. C. In such a case, it is sufficient for the plaintiff to sue for a declaration of his title. He need not pray for delivery of possession and what is more important he need not pay the very much greater stamp duty leviable on a suit for possession. If he succeeds the Receiver delivers the estate to him. That the same is the case when the estate is in the custody of a Receiver appointed by the Court is explained in *Bisheshwar Pratap v. Chandreshwar Prasad* (3). That case arose on an application for restitution under s. 144, Civil P. C., and is, I think, very much in point here. The property there in question was called the Sarsund Estate. It consisted of four separate items. The last undisputed owner died in 1908 and on his death there was a scramble for possession. The Magistrate apprehending a breach of the peace over Items Nos. 2 and 3 and not being able to decide who was in possession attached these two items and put a Receiver in charge of them. In 1911 one of the claimants, Asharfi Singh, who had possession of Item No. 4, sued the other claimants for possession of Items Nos. 1 and 2 and the Court in 1915 put Item No. 1 also in custody of a Receiver. Asharfi's suit was dismissed in 1919. But the Receiver remained in possession until December 13, 1920. He was discharged on that day but re-appointed on the

following day in a suit which had been filed by another set of claimants numbered as 112 of 1920. Thus, up to the date of the filing of O. S. No. 112 of 1920, Asharfi Singh had not been in possession of Items Nos. 1, 2 and 3 and they were in the possession of Receivers and remained in such possession till the suit was decided.

The defendants in O. S. No. 112 of 1920, were Asharfi Singh and a certain rival claimant Chandreshwar who had agreed to adjust their claims *inter se* one giving up his claim to Items Nos. 1 and 2, the other giving up his claim to Items Nos. 3 and 4. The position at the time that suit was filed was that Items Nos. 1, 2 and 3 were in the possession of Receivers and Item No. 4 was in the possession of Asharfi. The plaintiffs being a third set of claimants succeeded in the suit and were given a decree for possession and on February 27, 1923 possession of Items Nos. 1, 2 and 3 was taken on their behalf by the Court of Wards to whom the Receiver handed over Items Nos. 1, 2 and 3. Asharfi and Chandreshwar, the unsuccessful defendants, filed appeals to the High Court which reversed the decree of the Court of first instance and declared the title of Asharfi and Chandreshwar in priority to the plaintiffs. The High Court did not however make any decree for delivery of possession to the defendants. At the time of the High Court decree the defendants were, in respect of Items Nos. 1, 2 and 3 persons who had never had actual possession but who had been declared to be entitled; a position similar to that occupied by the plaintiff in this case at the time of the decree of the Privy Council.

The defendants Asharfi and Chandreshwar not having a decree for delivery of possession applied in the Court of first instance for restitution of the property under s. 144. The Subordinate Judge held: (1) that as the trial Court's decree had been set aside by the High Court the applicants were entitled to be restored to the position they would have occupied but for such decree; (2) that strictly speaking restitution in such a case would mean replacing the property in the hands of the Receivers; (3) but that as the possession of the Receivers was the possession of the Court for the benefit of the person entitled, the applicants were entitled to possession by way of restitution. The plaintiffs then appealed to the High Court whose decision is contained in the case cited. It was urged in the High Court as it is urged here that restitution could not be made to a party who was not in possession before. The Court,

held, (per Dawson-Miller, C. J.):

"Where disputes arise between claimants as to possession of immovable property and the property is placed in the hands of a Receiver by the Court pending the determination of the question of title, the Court takes possession through its Receiver on behalf of the party who may ultimately establish his title and from the moment the title is determined the possession must be deemed to have been the possession of the lawful owner whose title has been established. Nor do I think it makes any difference whether the property is attached by the Magistrate under the provisions of the Criminal P. C., or placed in the possession of a Receiver appointed by the Civil Court."

Pausing here for a moment, I observe, that the position of the plaintiff in this case at the time the Receiver was appointed was more than that of a mere claimant. He was in a better position than Asharfi and Chandreshwar were, in the Patna case *Bisheshwar Pratap v. Chandreshwar Prasad* (3). For, he was a successful claimant with a decree for possession already made in his favour. Continuing, Dawson-Miller, C. J., said that in his opinion the law in the subject had been correctly stated by Mookerjee, J., in two cases in the Calcutta High Court in 1924 and 1916* respectively; and he quotes from those two cases certain observations of Mookerjee, J., as follows:

"When the Court has appointed a Receiver and the Receiver is in possession his possession is the possession of the Court, and the possession of the Court by its Receiver is the possession of all parties to the action according to their titles..... The property passes into legal custody as the Receiver is in the position of stake-holder and such custody is for the benefit of the true owner."

Brajendra Kishore v. Abdul Razac (5), is an authority for the proposition that when property is attached under s. 146, Criminal P. C., it passes into legal custody and during the continuance of the attachment such custody is for the benefit of the true owner. If the true owner was in fact in possession when the attachment was effected, his possession in the eye of the law is not interrupted. If on the other hand the wrongdoer was in possession at the time the attachment took place, the effect of the attachment is to interrupt his possession and from the moment of attachment the possession of the rightful owner is revived in the eye of the law..... If during attachment the seisin or legal possession is in the true owner the attachment does not amount to either dispossession of the owner or discontinuance of his possession."

If the facts of the present case are interpreted in the light of the rule laid down in the foregoing judgment of Mookerjee, J., namely that the effect of the attachment interrupts the possession of the wrongdoer and in the eye of the law revives the possession of the rightful owner then the position is as follows: Brojo Kishore, father of the plaintiff, was the zamindar till his death in 1906. Plaintiff should have succeeded him, (5) 31 Ind. Cas. 242; A I R 1916 Cal. 751; 22 C L J 283; 20 C W N 481.

*See 79 Ind. Cas. 520 and 31 Ind. Cas. 242.—[Ed.]

but his title remained in abeyance for reasons which need not now be stated. Brojo Kishore was succeeded by Purushottama, elder son of his first cousin and senior representative of the junior line, and on Purushottama's death in 1915 he was succeeded by Kunji Bihari Deo, the original defendant in this suit. And Kunji Bihari Deo was the person in possession in April 1923, when the estate was placed in the possession of the Receiver. As has now been settled by the decision of the Judicial Committee, the possession of the estate from 1907 to 1923 first by Purushottama, and afterwards by Kunji Behari Deo, was wrongful. The effect of the appointment of the Receiver therefore was to interrupt that possession and at the same time, in the eye of the law to revive the possession of Brojo Kishore's representative-in-interest, namely the plaintiff. Again in *Bisheshwar Pratap v. Chandreshwar Prasad* (3) a question of limitation was raised by the appellants. Their argument was based on the following propositions. The last male owner died in 1908. Chandreshwar had never been in possession—which was true—and had never filed a suit to substantiate his title. On the other hand Bisheshwar, one of the appellants' claimed to have entered into possession in 1908 and adding on to the period of his possession, the possession of the Receivers appointed in 1908 and 1915 he had prescribed for title. Dawson-Miller, C. J., on this part of the case said:

"It is clear that they (the appellants) cannot set up a title by adverse possession over 12 years, for whatever possession they may have had in the beginning, assuming it can be proved, came to an end when the Receiver was appointed of the properties in Schs. II and III in 1908, and of those in Sch. I in 1915..... And if I am right in holding that the possession of the Receiver in a case like the present is to be deemed the possession of the rightful owner then Chandreshwar has not lost his title by omitting to bring a suit within 12 years of the death of Mulukrapi Kuer" and in the same case on this point, Mullick, J. said:

"Even if Bisheshwar can prove that he got possession in 1908, the subsequent entry of Mr. Stevens, the Receiver appointed in 1908, by the Magistrate and of Mr. Moore, the Receiver appointed by the Civil Court in 1911, put an end to the illegal possession of Bisheshwar and restored the possession of the true owner Chandreshwar."

Following the authority of this case and, with respect, adopting the reasoning of the learned Judges who decided it, I hold that the effect of the appellate decree of this Court, by which the Receiver's possession of the estate was determined, was to dispossess the plaintiff, since in the eye of the law the possession of the Receiver was the

possession of the plaintiff. The contention of learned Counsel for the defendant that under s. 144 the plaintiff can only be put back to the position of a successful plaintiff who has obtained a decree but has not executed it is not in my opinion sound. Nor is there substance in his contention that the plaintiff cannot be put in possession of that of which he has never been dispossessed. For plaintiff was in the eye of the law dispossessed when the Receiver handed over the estate to the defendant. Asharfi and Chandreshwar in the Patna case *Bisheshwar Pratap v. Chandreshwar Prasad* (3) had never actually been in possession. That case it will be observed was a stronger case than the present case: for the subject-matter of the application there was the corpus of the estate actual possession of which had not been decreed to the applicants. Here the subject-matter of the application is the surplus profits of the estate which accrued during the time when the plaintiff was out of possession. If it had been necessary, the plaintiff could have recovered the corpus of the estate under s. 144. And the Court while making an order for its restoration could have made an order for the payment to him of the profits appropriated by the wrongful owner during the latter's possession of the estate under the decree which has been reversed. An order for the payment of mesne profits to the person who would have been in possession but for the decree which has been reversed is in my opinion in the words of s. 144, "an order which is properly consequential on such reversal." I do not think that the cases are in point, which have been cited by learned Counsel for the respondent in support of his position that under s. 144 a person cannot be restored to possession of that of which he was never dispossessed. The property now in question consists of mesne profits which *prima facie* could never have been in plaintiff's possession. The cases cited refer to specific items of property.

In *Baikuntha Nath v. Prosanna Moyee Debi* (6) the property claimed consisted of cash and ornaments contained in an iron safe and in the possession of Prosannamoyi Debi, sister of one Mondakini, deceased. Baikuntha applied for letters of administration to the estate of the deceased and was opposed in the Court of the District Judge by Prosannamoyi who set up a will in her favour. The District Judge granted the letters, but on appeal to the High Court,

they were revoked and probate of the will was granted to Prosannamoyi. Baikuntha preferred an appeal to the Judicial Committee which succeeded. When the matter was pending in the District Court a Commissioner had been appointed to take an inventory of the property and Prosannamoyi prevented him from opening the safe, contending that some of its contents were her own, apart from the effect of the will. The District Judge ordered the safe to be kept under seal in a separate room and the key retained by the Commissioner. When the appeal of Prosannamoyi succeeded in the High Court the Commissioner removed the seals. After the Privy Council decree Baikuntha applied to the District Judge under s. 144 for an order against Prosannamoyi to restore to him the contents of the iron safe. The District Judge held that by his order that the safe be sealed and kept in a separate room he did not intend that it should be taken out of Prosannamoyi's possession and that as a Probate Court he had no power to take property out of a person's possession. Further he held that his order, passed after the appellate decree, directing that the seals be removed did not amount to an order restoring possession of the safe and its contents to Prosannamoyi. In other words he held that Prosannamoyi's possession of the safe and its contents had not been interrupted and he rejected the claim of the administrator that she had got possession of the safe from the Court in consequence of the High Court's decree and so must be made to return it when that decree was reversed. It is clear that in that case the proper remedy of the administrator was to sue for possession of the property in question if he thought he could prove that it was part of the estate of the deceased. In confirming the District Judge's order the Court (Chatterjee and Panton, JJ.) observed:

"The Probate Court could not direct the properties to be made over to the appellant by way of restitution, because they had never been in his possession nor taken out of his possession."

That observation clearly relates to the facts of that particular case. The administrator under his letters of administration did not become entitled to possession of any property but only to bring in such property as he could prove to have been the property of the deceased. He had never got possession of the iron safe and its contents. The Commissioner had never got possession of it as the property of the deceased. Restitution could only be made in such a case of property which the administrator had reduced to pos-

(G) 51 C 324; 81 Ind. Cas. 571; A I R 1924 Cal. 769.

session under his letters as belonging to the estate of the deceased and which had been taken from him as a result of the decree which had been reversed. In *Niadar Mal v. Ratan Lal* (7), the property was a debt due by two partners to the custodian of enemy property who was no party to the suit. The suit was for dissolution of partnership. In the Court of first instance it was decreed that the debt aforesaid was payable by one partner only. He paid the whole debt to the custodian. On an appeal filed by him, it was declared that the debt was payable by both partners in equal shares. The appellant then claimed under s. 144 from his ex-partner half of the amount of the debt. It was held that s. 144 did not apply to the facts of the case. Appellant had not paid his partner's share of the debt to the custodian in execution of the decree which had been reversed nor in consequence of that decree. Nor was his partner in possession of any property which had been taken out of appellant's possession by any decree or order of a Court. That was a clear case where the appellant's proper remedy was by a suit for contribution.

In *Banarsi Prasad v. Harikishun Radhe Kishun* (8), the property was five bales of cotton. These were part of a larger quantity, namely 18 bales, which plaintiff sued to recover from the defendant on the ground that they belonged to himself. Plaintiff's suit was dismissed and he appealed. Pending his appeal eight bales were attached by one of defendant's creditors who by way of compromise accepted and took away five bales. Plaintiff's appeal succeeded. He then applied for restitution of the five bales aforesaid which had legally passed into the hands of a third party. The Court (per Fazl Ali, J.) held that s. 144 did not apply to the facts of the case. It was observed that :

"Section 144 is meant to apply ordinarily to the class of cases where a person having obtained a decree executes it and recovers some money or property from the judgment-debtor and then the decree is reversed which necessitates the restitution of the property or money which the judgment-debtor had to part with at the instance of the Court."

The last argument of learned Counsel for the respondent on this part of the case is that the plaintiff having in this suit asked for and failure to obtain a decree for future mesne profits cannot now claim them by way of restitution under s. 144. It is true that the plaintiff in his suit prayed for

(7) 8 L 356; 104 Ind. Cas. 817; A I R 1927 Lah. 625; 28 P L R 695.

(8) 11 Pat. 553; 140 Ind. Cas. 482; A I R 1932 Pat. 317; Ind. Rul. (1933) Pat. 11.

future mesne profits. In the Court of first instance this prayer was refused. And when defendants appealed against the substantive part of the decree plaintiff filed a cross-appeal, A. S. No. 261, against the trial Court's order denying his future mesne profits. This cross-appeal naturally failed. And it does not appear that in his appeal to the Judicial Committee the plaintiff renewed his prayer for future mesne profits. But the answer to this contention of learned Counsel for the defendant is, in my opinion, that the profits which the plaintiff claims now in this application under s. 144 are not the same as the profits which he would have got if he had been given a decree for future mesne profits. Future mesne profits could have been awarded for the period extending from the date of the plaint to the date when the plaintiff recovered possession of the estate. But, as a result of my finding on the first part of learned Counsel's argument, plaintiff's possession in the eye of the law began when the Receiver was put in possession which was on or about April 11, 1923. The profits accruing during the Receiver's tenure of the estate would be the plaintiff's apart from any decree that he might have obtained for future mesne profits. The profits now claimed are for a period long after the plaintiff in this sense obtained possession. They are for the period subsequent to the appellate decree of this Court which caused the plaintiff to be dispossessed.

In my opinion, a plaintiff who has been refused a decree for mesne profits but who subsequently gets into possession is not debarred from claiming under s. 144, profits which accrued to his opponent after the latter had as the result of a successful appeal dispossessed the plaintiff. That in my view is the position of the plaintiff in this case. It will not be right to say that he is merely in the position of one who has got a decree for possession without future mesne profits. His position is better than that. He has got a decree for possession and has reduced the estate to possession. His present claim for profits is based on his deprivation of the estate by the force of the appellate decree. The decree of the Court of first instance worked itself out when the Receiver was placed in possession of the estate. The plaintiff acquired new rights when under the appellate decree the Receiver's possession which was plaintiff's possession was determined and the defendant was placed in possession of the estate. Lastly, on the question of restitution gener-

ally and the meaning of s. 144, there is a passage in a recent case decided by a Bench of the Allahabad High Court (Harris and Misra, JJ.), with which, with respect, I concur and which I think may with advantage be quoted. See *Badrudin Khan v. Mahyar Khan* (9), at p. 108.

"The doctrine of restitution contemplates a case where property has been recovered by the decree-holder under his decree and the decree is subsequently reversed wholly or partly in other proceedings. In such cases the law raises an obligation on the party who has received the benefit of the erroneous judgment to make restitution to the other party for what he has lost. The use of the words 'damages, compensation and mesne profits' in the section indicates that the possession obtained under an erroneous decree, subsequently reversed, is wrongful possession and on the reversal of the decree the judgment-debtor would be entitled not only to the possession of the property taken from him but also to mesne profits during the period he was kept out of possession."

Two more points only remain for our decision. It is contended now on behalf of the defendant that even if the plaintiff is entitled to recover this Rs. 1,30,476 from her as the surplus profits of the estate nevertheless she is entitled to retain for herself a sum which is very nearly equal to Rs. 1,30,476 either: (I) as allowance payable to her under orders of this Court, or (II) as maintenance at the rate of Rs. 1,500 a month which, she claims, would be payable to her as the widow of an undivided co-parcener of the Zamindar.

First as to the allowances. The orders of this Court on which the defendant relies are first the orders made by Krishnan, J. in 1923 and 1924; and secondly the orders made in 1928 and 1929 after the defendant had succeeded on appeal and before the estate was handed over to her. It will be remembered that when Krishnan, J. placed the estate in the custody of the Receiver he directed that each of the parties should be paid for maintenance and for the expenses of the litigation, a sum of Rs. 1,500 a month; and that Rs. 65,577 (as found by the lower Court) out of the allowances due to the defendant remained unpaid at the time (April 2, 1929), the Receiver handed over the estate to her. Defendant's case is that out of the revenues of the estate accruing to her after she came into possession of it, she paid herself this sum and is now entitled to retain it. Further she claims that for the 43 months during which she was in possession under the appellate decree she was entitled to appropriate to herself a monthly allowance at the same rate and this amounts to Rs. 64,500; these two amounts

being added together come to Rs. 1,30,077 which is very nearly equal to the amount of Rs. 1,30,476 of the surplus profits of the estate. In considering this part of the defendant's case we have to ascertain what the orders of this Court are relating to these allowances. And we have to decide what the effect of those orders is. Do they mean that the parties were to keep whatever was paid to them as allowances irrespective of the ultimate result of the litigation? Or do they mean that the allowances were only provisional payments and were bound to be refunded by that one of the parties who was finally unsuccessful?

As regards the Rs. 64,500 which the defendant claims to be entitled to appropriate as allowances accruing due, during the period she was in possession of the estate, there are, of course no orders of this Court sanctioning any such appropriation. The allowance was payable under Krishnan, J.'s order during the pendency of the defendant's appeal to this Court and the effect of that order was spent when the appeal was decided. Then when this Court directed the defendant to be put in possession in 1929, she was put in possession as rightful owner entitled to all the revenues of the estate and there would have been no point in making an order that she was entitled to take so much a month out of those revenues as an allowance for herself. We are left therefore with the Rs. 65,577 (accepting the lower Court's figure) which represented arrears of the allowance accruing due to the defendant during the pendency of her appeal and remaining unpaid when she entered on the estate. Was the defendant entitled to appropriate this sum out of the revenues of the estate which accrued to her after she entered in possession and even if she was, is she not now bound to refund it to the plaintiff? Learned Counsel for the plaintiff contends that no *interim* order of the Court could operate to give away the revenues of the estate absolutely to one of the contesting parties, but that allowances paid *pendente lite* must be deemed to have been paid on condition that they should be refunded by the party who ultimately proves unsuccessful. He contends that even if this sum of Rs. 65,577 had been paid to defendant by the Receiver before he handed over charge to the defendant, the plaintiff would be entitled to recover it. I think that he is right.

In *Challapalle Zemindari case* (*Mallikarjuna Prasada Naidu v. Durga Prasada*

(9) I L R (1939) All. 103 (108); 180, Ind. Cas. 633; A I R 1939 All. 66; 1938 A L J 1189; 11 R A 491.

Naidu) (10) there is an observation of the Judicial Committee referring to allowances paid to a claimant *pendente lite*. That was a suit for maintenance by a younger brother against the Zamindar in possession. It was urged on behalf of the defendant before the Judicial Committee that the plaintiff could not recover arrears of maintenance accruing prior to suit because he had never demanded maintenance. As against this it was pointed out that he was, prior to the maintenance suit, prosecuting another suit against the Zamindar for partition of the estate. The Privy Council observed by way of explaining the absence of a demand for maintenance, that

"so long as that action, i. e., the partition suit was pending, the plaintiff could not well claim maintenance except as a provisional means of support pending the appeal to Her Majesty in Council."

This observation appears to support the contention put forward by plaintiff's Counsel that sums awarded to a litigant as maintenance *pendente lite* are awarded on the implied understanding that they are to be refunded if the party is ultimately unsuccessful. It would be anomalous in my opinion if a Court could award to a suitor money to be paid out of the revenues of the very property which he is suing to recover, otherwise than on condition that the money would have to be refunded if he fails in his suit. That would be to give him part of the very relief which he claims before there is any judicial decision that he is entitled to that relief. I think therefore that Krishnan, J.'s order of 1923 did not operate to give defendant an absolute title to the sums directed to be paid to her for maintenance and for the expenses of the litigation.

We have next to see whether in any of the orders of this Court authority was in fact given to the defendant to appropriate Rs. 65,577 out of the revenues of the estate which accrued to her after she entered into possession, and to retain it as her own property on account of arrears of allowance due to her for the period when, pending her appeal to this Court, she was out of possession. Krishnan, J.'s orders of 1923 and 1924 are as I have said not before us. Learned Counsel on both sides have been content to rely, for the import of those orders, on references made to them in the orders passed by this Court after defendants' appeal was decided on March 30, 1928 and before defendant entered possession into of the estate on April 2, 1929. It is necessary therefore to explain what these latter orders were. After

the appellate decree was made, the plaintiff applied for stay of execution pending his appeal to the Judicial Committee and for a continuance of the Receiver appointed by Krishnan, J. in 1923. That application was dismissed in the order Ex. A, dated August 17, 1928. In Ex. A no reference is made to the arrears of allowances due to the defendant. The plaintiff's arrears of allowance amounting to Rs. 45,000 were dealt with however. The Receiver was directed to pay them up to the date of his handing over possession. The Receiver was still in possession pending defendant's taking delivery and pending disposal of plaintiff's petition that defendant be not given delivery but that the Receiver should be continued.

The next order is Ex. 6, dated November 20, 1928 to which we have already referred, in which the rate at which the arrears payable to plaintiff were to be computed was directed to be Rs. 1,500 a month not Rs. 1,000 a month as had been inadvertently stated in the previous order Ex. A. On that occasion no motion was made by the defendant regarding her own arrears. The last order is Ex. C, dated March 20, 1929. In this order the question of allowances and arrear allowances is discussed in full. There were three petitions before the Court. One was by the plaintiff praying for a direction to the Receiver to pay him the arrears of allowance, as already ordered, and that the Receiver be not discharged until he did so—which was obviously only a device to prevent the defendant from getting into possession, since the Receiver had not nearly enough funds in hand to pay plaintiff's arrears—they amounted to Rs. 45,000 and would have had to continue in possession in order to realize the necessary sum from the rents of the estate. The second motion was by the defendant praying that the Receiver be directed to disburse to her the arrears of allowance due to her as he had already been directed to do in the case of the plaintiff; and in the alternative if he had not enough funds—which everybody knew to be the case, for he had less than Rs. 11,000 in his hands—then to direct him to divide whatever he had, equally between the parties.

The third petition was by the defendant praying that the order of the Court passed on November 20, 1928 (Ex. 6) should be reviewed and amended by reducing the rate at which the arrears due to plaintiff were directed by that order to be calculated. The order of the Court Ex. B was that the arrears due to the plaintiff under Mr.

Krishnan's order were Rs. 45,000 as on September 1, 1928; that he was to be paid Rs. 500 per month as from that date; that the arrears of Rs. 45,000 were to be paid to him in annual instalments on July 1 of every year; that the Receiver however might pay him the instalment for 1929, namely Rs. 10,000 out of the money in his hands, and if he did not, then the respondent (who was about to take possession of the estate and did take possession a fortnight later) must pay it, and if the money was not paid as directed that this order could be executed and also the parties would be at liberty to apply for directions. No definite direction was made on the petition of this respondent praying that the arrears of allowance due to her should be paid by the Receiver or that he should divide the funds in his hands between herself and the plaintiff. The relevant portions of Ex. B in which these directions were made are as follows:

"These applications relate to the arrears of maintenance at Rs. 1,500 a month ordered to be paid both to the plaintiff and defendant by Krishnan, J., on April 11, 1923. An appeal by the defendant was then pending in the High Court and a Receiver was in possession of the estate. On February 11, 1924, the Subordinate Judge reported that the allowances could not be paid having regard to the collections of the estate, the payment of *peishcash* and other necessary charges. On February 22, 1924, Krishnan, J., varied his order by saying that whatever net amount remained available after paying *peishcash*, the establishment charges and the Receiver's remuneration should be divided equally between the plaintiff and the defendant, subject, I take it, to the maximum of Rs. 1,500 allowed to each On August 17, 1928, we directed that the defendant do take possession of the estate on giving security for Rs. 60,000 and we also directed Rs. 500 a month to be given to the plaintiff for maintenance, Rs. 250 without security and the remaining Rs. 250 on his giving security to return the amount if called upon after the disposal of the Privy Council appeal. As we were under the impression that security would be given by the defendant within a short period we said that till the security was given and the Receiver discharged, the position was to be treated as if the old order of things continued, and Rs. 1,500 a month should be given to the plaintiff for maintenance. (Then dealing with the question of the arrears of allowance). The plaintiff wants to treat the income for this year and the money in the Imperial Bank as the assets out of which his arrears should be paid; and he wants payment. For the defendant, it is contended by the learned Advocate-General that, so far as the arrears of maintenance are concerned, both his client and the plaintiff are entitled equally to Rs. 1,500 a month, and that any sum in Court would not be available entirely to the plaintiff to discharge his arrears. Another contention is put forward, that there can be no question of arrears in this case, for all that the plaintiff is entitled to is a half of the available net income till the Receiver is discharged, and if on any account there is no possibility of being paid..... he must suffer the consequences, and cannot claim any payment..... We are unable to accede to the argument of the learned Advocate-General that no arrears of maintenance

are really payable at all and that the plaintiff must take the consequences if the Receiver is discharged. If that view had been pressed we would not have discharged the Receiver. We think Krishnan, J.'s order is clear that each party was to get Rs. 1,500 a month but as it was reported that the Receiver had not sufficient funds to pay this amount, the net income after meeting the necessary expenses was directed to be divided between the parties. We think that, if in any year assets had been available to pay the maintenance due and a balance remained, such balance should have been claimed by the parties to pay the arrears. Mr. T. Rangachariar says that while Krishnan, J.'s order limited the necessary expenses to the payment of *peishcash*, Receiver's remuneration and the establishment charges, the Receiver paid off debts due by the estate to the extent of Rs. 1,00,000 the benefit of which amount the plaintiff would have got if it had not been paid and that now the defendant gets it. We have no doubt that the order of Krishnan, J., must be so construed that Rs. 1,500 is payable to each party and that as there were not sufficient funds they should share the balance after payment of *kist* etc., and that when funds were available they could enforce the claim for Rs. 1,500 and get paid. We think that so far as the defendant is concerned she is also entitled to payment of these sums and we cannot treat the amount in Court or the assets as entirely attributable to the plaintiff.....

We expected that security would be furnished within about two months from the date of our order (August 17, 1928). We now find that matters are still pending. If matters are thus pending it is difficult to make any order as regards the arrears. We think in view of the circumstances that the best solution will be to direct that the security now tendered, Rs. 41,000 to be accepted as sufficient and to reduce the security already ordered to this amount so that there should be no difficulty in the defendant taking possession of the estate. (I note that defendant actually took possession a fortnight after this order.)

As regards the payment of arrears due to the plaintiff the sum due to him is Rs. 45,000. The same consideration which guided Krishnan, J., in directing the available assets to be divided between the parties will govern us also in making any provision for the payment of arrears: and we think that, if Rs. 10,000 is paid every year to the plaintiff out of the income, it would be sufficient protection. It will on the one hand give the plaintiff funds to carry on the litigation and maintain himself..... and on the other it will not unduly cripple the estate which the defendant will have to manage. Our order, therefore, is etc. The Receiver is at liberty to pay the Rs. 10,000 to be paid this year. If he does not pay, the defendant will have to pay."

Now in this order there is no direction as I have said that defendant should irrespective of the result of the plaintiff's appeal take absolutely out of the future profits of the estate a sum equal to the arrears due to her as allowance for the period prior to her entry on the estate. And there is no direction that during her occupation of the estate and pending plaintiff's appeal any part of the profits should be earmarked as a personal allowance of the defendant. The learned Judges knew that if plaintiff succeeded the defendant would have to account for the profits. In fact, they directed that defendant should file accounts annually of

income and expenditure. If they had thought that defendant was entitled to any part of the profits, other than in her character of rightful owner, they would have said so. Learned Counsel relies on one sentence in this order:

"We think that so far as the defendant is concerned she is also entitled to payment of these sums and we cannot treat the amount in Court, or the assets, as entirely attributable to the plaintiff."

But this sentence must, I think, be construed with reference to the facts. There was between Rs. 10,000 and Rs. 11,000 in Court. Plaintiff to whom Rs. 45,000 was due on account of arrears of allowance had prayed that the whole of this sum and the income for the current year should be treated as the assets out of which his arrears should be paid. This was another way of praying that the Receiver should be continued, a prayer which the Judges had already refused in their order Ex. A. The Advocate-General appearing for the defendant had pointed out that under Krishnan, J.'s order the money in Court, though it fell far short of the arrears of allowance due to the parties, should be divided between the parties. The sentence just quoted appears to relate to this argument. "We cannot treat the amount in Court or the assets as entirely attributable to the plaintiff." And the order of the Judges about this amount was that out of it Rs. 10,000 might be paid to plaintiff by the Receiver before he handed over the estate to the defendant. If not it would have been handed over to the defendant who would then have had to pay the plaintiff Rs. 10,000 on or before July 1, 1929. Learned Counsel also wishes us to construe this order as meaning that since out of the future profits of the estate plaintiff was to be paid the arrears due to him, therefore the defendant was similarly to pay herself the arrears of allowance due to her. This I think is far-fetched. Defendant took the estate absolutely. The whole of the profits belonged to her. If it had been intended that she was not to be accountable for the whole of those profits but could in any case appropriate Rs. 65,577 we think there would have been a definite direction to that effect. We observe also that defendant is in effect claiming this sum of Rs. 65,577 as a first charge on the revenues of the estate. She is putting it before the payments she was directed to make to the plaintiff. Those payments consisted of Rs. 30,000 arrears of allowance and Rs. 500 per month for 50 months or Rs. 55,000 in all. Defendant paid the plaintiff in fact only Rs. 29,000.

See Item No. 21 in the abstract statement. She owes him under this head Rs. 26,000. My conclusion therefore is that as regards the Rs. 65,577 arrears of allowance there is no warrant in the orders of this Court to justify the defendant in appropriating it; and that even if there was, such an appropriation would be provisional, and in the event that has happened, the money would have to be refunded to the plaintiff. And secondly that as regards the Rs. 64,500 claimed as allowance for the period during which defendant was in possession of the estate there is no shadow of a justification for that claim in any of the orders of this Court.

The second of the grounds on which the defendant claims to be entitled to retain almost the whole of the amount now claimed by the plaintiff as mesne profits is that as the widow of an undivided co-parcener of the Zamindar she has the right to be maintained out of the revenues of the estate; that Rs. 1,500 a month is a reasonable rate of maintenance and that therefore she is entitled to retain Rs. 1,30,077 which amount is calculated in the manner we have already explained, namely, Rs. 65,577 due up to her taking possession of the estate and Rs. 64,500 due for the subsequent period up to the date of the Privy Council decree. To this claim learned Counsel for the plaintiff answers (1) that the defendant is not a person who is entitled to maintenance; (2) that in these proceedings a counterclaim like the present cannot be adjudicated on as it raises complicated questions of law and fact; (3) that this counterclaim was not placed in the lower Court.

On the point of law whether the defendant is entitled to maintenance as of right learned Counsel for the plaintiff relies on what is known as the *Second Pittapur case*, (*Venakta Mahipathi Gangadhara Rama Rao v. Raja of Pittapur*) (11), in which the Privy Council ruled that in an impartible *zamin-dari* belonging to a person governed by the Mitakshara Law there is no co-parcenary between the Zamindar and his agnates; and therefore the grandson of a deceased Zamindar was held to be not entitled to maintenance out of the impartible estate in the hands of his successor. In this decision the view taken by this Court in certain cases decided prior to 1899 that there was joint property in an impartible estate which only

(11) 41 M 778; 47 Ind. Cas. 354; A I R 1918 P C 81; 45 I A 148; 35 M L J 392; 24 M L T 276; 16 A L J 833; 28 C L J 428; 5 P L W 267; 20 Bom. L R 1056; (1918) M W N 922 (P C).

fell short of co-parcenary because by custom there was no right to partition was held to be no longer tenable. On the other side learned Counsel for defendant contends that the decision in the *Second Pittapur case*, (*Venkata Mahipathi Gangadhara Rama Rao v. Raja of Pittapur*) (11), has been overruled in subsequent decisions of the Judicial Committee notably in *Bajinath Prasad Singh v. Tej Bali Singh* (12) and *Collector of Gorakhpur v. Ram Sundar Lal* (13). It is unnecessary for me to refer in detail to the decisions which have been cited to us now in support of the rival theories, since very recently a Bench of this Court has decided, following *Collector of Gorakhpur v. Ram Sundar Lal* (13), that the undivided members of the family of a Zamindar have a right to maintenance out of the estate as if it were joint family property and that the decisions of this Court to that effect made prior to the *Second Pittapur case*, (*Venkata Mahipathi Gangadhara Rama Rao v. Raja of Pittapur*) (11) and overruled by it may now be followed: see *Maharajah of Venkatagiri v. Raja Rajeswara Rao* (14), at p. 658. We quote from that decision with respect a passage in the judgment of my Lord the Chief Justice :

"Impartibility arises out of custom, but with the greatest respect to what has been said to the contrary I do not regard a custom of impartibility as in itself destroying the right of the junior members of the family to maintenance out of the family estate while it remains in the family. The fact that a family has allowed a custom of impartibility to arise does not in itself imply the abandonment by the junior members of their right to maintenance out of the estate.....To deprive junior members of a joint Hindu family owing an ancestral estate, whether partible or impartible, of the right to maintenance there must, it seems to me, be a custom to that effect."

On this part of the defendant's case if the point directly arose for decision I would on the materials furnished in this case, hold that as widow of an undivided co-parcener defendant is *prima facie* entitled to maintenance out of the estate. There is I think very little reason to doubt that Kunji Behari Deo, her late husband, was an undivided member of the family to which the Zamindar belongs. Both were descended from a common great-grandfather who was

(12) 43 A 228; 60 Ind. Cas. 534; A I R 1921 P C 62; 48 I A 195; 19 A L J 317; 33 CLJ 388; 40 M L J 387; (1921) M W N 300; 25 C W N 564; 2 P L T 257; 23 Bom. L R 654; 3 U P L R (P C) 35; 29 M L T 358 (P C).

(13) 56 A 468; 150 Ind. Cas. 545; A I R 1934 P C 157; 61 I A 286; 7 R P C 1; 11 C W N 889; 40 L W 217; (1934) A L J 779; 67 M L J 274; 15 P L T 531; 60 C L J 67; (1934) M W N 751; 36 Bom. L R 867; 38 C W N 1101 (P C).

(14) I L R (1939) Mad. 622; 189 Ind. Cas. 123; A I R 1939 Mad. 614; (1939) I M L J 831; (1939) M W N 522; 13 R M 144.

the holder of the estate. Audikonda grandfather of the plaintiff, and Raghunatha, grandfather of Kunji Behari, husband of this defendant, were brothers. There was a younger brother but he died without leaving male issue and the family thereafter has been represented solely by Audikonda and Raghunath and their descendants. Audikonda, the elder brother, was Zamindar from 1840 till 1868. Dying without male issue, he was succeeded by Raghunath who was ousted in 1876 by plaintiff's father Brojo Kishore who had in 1870 been adopted by Audikonda's widow. Brojo Kishore was Zamindar till his death in 1906. Raghunath's son—Raghunath had in 1883—Vaishna Deo, claimed the estate but died before his claim could be recognized. In 1907 Vaishna Deo's elder son Purushottama Deo was registered in the Collector's books as proprietor of the estate and entered on possession and remained in possession till his death in 1915 when he was succeeded by his younger brother defendant's husband Kunji Behari Deo. Kunji Behari Deo was till Zamindar December 20, 1922, when the title of the plaintiff was declared by the decree of the Court of first instance in the present suit, in which plaintiff's claim as the legitimate son of Brojo Kishore was confirmed.

It will be seen therefore that the estate has been in the possession of the junior line for 23 years during the period from 1868 to this suit, while the senior line has held it for 27 years. In the judgments of this Court and of the Privy Council, in which the title to this estate has been in question, namely, *Virada Pratapa Deo v. Brozo Kishoro Datta* (15), *Madana Mohana Ananga Bheema Deo v. Purushottama Ranga Bheema Deo* (16) and the present suit *Ananga Bhima Deo v. Suseela Mala Patta Mahadevi* (1), there is no indication that the two branches of the family had ever become divided. Besides these cases, there is an unreported case dated 1896 of this Court, not referred to in the arguments before us in which Brojo Kishore zamindar from 1876 to 1908 and father of this plaintiff appealed to this Court against a decree of the District Judge, Ganjam, awarding maintenance to Brojo Kishore's cousin Vaishna Deo, father of defendant's husband Kunji Behari Deo: see A. S. No. 111 of 1895, decided on

(15) 1 M 69; 3 I A 154; 25 W R 291; 3 Sar. 583 (P C).

(16) 41 M 855; 46 Ind. Cas. 481; A I R 1918 P C 74; 45 I A 156; 35 M L J 158; 5 P L W 179; 8 L W 167; 16 A L J 725; (1918) M W N 621; 24 M L T 231; 28 C L J 403; 20 Bom. L R 1041; 23 C W N 177 (P C).

appeal against O. S. No. 14 of 1893 of the District Court, Ganjam. The decision of this Court was that Vaishna Deo was clearly entitled to maintenance as a matter of right. The amount awarded was Rs. 500 a month, stated to be about 1/9th of the admitted income.

Learned Counsel for the plaintiff contends however, that the defendant in her answer to the plaintiff's claim did not explicitly put forward her own claim to maintenance as a set-off against the amount, which plaintiff sought to recover from her as profits of the estate enjoyed by her while she was in possession. This I think is true. In defendant's pleading there is no positive assertion of a claim against the plaintiff for money due to the defendant by way of maintenance. The relevant portions of that pleading are as follows:

"The abstract herewith filed shows an expenditure of Rs. 1,19,264 towards arrears of allowances and the current allowance of this respondent. This expenditure is also binding on the estate. The order of Krishnan, J., fixing an allowance of Rs. 1,500 a month to each party..... is not modified or set aside so far as this respondent is concerned, and hence the expenditure of Rs. 1,500 a month as allowance of this respondent is binding on the estate and on the petitioner. Moreover, this respondent was representing and managing the estate during the period in question and had to maintain the status and expenditure incidental to the said position and hence the expenditure of Rs. 1,500 a month as the allowance of the respondent is reasonable and binding on the estate."

It is clear I think that respondent's counterclaim was put forward entirely on the strength of Krishnan, J.'s order and not on the ground that it represented the amount of maintenance due to her as of right. At the stage of argument in the lower Court, apparently, defendant's Counsel raised for the first time this alternative basis for the counterclaim. For the learned Subordinate Judge observes in para. 4 of his judgment:

"It is contended that the first counter-petitioner (that is, this defendant) is entitled to maintenance out of the estate as the widow of a member of the plaintiff's family."

And the learned Subordinate Judge disposing of this contention held that in accordance with the ruling in the *Second Pittapur case* (11), that the defendant was not entitled to maintenance out of the estate as of right or by custom. The question, therefore, arises whether this counterclaim by way of maintenance can be canvassed on appeal. The first point that would have to be decided, if the question was directly in issue before us is whether such a claim can be advanced in answer to an application for mesne profits under s. 144, Civil P. C. That I think is an arguable point. The decision of it would

depend on whether the defendant's claim arises from the same transaction as the plaintiff's claim. And the crucial point would be, what is the transaction in the circumstances of the present case? Plaintiff claims the profits which accrued to the defendant while she was in possession of the estate. Defendant's counterclaim would presumably be that some of those profits would be payable to her even if she had not been in possession. We think there would be a reasonable ground for argument, in defendant's behalf, that her counterclaim arises in the same transaction as the plaintiff's claim. It might possibly be held that the transaction consisted in the enjoyment by the defendant of the whole profits of the estate during a period when she was, independent of her position as owner in possession, entitled to part of those profits. I do not think it necessary, however, to record a finding on this question as the set-off by way of maintenance was not properly raised and adjudicated upon in the lower Court and is not properly before us in appeal. Assuming that the defendant is entitled to maintenance, the question, how much she is entitled to under that head remains to be tried and decided.

In the result, therefore, I find that none of the objections raised on behalf of the defendant either in the lower Court or newly in this appeal can validly affect the plaintiff's right to recover from the defendant by way of restitution, under s. 144, Civil P. C., the sum of Rs. 1,30,476 which the defendant received as profits of the estate during the time she was in possession under the decree which has been reversed. In this judgment throughout I have referred to the amount of profits as Rs. 1,30,476. That is the actual amount, I should explain that in her abstract of accounts the defendant put it at Rs. 1,19,264. See Item No. 23 of that statement, in which she calls it her "allowance". That is a fallacious figure. Defendant arrives at it by debiting herself with Rs. 11,212 (see Item No. 22) which she sets down as having been paid by her to the plaintiff. But she never paid this sum to the plaintiff. The debit entry is sought to be explained in the following manner: At the date of the appellate decree plaintiff owed to defendant a certain sum for money which he had recovered from her as costs awarded to him by the Court of first instance. And he also became liable by the appellate decree to pay to the defendant a certain sum as costs. These two sums added together come to Rs. 11,212. Defendant on the other hand had, as already

explained, to pay to the plaintiff large sums under the order of this Court Ex. B as well as an allowance of Rs. 500 a month. By entering on the debit side Rs. 11,212 defendant professes to have adjusted the money due to her by the plaintiff *pro tanto* against the money she had to pay the plaintiff. But she has done nothing of the sort. In order to effect that adjustment she would have to enter Rs. 11,212 also on the credit side of the account as having been received from the plaintiff. This she has not done. In fact therefore she did not pay the plaintiff this sum of Rs. 11,212. She put it in her pocket. The true figure of profits received by her is therefore Rs. 1,30,746.

I would also observe before leaving this part of the case that if defendant's counter-claim for the profits of the estate or part of them whether on the ground that she is entitled to them as allowances under the orders of this Court or as maintenance due to her as a co-parcener's widow is to be entertained, the money which the defendant owes the plaintiff as arrears of allowances and as allowance directed to be paid by her to the plaintiff—which is Rs. 26,000—should be taken into account. He who seeks equity should do equity. In accordance with the opinions expressed above I think this appeal should succeed and that the plaintiff is entitled to recover Rs. 1,30,476 from the defendant.

(On account of difference of opinion between Burn and Stodart, JJ., the case was referred to Wadsworth, J.)

Wadsworth, J.—This appeal raises a question of restitution and has been referred to me on a difference of opinion between Burn and Stodart, JJ., on two points: (1) The question of the applicability of s. 144, Civil P. C., and (2) the question of the liability of the defendant's legal representative (respondent No. 1 herein) to make a restitution, if s. 144, Civil P. C., applies.

The facts of the case have been fully set forth in the judgments of my learned brothers and it is unnecessary to repeat them at length. The essential points are that the plaintiff sued for possession of his estate from the husband of the present respondent No. 1 and in the Subordinate Judge's Court he succeeded, the decree being dated December 20, 1922. The defendant appealed to the High Court and in that appeal a Receiver was appointed who took charge of the estate in April 1923, the plaintiff not having got possession meanwhile. The defendant died in 1925 and his widow (the present respondent No. 1) carried on the appeal. On

March 30, 1928, the High Court reversed the trial Court's decree. The plaintiff preferred an appeal to the Privy Council and asked that the Receiver should continue in possession of the estate. But this prayer was refused and the widow obtained possession from the Receiver. On November 1, 1932, the Privy Council set aside the decree of the High Court and restored the decree of the Subordinate Judge. Immediately after this decree was passed, respondent No. 1 was herself appointed Receiver pending receipt of the formal order in Council and the appellant got possession in March 1933. The appellant claims restitution in the shape of profits of the estate for the period from April 1929, when respondent No. 1 took possession from the Receiver, to December 1932, when she was herself appointed Receiver. The profits of the estate, after allowing ordinary charges, amount to approximately Rs. 1,30,000 for this period.

Respondent No. 1 contended, firstly, that there could be no order for restitution in the circumstances of the case, and secondly, that she was entitled to appropriate the profits to the amount due to her under the High Court's orders whereby the Receiver was directed to pay to each party a monthly maintenance of Rs. 1,500 and she claims that she is entitled to set off, against the surplus, the arrears of this maintenance for the period during which the Receiver was in charge and a monthly allowance of Rs. 1,500 for the period during which she herself had possession of the estate. It has to be observed that pending the appeal to the Privy Council, respondent No. 1 was required to pay a reduced maintenance of Rs. 500 per mensem to the plaintiff and she was directed to pay the arrears due to him under the previous order as the balances in her hands permitted and she did in fact pay certain sums towards the arrears.

The learned Judges who referred this appeal are agreed on certain points. They agree that the order of Krishnan, J., fixing for each party a monthly maintenance allowance of Rs. 1,500 cannot be regarded as anything more than a provisional arrangement to be in force during the pendency of the appeal. They are also agreed that the respondent cannot claim in these proceedings a right to appropriate maintenance under any common law right which she may have, so that she must stand or fall by the order of the High Court fixing her maintenance. There is a further fact which has to be stated. The suit originally included a claim for past and future mesne profits, but no issue was

framed in this respect and the trial Judge held that the claim for mesne profits had been given up. Before the High Court there was a cross-appeal by the plaintiff on the subject of mesne profits which was dismissed. The judgment of the Privy Council does not deal expressly with the claim for mesne profits, but since the decree of the trial Court is restored, it must be taken that no mesne profits were awarded in the suit.

The view taken by Burn, J., is, firstly, that s. 144, Civil P. C., does not apply because the possession which respondent No. 1 got after the High Court's decree was neither under that decree nor properly consequential upon that decree; secondly, that even if s. 144 does apply, the most that could be claimed would be the restoration of any benefit accruing to respondent No. 1 on the basis of the continuance of the position which obtained immediately before the wrong decree was passed; therefore one must postulate the continuance of the provisional orders which would justify the appropriation by respondent No. 1 of the amounts to which she was entitled under the orders, so that nothing would be left which could be called a benefit returnable; and thirdly that the refusal of future mesne profits in the decree of the trial Court which the Privy Council has restored, bars the claim by way of restitution for any sum out of the profits of the estate during respondent No. 1's possession. Stodart, J. has taken a contrary view on all these points.

I will deal firstly with the question of the applicability of s. 144, a matter which seems to be covered by the decision in *Bisheshwar Pratap v. Chandreshwar Prasad* (3), discussed by both the learned referring Judges. In that case, a Receiver was appointed pending a suit for possession of land. After the decree the successful party obtained possession from the Receiver. The decree was reversed in appeal. The appellant applied for restitution. Objection was taken that the appellant was not entitled to get the property back by way of restitution because it was the Receiver who had been dispossessed and not the appellant. It was held that the appellant could get the property back, since the possession of the Receiver was for the benefit of the person entitled to the property. Burn, J. distinguishes this case on the ground that the wrong decree was actually executed and the Receiver was therefore dispossessed under that decree and he points out that there can be no doubt that the order for restoration of possession was one properly consequential on the variation of the erroneous decree. He points out that in order to justify restitution,

it must be shown that property has been received by the decree-holder in execution of a wrongful decree or directly in consequence of that decree.

My learned brother holds the view that the possession obtained by respondent No. 1 in the present case was not possession in execution of the decree, nor under any explicit direction contained in the wrong decree and that it must therefore be held to be only indirectly consequential on the wrong decree, so that it cannot form the basis for an order for restitution. With the greatest respect, I find myself unable to agree with this conclusion and I am of opinion that Stodart, J. is right in holding that not only was the possession of the Receiver the possession of the plaintiff who is ultimately found entitled to the property, but also that the dispossession of the Receiver was directly consequential on the wrong decree. It is true that the High Court's decree merely reverses the decree for possession given by the Subordinate Judge and it is true that respondent No. 1 got possession after some little delay as a result of the refusal of the appellant's application to continue the Receiver pending the appeal to the Privy Council. But I am unable to subscribe to the view that restitution should not be ordered unless the possession is got as a result of either the execution of the decree or an explicit order contained in the wrong decree. When, as in this case, the property in dispute is held by the Court's Receiver, it is unnecessary for the decree to contain a direction to the Receiver to hand over the property to the successful party. The Receiver will automatically transfer possession to the party who succeeds in the suit and the fact that the transfer is made without the execution of the decree and without any explicit order in the decree, will not, to my mind, alter the fact that possession is, in fact, given under the decree. The surrender of possession by the Receiver on the termination of the appeal is the inevitable consequence of the decree passed in the appeal. It seems to me therefore with great respect that the distinction which my learned brother Burn, J. seeks to apply in dealing with the case in *Bisheshwar Pratap v. Chandreshwar Prasad* (3), is fallacious.

An attempt has been made before me to make a further distinction based on the ground that in the Patna case the party who got possession under the wrongful decree could trace that possession to no other source than the decree which was set aside, whereas in the present case respondent No. 1

who succeeded in the High Court was the widow of the party originally in possession before the litigation started who had continued in possession right up to the time when the Receiver was appointed. It is argued therefore that respondent No. 1's possession, obtained from the Receiver, was nothing more than the restoration of the possession which her husband had before the appointment of the Receiver. It seems to me that this argument is spacious. The point of time for determining a right to restitution is not the inception of the proceedings resulting in the wrong decree, but the point of time immediately before the wrong decree. This is clear from the words "place the parties in the position which they would have occupied but for such decree." They are not to be placed in the position which they occupied at the beginning of the litigation, but in the position which they occupied just before the wrong decree was passed.

When once it is conceded, as I think it must be, that the possession of the Receiver at the time when the High Court's decree was passed, was the possession of the plaintiff who ultimately succeeded before the Privy Council, it does not seem to me to matter that the plaintiff did not get possession after the trial Court's decree or that the defendant continued in possession up to the time of the appointment of the Receiver. The important question is, who was in possession before the wrong decree was passed. The answer to that question is that the Receiver was in possession on behalf of the person who would ultimately be found entitled, that is to say, on behalf of the plaintiff. The Receiver surrendered possession to respondent No. 1, not because he had taken possession from the original defendant, but because respondent No. 1 had been declared entitled by the erroneous decree. It follows, therefore, that his possession, which was constructively the possession of the plaintiff, terminated and the defendant got possession directly in consequence of the erroneous decree of the High Court, reversing the trial Court's decree. It seems to me, therefore, that s. 144, applies in terms and that the plaintiff is entitled to claim restitution of any profits realized by the defendant's legal representative which can be called properly consequential upon the wrong decree, unless the defendant's legal representative is entitled to resist the claim either by showing that she has a superior claim to those profits or by showing that the plaintiff's claim is barred by reason of the failure to establish his right to future profits in the trial Court.

This leads to the next question as to the extent of the defendant's legal representative's liability by way of restitution and involves a consideration of the precise meaning of the words "place the parties in the position which they would have occupied but for such a decree," occurring in s. 144, Civil P. C. It seems to me that there are three possible ways of interpreting these words. The words might mean that the parties are to be put in the position they would have occupied had the right decree been passed instead of the wrong decree; or, secondly, they may mean that the parties are to be put in the position that they would have occupied had no decree at all been passed; or the words may mean simply that the parties are to be put in the position which they would have occupied had it not been that a wrong decree had been passed. It seems to me that the last interpretation is the correct one. There is nothing in the words of s. 144 to justify the conclusion that it was the intention of the Code to give to the person claiming restitution any better position than that which he occupied at the time when the wrong decree was passed and this is what has to be inferred if we are to take it that he has to be put in the position which he would have occupied had the right decree been passed. Similarly I do not think that it can be said that the person claiming restitution must base his claim on the theory that he is entitled only to what he would have got had there been no decree at all and had the proceedings been pending right up to the time when the final decision set the matter at rest. It seems to me to be going too far to postulate, for purposes of restitution, the continuation of the proceedings until terminated by the right decree, more especially if we are to postulate also the continuation of all incidental orders passed during the pendency of those proceedings. The correct procedure seems to me to be to take the position as it stood immediately before the wrong decree, to find out what would be the position of the ultimately successful party as on that date, having regard to the fact that the proceedings terminated and to award to the successful party restitution in the shape of any profits wrongfully received under the erroneous decree or as a direct consequence thereof.

In any view, it seems to me that it is impossible to hold on the facts of the present case that the defendant's legal representative would be entitled to appropriate the whole of the amounts due to her both

for arrears and for future maintenance on the basis of the continuation of the provisional orders passed pending the High Court appeal, without regard to the fact that those orders recognized similar rights in the plaintiff. But I am of opinion that the correct view is that which has been taken by my learned brother Stodart, J., namely, that one must regard the possession of the Receiver immediately before the erroneous decree as the possession of the plaintiff who is found ultimately to be entitled, one must treat these provisional orders passed purely for the purpose of appeal before the High Court as having terminated on the termination of that appeal and one must award to the plaintiff the profits wrongfully received by the defendant's legal representative as a result of the dispossession of the Receiver, as representing the plaintiff, without any adjustment in respect of payments which could only be made on the assumption of the continuance of the provisional orders, which automatically came to an end on the termination of the appeal before the High Court. That is to say the plaintiff is entitled to restitution on the basis of the position immediately before the wrong decree and on the assumption that orders made with reference to the pending appeal came to an end on the termination of that appeal.

There remains the question whether the plaintiff's claim to restitution is barred by reason of his failure to get a decree for future mesne profits in the original Court. On this part of the case, the respondent relies on the decision in *Bhimana Gowd v. Siddalingana Gowd* (17) which was to the effect that when in a suit for partition and possession, there was no prayer for mesne profits, mesne profits could not be claimed by way of restitution when the original order, dispossessing the claimants, was set aside. This decision would be authority for the view that the plaintiff could not claim by way of restitution mesne profits for the period anterior to the date on which the Receiver got possession constructively for the plaintiff. But when the Receiver got possession, there was really no scope for any execution by the plaintiff either in respect of possession or in respect of profits. Thereafter the possession of the Receiver was the possession of the plaintiff and no question of future mesne profits could arise.

The High Court having passed an erroneous decree as a result of which the Receiver was dispossessed and respondent

(17) 27 L W 188; 104 Ind. Cas. 768; A I R 1927 Mad. 898; 39 M L T 94.

No. 1 was put into possession the profits which accrued to the defendant's legal representative as a result of this erroneous decree are not, in my opinion, profits which could have been claimed in the original suit. They were profits flowing directly from the erroneous appellate decree, recoverable only by restitution and not such as could have been foreseen in drafting the original plaintiff. The position is just the same as it would have been had the plaintiff executed his decree and got possession during the pendency of the High Court appeal and been dispossessed as a consequence of his failure in that appeal. After such dispossession, profits accruing to the defendant's legal representative would not be recoverable as future mesne profits claimed in the suit, but by way of restitution owing to the wrongful decree. It seems to me therefore that there is no bar to the plaintiff's claim by reason of his failure to get a decree for future mesne profits before the trial Court. In the result therefore I find, agreeing with my learned brother Stodart, J., that the appeal must be allowed and the plaintiff be given a decree for restitution of a sum of Rs. 1,30,476 from the defendant's legal representative with costs throughout. No relief is granted against the sureties in this application. Advocate's fee Rs. 500.

N.-D.

Appeal allowed.

CALCUTTA HIGH COURT

Civil Rule No. 538 of 1940

June 26, 1940

DERBYSHIRE, C. J. AND B. K. MUKHERJEA, J.

MAHENDRA NATH SARDAR AND

ANOTHER—PETITIONERS

versus

KALIPADA HALDAR AND OTHERS

—OPPOSITE PARTY

Bengal Tenancy Act (VIII of 1885), s. 26-G—Held on construction that mortgage was not usufructuary but one by conditional sale—Usufructuary mortgage—Mortgagor representing that holdings mortgaged were mokarari—If estopped from saying that holdings are occupancy.

Held, on construction of the mortgage-deed, that the mortgage was not a usufructuary mortgage as contemplated by s. 58 (d), T. P. Act. Although the mortgagors were given possession of the mortgaged properties and they were entitled to appropriate the rents and profits towards the interest due, yet the essential element of a usufructuary mortgage was wanting, namely that the mortgagor would retain possession of the properties till the mortgage money was paid. The transaction was substantially a mortgage by conditional sale though certain rights of a usufructuary mortgage were also given to the mortgagors. The expressions *kot kobala* and *saf kobala* which were used

in the document were quite sufficient to show that the mortgage was by conditional sale.

Where a mortgagor executing a usufructuary mortgage represents to the mortgagee that the properties mortgaged were *mokarari* holdings held by him at a fixed rent, he is not estopped from saying that these were occupancy holdings which would attract the operation of s. 26-G, Ben. Ten. Act.

C. Rule from the order of the Sub-Judge, Third Court, 24-Pargana at Alipore, dated March 26, 1940.

Mr. *Prafulla Kamal Das*, for the Petitioners.

Mr. *Abinash Chandra Ghose*, for the Opposite Party.

B. K. Mukherjea, J.—This rule is directed against an order of the Subordinate Judge, Third Court, Alipore, dated March 26, 1940, made in a proceeding under s. 26-G (5), Ben. Ten. Act. The petitioners are the mortgagees under a mortgage-deed executed by opposite party No. 3 on behalf of herself and her two sons, the opposite parties Nos. 1 and 2, who were then minors in April 1923. The case of the opposite parties was that it was a usufructuary mortgage and they presented the application for restoration of the mortgaged properties under s. 26-G (5), Ben. Ten. Act, on the ground that more than fifteen years having elapsed from the date of the registration of the instrument the consideration of the mortgage was extinguished.

The mortgagees resisted the claim substantially on two grounds: It was urged in the first place that the mortgage was one by conditional sale and not a usufructuary mortgage and as such the provisions of s. 26-G (5) Ben. Ten. Act, were not applicable. The second point taken was that the mortgagors having represented to the mortgagees that the properties mortgaged were *mokarari* holdings held by them at a fixed rent, they were estopped from saying that these were occupancy holdings which would attract the operation of s. 26-G, Ben. Ten. Act. Both the defences were negatived by the learned Subordinate Judge who allowed the application of the opposite parties for restoration of possession of the mortgaged properties. It is against this order that the present rule has been obtained. The learned Advocate who appears for the petitioners has challenged the propriety of the decision of the trial Court on both these points.

As regards the first point it is conceded on both sides that the mortgage in dispute could not rank as a complete usufructuary mortgage as defined in s. 3 (3), Ben. Ten. Act. The only question is whether it is a usufructuary mortgage at all and the document

being executed prior to the commencement of the Ben. Ten. Amendment Act of 1928, could take effect as a complete usufructuary mortgage under the provisions of sub-s. (1) (a) of s. 26-G. In the document itself the parties described it as a mortgage by conditional sale and the expression "*kot kobala*" is used throughout the instrument. The mortgagors purported to execute the mortgage by conditional sale in respect of their share of the mortgaged properties to secure an advance of Rs. 1,400 only. The possession of these properties was delivered over to the mortgagees and the stipulation was that they would enjoy the usufruct of the land and credit the same towards the interest due on the mortgage bond. The document mentions a due date which was the end of *Chaitra* 1338 B. S. and the mortgagors promised to pay the entire mortgage debt within that time upon which the mortgaged properties would be released to them. Then there appears a clause which runs as follows:

"If we make default in paying you the principal sum on or before the due date aforesaid, viz., within the month of *Chaitra* 1338 B. S. on expiry of the said due date you will be entitled to foreclose the mortgage and this conditional sale will thereupon ripen into an absolute sale and in that event you, your sons, grandsons and other heirs, your assigns will have title to the properties and will possess the same in great felicity and in any way you like."

Taking this document as a whole I am unable to say that this is a usufructuary mortgage as contemplated by s. 58 (d), T. P. Act. It is true that the mortgagees were given possession of the mortgaged properties and they were entitled to appropriate the rents and profits towards the interest due. But the essential element of a usufructuary mortgage was wanting, namely that the mortgagee would retain possession of the properties till the mortgage money was paid. The mere mentioning of a due date for payment is indeed not material and could be considered as a mere proviso for redemption, if the provision was that in default of redemption the mortgagees would continue to hold the property and go on enjoying the same till the mortgage money was paid. In the document in dispute not only is there no such terms, but on the other hand the express provision is that in default of payment of the mortgage money within the due date, the mortgagee will be entitled to foreclose; the *kot kobala* would then ripen into a *saf kobala* or an out and out sale. In my opinion the transaction was substantially what it purported to be, namely a mortgage by conditional sale though certain right of a usufructuary mortgage were also

given to the mortgagees. I am not impressed by the argument of Mr. Ghose that the document could not be construed as a mortgage by conditional sale, because there are no express words of transfer in the document showing that the mortgagor ostensibly sold the property to the mortgagees. The expressions *kot kobala* and *saf kobala* which are used in the document are in my opinion quite sufficient for this purpose. It is a mortgage by conditional sale of the type mentioned in para. 1 of s. 58 (c), T. P. Act, where in default of payment of the mortgage money within a certain date the sale becomes absolute.

So far as the second point is concerned, we are not inclined to disturb the finding of the Subordinate Judge on this point and hold that there was any estoppel to preclude the mortgagor from showing that the holdings were really occupancy holdings. The Rule however must succeed on the first ground. The result is that the Rule is made absolute, the order of the Subordinate Judge is set aside and the application for restoration of the mortgaged properties made by opposite parties Nos. 1 to 3 is dismissed. We make no order as to costs in this Rule.

Derbyshire, C. J.—I agree.

s.

Rule made absolute.

BOMBAY HIGH COURT

Civil Application No. 392 of 1940

November 21, 1940

BROOMFIELD AND MACKLIN, JJ.

NAGAPPA CHANNAPPA TAMBRALI

—APPLICANT

versus

RAMSING JESSASING AND ANOTHER—

OPPONENTS

Civil Procedure Code (Act V of 1908), s. 10—Stay of suit filed on original side of High Court pending decision in previous suit filed in mofussil—Procedure—Application to be made on original side to Judge trying suit.

The proper and convenient procedure to stay a suit which has been instituted on the original side of the High Court until the decision of a previously instituted suit in the *mofussil* Court, is to apply under s. 10, Civil P. C., on the original side of the High Court to the Judge trying the suit and not on the appellate side.

The Judge on the original side can, if necessary, restrain the parties from proceeding with the suit in the *mofussil* Court. If the Judge declines to make an order under s. 10 an appeal would then lie to an Appellate Bench. 53 Ind. Cas. 518 (1) and 143 Ind. Cas. 806 (2), relied on, C. A. No. 672 of 1939, explained.

Messrs. G. N. Thakor and T. N. Walavalkar, for the Applicant.

Mr. F. J. Coltman, for the Opponents.

Broomfield, J.—This is an application under s. 10, Civil P. C., to stay a suit which has been instituted on the original side of this Court until the decision of a previously instituted suit in the Sholapur First Class Subordinate Judge's Court. Mr. Coltman who appears for the opponents has taken a preliminary objection that the application should be made on the original side. We think he is right. He relies on r. 344 of the High Court Original Side Rules. But in our opinion the matter is made sufficiently clear by the language of s. 10 itself. The section provides that no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties. It is a reasonable inference in our opinion that an application asking the Court not to proceed with the trial should normally be made to the Court which is actually seized of the case. According to my experience that is also in accordance with the general practice.

Mr. Thakor for the applicant says that so far the case has not been assigned to any particular Judge on the original side. But in due course the assignment will be made and when it is made his client can apply. As held in *Mulchand Raichand v. Gill & Co.* (1) the Judge on the original side could, if necessary, restrain the parties from proceeding with the suit in the *mofussil* Court. If the Judge declined to make an order under s. 10 an appeal would then lie to an appellate Bench as held in *Jivanlal Narsi v. Pirojshaw Vakharia & Co.* (2). Mr. Thakor has relied on a case, C. A. No. 672 of 1939, decided on January 17, 1940, by Broomfield and Macklin, JJ., *Lachmandas Tulshiram v. Buckingham and Carnatic Co., Ltd.* in which my learned brother and myself held that an appellate side Bench of this Court has power under s. 24 of the Code to transfer a suit pending on the original side of the High Court for trial to a Court in the *mofussil*. In coming to that conclusion we were partly influenced by the fact that there was a precedent, whereas in this case no precedent has been referred to, and we were also impressed by the circumstance that it is at least doubtful whether a Judge on the original side would have power to make the order of transfer which we were asked to make under s. 24. It is unnecessary, however, to

(1) 44 B 283; 53 Ind. Cas. 518; A I R 1920 Bom. 296; 21 Bom. L R 963.

(2) 57 B 364; 143 Ind. Cas. 806; A I R 1933 Bom. 85; 35 Bom. L R 15; Ind. Rul. (1933) Bom. 285.

decide whether we have or have not jurisdiction to make the order which we are asked to make in the present case, because we are quite satisfied that even if we have jurisdiction, we ought not to exercise it. We consider that the proper and convenient procedure is that the application should be made on the original side to the Judge trying the suit, and we apprehend that all sorts of difficulties might arise if applications of this kind were to be entertained on the appellate side. For these reasons we discharge the rule with costs.

s.

Rule discharged.

CALCUTTA HIGH COURT

Civil Rule No. 757 of 1939

April 12, 1940

B. K. MUKHERJEA AND MOHAMMAD

AKRAM, JJ.

Babu DHIRENDRA NATH ROY

—LANDLORD—PETITIONER

versus

IJJETALI MIAH, AUCTION-PURCHASER

AND OTHERS—OPPOSITE

PARTY.

Bengal Tenancy Act (VIII of 1885), ss. 26-J, 188 (1) (i)—Recovery of transfer-fee by landlord must be by application—Rights under s. 26-J accrued before its repeal—If can be enforced by application under s. 26-J read with s. 188 (1) (i) even after their repeal—Bengal General Clauses Act (I of 1899), ss. 8, (8) (e)—Words “instituted, continued or enforced” in s. 8 (e), interpretation—S. 8, construction of—Rights in respect of transactions completed prior to repeal saved—Remedies in respect of such rights are also saved—Interpretation of Statutes—Enactment altering procedure, if retrospective.

The recovery of the balance of transfer fees by the landlord must be by an application and not by a suit.

[Case-law relied on.]

A right acquired by the landlord under s. 26 (J) of the old Ben. Ten. Act to recover the balance of landlord's fees and compensation before the repeal of the section by Act VI of 1938, can be enforced by an application under s. 26-J read with s. 188 (1) (i) even after the repeal of those sections. 186 Ind. Cas. 349 (7), approved, 186 Ind. Cas. 589 (10), distinguished.

The words “instituted, continued or enforced” in s. 8, cl. (e), Ben. General Clauses Act are to be taken with each of the words “investigation, legal proceeding or remedy” so far as they seem to be appropriate.

Section 8, Ben. General Clauses Act contemplates a case where the repealing enactment repeals a substantive right as well as the procedure by which it was enforced, and in such cases if the rights are saved in respect of transactions completed prior to the repealing of the statute, the remedies in respect of such rights as laid down in the repealed statute are also saved and the litigant can institute or continue proceedings in the same way for the enforcement of his rights as if the

repealing Act had not come into force. *In re Hale's Patent* (9), referred to.

Where an enactment merely alters the procedure, without altering the substantive rights of the parties, the new procedure would be retrospective in its operation, and would extend to rights which had accrued before the changes were made.

C. Rule issued from an order of the Second Court, Munsif, Jhenidah (Jessore), dated March 27, 1939.

Messrs. Hemendra Chandra Sen and Sailendra Nath Mitra (Jr.), for the Petitioner.

Syed Farhat Ali, for the Opposite Party.

B. K. Mukherjea, J.—This rule is directed against an order of the Munsif, Second Court, Jhenidah made in a proceeding under s. 26-J, Ben. Ten. Act. The petitioner before us is the landlord and there was an occupancy holding owned by opposite parties Nos. 2 to 7 who held the same as tenants under the petitioner. A two-thirds share of this holding was put up to sale in execution of a money decree obtained by a creditor against the tenants and it was purchased by opposite party No. 1. In the sale certificate the holding was incorrectly described as *mokarari* and on that footing the purchaser deposited only Re. 1 as landlord's fee. Notice of the sale was served upon the petitioner under s. 26 (E), Ben. Ten. Act, on January 12, 1937. On August 24, 1938, the petitioner applied to the Munsif, Second Court, Jhenidah for recovery of the balance of landlord's fee together with compensation under s. 26 (J), Ben. Ten. Act, as it stood prior to its being repealed by the amending Act in 1938. The amending Act came into force on August 18, 1939, just six days before the application was presented. The Munsif was of opinion that the petitioner had the right to recover the balance of landlord's fees, but his remedy lay in a suit and not by an application under s. 26 (J), Ben. Ten. Act, which was repealed by Act VI of 1938 and was not in existence at the date when the application was made. It is against this order that the present rule has been obtained. It is not seriously disputed before us that the petitioner acquired the right under s. 26 (J) of the old Act to recover the balance of landlord's fees and compensation from opposite party No. 1 as as soon as the holding was sold with an erroneous description that it was a *mukarari* tenancy, and a corresponding liability was imposed upon the purchaser at the same time to pay the money. Section 26-J stood repealed on and from August 18, 1938, but there is nothing in the repealing Act which would show that the Legislature intended to

take away or impair any vested right that had already accrued under the repealed section. The question that has been pressed for our consideration is, whether the remedy by way of an application was still open to the landlord, or was he bound to enforce his right by means of a regular suit?

Section 26-J, as it stood before Act VI of 1938 was passed, simply defined the rights of the landlord to recover the balance of landlord's fees, and compensation in cases when an occupancy holding was sold with a false description that it was a permanent tenure or a holding at fixed rates. The section itself did not indicate as to how the right was to be enforced, and if the matter stood there, in my opinion, the conclusion would have been irresistible that the remedy lay in an ordinary suit instituted under the provisions of the Civil P. C. The Legislature however while enumerating the acts which the law authorizes co-sharer landlords to do, either acting together or by an agent definitely spoke of an application under s. 26-J; Ben. Ten. Act. This provided or rather implied that the remedy of the landlord lay in an application and it was held in several decisions of this Court that the recovery of the balance of transfer fees by the landlord must be by an application and not by a suit: *vide Aghore Chandra Jalui v. Rajnandini Debi* (1), *Muhammad Ismail v. Lal Mia* (2) and *Mahaluxmi Bank Ltd. v. Abdul Khaleque* (3). These decisions I think could be supported on principle. It was Act IV of 1928, which for the first time created the right in favour of the landlord, and if the Act itself provided as to how the right could be enforced, the remedy should be deemed to be exclusive, and the ordinary right of suit must be held to be barred. As Lord Tenterden, C. J., observed in *Doe d. Bishop of Rochester v. Bridges* (4), at p. 859:

"Where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner. If an obligation is created, but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case."

The same principle was enunciated by Wills, J. in *Wolverhampton New Water-works Co. v. Hawkesford* (5) and was fol-

(1) 36 C W N 924; 141 Ind. Cas. 842; A I R 1933 Cal. 283; 60 C 289; 58 C L J 484; Ind. Rul. (1933) Cal. 185.

(2) 37 C W N 917; 148 Ind. Cas. 14; A I R 1933 Cal. 784; 6 R C 458 (1).

(3) 43 C W N 1046.

(4) (1831) 1 B & Ad. 847 (859); 9 L J K B 1113; 35 R R 483.

(5) (1859) 6 C B (N s) 336; 28 L J C P 242; 5 Jur. (N s) 1104; 7 W R 464; 120 R R 151.

lowed by the Judicial Committee in *Attorney-General of Trinidad and Tobago v. Gordon Grant & Co.*, (6). Now both s. 26-J as well as s. 188, I (1) have been repealed by Act VI of 1938, and if the right which arose under the old law is not affected by the repealing statute, the question arises as to how the right could be enforced, after the repealing enactment came into force. Mr. Sen argues that the remedy provided by the old Act was still applicable under s. 8, Ben. General Clauses Act, I of 1899, and in support of his contention he relies upon a decision of S. K. Ghose, J. in *Rajendra Nath Nag v. Ashalata Debi* (7), s. 8, General Clauses Act (Bengal) runs as follows:

"Where this Act, or any Ben. Act, made after the commencement of this Act repeals any enactment hitherto made or hereafter to be made, then unless a different intention appears, the repeal shall not—

(c) affect any right, privilege, obligation or liability acquired, accrued, or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed."

Mr. Sen argues that as the right which arose under s. 26 (J) of the old Ben. Ten. Act is not affected by the repealing Act, any legal proceeding or any remedy in respect of such right is also not affected, and under the provision of the last clause in the section any such legal proceeding may be instituted, as if the old law was still in force. It has been argued on the other hand by Mr. Farhat Ali, who appears for the opposite party, that cl. (e) as well as the subsequent provision in s. 8 cannot apply to suits or proceedings which were started after the old Act was repealed. They refer only to pending litigations. He invites us to hold that the expressions 'instituted, continued, or enforced' occurring in the last clause of the section are to be taken distributively and should be predicated respectively of the words 'investigation, legal proceeding, or remedy' mentioned at the beginning of the section; and they should not be read with each of the preceding words. Any other construction, it is said, would offend the well known principle of law that nobody has a vested right in any particular form of procedure. This contention, though seemingly

(6) (1935) A C 532; 153 L T 441; 104 L J P C 82.

(7) 43 C W N 948; 186 Ind. Cas. 349; A I R 1940 Cal. 86; 1 L R (1939) 2 Cal. 346; 12 R C 471.

plausible, does not appear to me to be sound. The effect of this construction would be to limit the section unduly, which is not warranted by the express language used by the Legislature. Clause (e) of s. 8 relates to investigation, legal proceeding, or remedy in respect of a right which is preserved under cl. (c), and cl. (d) refers to any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed. The last clause combines both these matters, and from the distribution of verbs, as has been made by the Legislature itself, it would appear that whereas investigation, legal proceeding, or remedy could be instituted, continued or enforced, the penalty, forfeiture or punishment could be 'imposed' as if the repealing Act had not been passed.

In my opinion, these words "instituted, continued or enforced" are to be taken with each of the words "investigation, legal proceeding or remedy" so far as they seem to be appropriate. If the strict interpretation suggested by the learned Advocate for the opposite party is accepted, the result would be that whereas a suit could only be continued and not instituted after the repealing Act is passed, an investigation on the other hand could be started, but not continued after the old law has been repealed. I am also not impressed by the argument that the word "investigation" here refers to a proceeding which is not judicial in its character. It is strenuously argued on behalf of the opposite party that if under s. 8, Ben. General Clauses Act, a suit is allowed to be instituted as provided for under the old law, even after that law is repealed, it would amount to giving a litigant a vested right in the procedure also; whereas it is an established principle that all changes in the procedure are normally retrospective. This contention, in my opinion, seems to be entirely misconceived. Where an enactment merely alters the procedure, without altering the substantive rights of the parties, the new procedure would be retrospective in its operation, and would extend to rights which had accrued before the changes were made. As was observed by Lord Blackburn in *Gardner v. Lucas* (8), at p. 603 :

"It is perfectly settled that if the Legislature intended to frame a new procedure that, instead of proceeding in this form or that, you should proceed in another and a different way; clearly then bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be."

(8) (1878) 3 A C 582, (603).

In other words, if a statute deals merely with the procedure in an action, and does not affect the rights of the parties, the new procedure will *prima facie* apply to all such proceedings as well as future. (Craies on Statute Law, p. 337). Section 8, Ben. General Clauses Act, in my opinion, does not contemplate a case where the procedure only is changed leaving the rights of the parties intact. Clauses (c) and (e) of the section go together. Clause (e) refers only to the remedial rights which arise in connection with substantive rights which are repealed by the new enactment but are saved under cl. (c). In other words s. 8 contemplates a case where the repealing enactment repeals a substantive right as well as the procedure by which it was enforced, and in such cases if the rights are saved in respect of transactions completed prior to the repealing of the statute, the remedies in respect of such rights as laid down in the repealed statute are also saved and the litigant can institute or continue proceedings in the same way for the enforcement of his rights as if the repealing Act had not come into force. This, I believe, is the true interpretation to be put upon the provision of s. 8, Ben. General Clauses Act. This section is almost a reproduction of s. 38 of the English Interpretation Act of 1889, and the principle embodied in the last clause is quite in accordance with what has been laid down in well known English cases.

In *In re Hales Patent* (9) there was a dispute regarding compensation to be paid for the use of a certain patent by the Govt. Department. Under the Patents and Designs Act of 1907 such dispute was to be settled by the Treasury. By the Act of 1919 the Court was substituted for the Treasury for the purpose of determining and settling such disputes. Hale, the appellant in the case, made the application before the Court after the new Act was passed but it was held that the applicant's proper remedy lay in presenting his application to the Treasury, as was provided in the Act of 1907. Sargeant, J., observed as follows :

"No doubt the general law is that, while rights are not statutorily altered retrospectively, procedure is, apart from indications to the contrary, altered retrospectively; but where rights and procedure are dealt with together in the way in which s. 8 of the Act of 1919 deals with them, the intention of the Legislature would seem fairly clear—namely that the old rights are still to be determined by the old tribunal under the Act of 1907, and that only the new rights under the substituted section are to be dealt with by the tribunal thereby substituted for the Treasury."

In the present case the rights of the peti-

(9) (1920) 2 Ch. 377; 37 R P O 171; 64 S J 714; 36 T L R 832.

tioner in the matter of recovery of landlord's fees, when the holding was sold under a false description, as well as the procedure for enforcing the rights were dealt with together in the old Act and as they have both been repealed and as the right is saved in respect of antecedent transactions under cl. (c) of s. 8, General Clauses Act, the remedy in my opinion, is also saved under cl. (c); and as the landlord had the right of presenting the application under s. 26-J of the old Act read with s. 188-I (i) I hold that the same remedy is still open to the landlord even after the passing of the amending Act of 1938. In my opinion, the decision of S. K. Ghose, J. in *Rajendra Nath Nag v. Ashalata Debi* (7), is correct. The decision in *Profulla Chandra v. Raj Mohan Das* (10) which has been relied on by the opposite party refers to a proceeding under s. 26-F, Ben. Ten. Act, and is not directly in point. The result, therefore, is that this Rule is made absolute. The order of the Munsif, Second Court, Jhenidah, is set aside and the case is sent back to him in order that the application may be heard and decided on points other than those dealt with in his order. As the petitioner was guilty of inordinate delay in making the application, I make no order as to costs in this Court.

Mohammad Akram, J.—I agree.

s. *Rule made absolute.*

(10) 43 C W N 1172; 186 Ind. Cas. 589; A I R 1940 Cal. 81; 12 R C 502.

MADRAS HIGH COURT

Appeal No. 17 of 1937

January 15, 1940

WADSWORTH AND PATANJALI SASTRI, JJ.

RM. L. M. L. V. ALAGAMAI ACHI

AND ANOTHER—APPELLANTS

versus

VR. PR. M. PALANIAPPA CHETTIAR

AND ANOTHER—RESPONDENTS

Hindu Law—Joint family—Business—Junior co-parcener participating in conduct of business—His personal liability—Whether extends to antecedent transaction—Principle of ratification, applicability of—Rule of estoppel, if can give rise to partnership quod general public—Personal liability of junior co-parcener, if can be based on that ground.

The whole question whether a co-parcener who takes part in the conduct of the family business is personally liable, and, if so, on what legal basis, is essentially one of fact depending for its decision upon the nature and extent of participation as disclosed by the evidence in the particular case. If what the junior member is shown to have done in relation to the business is nothing more than what can reasonably be attributed to his interest in the business as a member of the family, there will be no legitimate inference that he intended to undertake a greater liability as a partner in the busi-

ness and consequently no question of personal liability can arise. On the other hand, if the part taken by such member in the management of the business goes beyond what can be sufficiently explained by his interest in it as an asset of the family, as for instance, when he joins in borrowing for the purposes of the business, it may afford ground for the conclusion that he has become a partner so as to be personally answerable for all the debts incurred in the course of the business including those which he did not join in borrowing. Without such definite and unequivocal consensual acts, no partnership relation between members of a joint family can be implied from participation, however, active, in the conduct of the family business, a position which has received additional emphasis from the provisions of s. 5, Partnership Act. But such liability does not extend, in either case, to antecedent transactions. 49 Ind. Cas. 220 (1) and *Bala Venkata Sitarama Chettiar v. Sivagurunatha Chettiar* (3), discussed, 179 Ind. Cas. 308 (4), relied on, 98 Ind. Cas. 257 (5), referred to.

In holding a junior member of a family personally liable for a contract purporting to have been entered into by the manager on the ground of ratification, it is important to bear in mind that the doctrine presupposes ability to adopt or repudiate the transaction in question and cannot properly be applied for this reason to dealings or transactions which under the Hindu Law the co-parceners are powerless to disown, so long as they continue to remain in the joint family, unless it can be shown that the manager pledged the individual credit of the junior co-parceners at the time when he received the deposits in question and that the junior co-parceners having come to know of the transaction accepted or acquiesced in it. 174 Ind. Cas. 308 (4) and *Chalamayya v. Varadayya* (6), explained. [p. 517, col. 1.]

The rule of estoppel can only preclude proof of facts against individuals actually misled. It cannot give rise to a partnership quod the general public in the case of a joint Hindu family and hence the junior members participating in the conduct of the family business cannot be personally liable merely on that ground. 162 Ind. Cas. 371 (2), not approved. [p. 516, col. 1.]

A. against the decree of the Sub-Judge, Sivaganga, dated August 1, 1936.

Mr. K. S. Sankara Ayyar, for the Appellants.

Mr. N. G. Krishna Aiyangar, for the Respondents.

Patanjali Sastri, J.—This appeal arises out of a suit brought by the appellant for recovery of Rs. 5,982-14-9 from defendants Nos. 1 to 3 personally and from the family properties of all the defendants. Defendant No. 1 is the father of defendants Nos. 2 to 4, and defendant No. 5 is the son of defendant No. 1's deceased brother. The defendants constitute a joint Hindu family of which defendant No. 1 is the manager. The defendants are Nattukottai Chetties and were carrying money-lending and banking business under their family vilasam VR. PL. M. at Rangoon and other places in Burma. The amount claimed is said to be the *stridhana* money of plaintiff No. 1 deposited by her father, plaintiff No. 2 with defendant No. 1.

The Court below decreed the claim against defendant No. 1 personally and against the family properties of all the defendants as it was a debt contracted by defendant No. 1 in the course of the family business. Not satisfied with this decree, the plaintiffs have appealed claiming a personal decree also against defendants Nos. 2 and 3, the respondents herein, and the only question for decision relates to their personal liability.

Such liability is said to arise on the ground that, as sons of defendant No. 1, they were managing the family business jointly with him and must, by virtue of such participation in management, be deemed to have become partners. A special ground of liability was also urged so far as respondent No. 1 was concerned, namely that he had expressly undertaken to pay the debt personally in certain letters written by him to appellant No. 2. The learned Subordinate Judge found that all that was established by the appellants was that respondent No. 1 was managing the business under a power-of-attorney dated July 13, 1931 executed in his favour by his father for a period of three years thereafter; and that respondent No. 2 was writing the accounts of the firm for some time and held, on these findings, the respondents could not be said to have become partners or to have held themselves out as such, so as to be personally liable for the debts incurred in the course of the business. The learned Judge said nothing about the special ground urged as regards respondent No. 1, as the point was apparently not raised before him. Some criticism was directed against the finding that respondent No. 1 was managing the firm as under a power-of-attorney executed by defendant No. 1, and it was pointed out that the power-of-attorney was not produced by the respondents. We are not prepared to attach any importance to the non-production of the power as the appellant's own witness (P. W. No. 2) who was the agent of another Chettier firm in Rangoon which had dealings with the respondents' firm, admitted that respondent No. 1 was acting as under a power executed by his father when he was managing the family business in Burma. But this is not, in our view, a material circumstance, for, we are clearly of opinion that even if he managed the firm in his capacity as a junior member of the family interested in the business, no personal liability could arise by virtue of such management, in the circumstances of this case. For, the deposits to which the suit relates, were all made prior to December 10, 1924 and duly stamped vouchers evidencing the terms of the

deposits, including the final deposit letter (Ex. A, dated December 11, 1930) on which the suit was brought, were all executed from time to time only by defendant No. 1, before the respondents began to participate in the conduct of the business in 1931. Assuming, therefore, that the respondents must be deemed to have become partners or to have held themselves out as such in relation to the family business in Burma by reason of such participation, they could not, in our opinion, be held to be personally liable in respect of the pre-existing debts of the firm.

On the question of personal liability of junior members of a joint Hindu family for debts incurred in the course of family business on the ground of their participation in the conduct or management of it, the decisions of this Court, to go no further, have been neither clear nor uniform. In *Official Assignee of Madras v. Palaniappa Chetti* (1), it was held by Wallis, C. J., and Spencer, J. that the fact that the son had been assisting the father in the conduct of the business during his minority and had taken an active part in its management after attaining majority, did not make the son personally liable for obligations contracted during his minority, but that in respect of debts incurred since he attained majority such liability arose by reason of his conduct in taking an active part in the business. Both the learned Judges were of opinion that ss. 247 and 248, Contract Act, did not apply to the case, and based their conclusion apparently on the principles of Hindu Law. Sadasiva Ayyar, J. held that both by virtue of those sections and the rules of Hindu Law, the son was personally liable for all the debts of the business including those contracted during his minority. This extreme view has never been followed in this Court and may be left out of consideration. The other two learned Judges however have not clearly indicated on what legal basis personal liability in such a case rests—whether it is based on implied partnership or estoppel by holding out or ratification. In *Ramasami Chetty v. Srinivasa Ayyar* (2) the view is expressed that personal liability where it arises in such cases, rests on the doctrine of holding out and that, "a partnership from the point of view of the general public comes into existence."

It is however somewhat difficult to see how the rule of estoppel which can only

(1) 41 M. 824; 49 Ind. Cas. 220; A. I. R. 1919 Mad. 690; 35 M. L. J. 473; 24 M. L. T. 216; 8 L. W. 530; (1918) M. W. N. 721.

(2) 70 M. L. J. 214; 162 Ind. Cas. 371; A. I. R. 1936 Mad. 94; (1936) M. W. N. 134; 43 L. W. 437; 8 R. M. 982.

preclude proof of facts against individuals actually misled, can give rise to a partnership quod the general public. On the other hand, in *Bala Venkata Sitarama Chettiar v. Sivagurunatha Chettiar* (3), it was thought that according to the majority view in *Official Assignee of Madras v. Palaniappa Chetti* (1),

"unless they (*i. e.*, the junior members of the family) were partners, they cannot be made personally liable for the debts of the business,"

and the case was sent down to the lower Court for a finding on that point. That Court having found that the junior members had taken an active part in the management of the family business, the case came up again before Coutts-Trotter, C. J. and Ramesam, J. who however would seem to repudiate the doctrine of personal liability of a co-parcener arising out of an active participation in the family business, and refused to hold the junior members personally liable in the absence of

"any other evidence of a consensual act whereby a definite new relation other than that of members of a joint Hindu family trading together was created: *Bala Venkata Sitarama Chettiar v. Sivagurunatha Chettiar* (3)."

It seems to us however that this divergence of opinion is more apparent than real, for we venture to think that the whole question whether a co-parcener who takes part in the conduct of the family business is personally liable, and, if so, on what legal basis, is essentially one of fact depending for its decision upon the nature and extent of participation as disclosed by the evidence in the particular case. If what the junior member is shown to have done in relation to the business is nothing more than what can reasonably be attributed to his interest in the business as a member of the family, there will be no legitimate inference that he intended to undertake a greater liability as a partner in the business. This is all, as it seems to us, that the learned Judges meant to affirm in the last mentioned case. On the other hand, if the part taken by such member in the management of the business goes beyond what can be sufficiently explained by his interest in it as an asset of the family, as for instance, when he joins in borrowing for the purposes of the business, it may afford ground for the conclusion that he has become a partner so as to be personally answerable for all the debts incurred in the course of the business including those which he did not join in borrowing. Without such definite and unequivocal consensual acts, no

(3) (1930) M W N 371.

partnership relation between members of a joint family can, in our opinion, be implied from participation, however active, in the conduct of the family business, a position which has received additional emphasis from the provisions of s. 5, Partnership Act, which postulate the possibility of members of a joint family carrying on the family business without becoming partners therein in the legal sense of the term. Again, the part taken by a junior member, while it may not be sufficient to justify an inference of partnership, may be such as to lead others to act on the belief that he is a partner, in which case the member will be precluded by the principle of estoppel from showing as against the person misled that he (the member) is not in fact a partner. Thus, in each case, the question is, as it seems to us, what is the proper inference to be drawn from the facts proved; and as pointed out by Varadachariar, J. in *Alagappa Chettiar v. Bank of Chettinad* (4) at p. 954, the extent of the personal liability incurred by the member will vary according as it is found to arise on the one ground or the other. But what is important for the purpose of this appeal is, that such liability does not extend, in either case, to antecedent transactions. As observed by the same learned Judge in the case referred to above:

"If the liability, to be based on the doctrine of holding out it is obvious that such liability can arise only in respect of transactions subsequently entered into and on the faith of his conduct. Even if it should be held that by such participation the co-parcener becomes a partner in the business, it seems to us unreasonable to hold that he thereby incurs a personal liability in respect of the pre-existing debts of the business."

See also *Russa Engineering Works v. Kanara Transport* (5). The appellants next relied on the following observations in *Chalamayya v. Varadayya* (6) at p. 167:

"No doubt where it is shown that the contract relied on, though purporting to have been entered into by the manager only, is in reality one to which the other co-parceners are actual contracting parties either because they had agreed, before the contract was entered into, to be personally bound thereby, or because they, being in existence at the date of the contract and competent to enter into it, have subsequently duly ratified and adopted it, in that case unquestionably every such co-parcener is absolutely responsible. Equally he would be responsible though he did not assent to the particular contract if there had been such acquiescence on his part in the course of dealings, in which the particular contract was entered into, as to warrant his being treated in the manner as a contracting party."

(4) (1938) 2 M L J 944 (954); 179 Ind. Cas. 308; A I R 1939 Mad. 6; 48 L W 707; (1938) M W N 1194; 11 R M 565.

(5) 49 M 930; 98 Ind. Cas. 257; A I R 1926 Mad. 1138; 51 M L J 506; (1926) M W N 825; 24 L W 546.

(6) 22 M 166 (167); 9 M L J 3.

Appellants accordingly urged that the respondents must be taken by reason of their participation in the business to have "ratified and adopted" even the antecedent transactions in the business including the suit deposit and that, in any case, there has been such "acquiescence" on the part of the respondents in the course of the dealings had by the father as to warrant the respondents being regarded as contracting parties themselves in respect of the suit deposit. Our attention was also drawn to the approval by Varadachariar, J. at pp. 955 and 956 of *Alagappa Chettiar v. Bank of Chettinad* (4), already referred to, of the observations in *Chalamayya v. Varayya* (6) quoted above. There is nothing in those observations which need arouse any dissent, for they do no more than envisage the possible application of the general principle of ratification by adoption or acquiescence to this class of cases. The principle itself is simple and well known, but the difficulty arises, as with so many other principles, in the application. In holding a junior member of a family personally liable for a contract purporting to have been entered into by the manager on the ground of ratification, it is important to bear in mind that the doctrine pre-supposes ability to adopt or repudiate the transaction in question and cannot properly be applied for this reason to dealings or transactions which under the Hindu Law the co-parceners are powerless to disown, so long as they continue to remain in the joint family. As pointed out in the very case in which these observations occur, when

"the contract is of a character such as under the Hindu Law entitle the manager to enter into *independently of the consent of the other members of the family so as to bind them thereby*, then it is clear that the scope of the manager's power is restricted to and does not extend beyond the family property (italics ours)."

It would be wholly subversive of this well-established rule of Hindu Law to hold that a co-parcener is personally liable on the ground of ratification by acquiescence for the dealings of the manager in the ordinary course of family business. If it had been shown in this case that defendant No. 1 pledged the individual credit the respondents at the time when he received the deposits in question and that the respondents having come to know of the transaction accepted or acquiesced in it, it might be possible to hold them personally bound on the principle of ratification; but nothing of the kind has been proved or even suggested in this case. We have therefore no hesitation in rejecting this contention.

It remains to consider the special ground of liability urged with reference to respondent No. 1, namely a personal undertaking to pay in consideration of the appellants' forbearance to sue. Reliance was placed upon Exs. J., J-2 and D to show that when appellant No. 2 demanded the money and threatened to sue, respondent No. 1 wanted time for payment promising to pay the debt personally and that in consequence the filing of the suit was delayed for over a year. We are unable however to read these letters as containing any undertaking by respondent No. 1 to pay the debt due to the appellants personally. The letters merely explained why there was delay in the payment of the debt and gave an assurance that as soon as conditions of trade improved, arrangement would be made to pay up the debt.

Though written by respondent No. 1, the letters bore only the family vilasam VR. PL. M. and were signed with an invocation of the family deity, the mode usually adopted for signing family letters in accordance with the practice prevailing among Nattukottai Chetties. The letters are thus consistent with respondent No. 1 having merely affirmed the pre-existing liability of the family such as it was, and contain no indication of his having undertaken any additional or extended liability for the debt. Nor is there any definite request in any of them for grant of time for payment. The suit was, no doubt, brought more than a year after the latest of them, namely Ex. D, but it does not appear that this delay was due to the appellants' having granted any time for payment. Appellant No. 2 who was examined as P. W. No. 1 does not say that time was granted in compliance with the request of respondent No. 1; nor was such a thing suggested in the cross-examination of respondent No. 1. On the other hand, the allegations in para. 7 of the plaint that "On several dates after the said date (that is after Ex. D) both personally and through agents demands were made on the defendants and a demand was made lastly on June 30, 1934, all to no purpose," are plainly destructive of any such suggestion. The appeal fails and is dismissed with costs.

N.-D.

Appeal dismissed.

LAHORE HIGH COURT

Letters Patent Appeal No. 158 of 1939

March 28, 1940

TEK CHAND AND DALIP SINGH, JJ.

JAGAT SINGH AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

DISTRICT BOARD, AMRITSAR—

DEFENDANT—RESPONDENT

Easement—Punjab—Licensee acting on license building works of permanent character—License, if can be revoked at option of licensor even on payment of compensation.

If the licensee acting upon the permission granted, has executed a work of a permanent character, and has incurred expenses in its execution it is not open to the licensor to revoke the license at his option and resume the land even on offer of compensation. This rule being in consonance with equity, justice and good conscience should be given effect to in provinces like the Punjab, where the Easements Act is not in force. 186 Ind. Cas. 890, affirmed.

[Case-law discussed.]

L. P. A. from the judgment of Mr. Justice Bhide, Reported in 186 Ind. Cas. 890.

Mr. Barkat Ali, for the Appellants.

Mr. Kishan Chand, for the Respondent.

Tek Chand, J.—This appeal has arisen from a suit for possession of 3 *kanals* and 19 *marlas* of land in *Mauza Raya*, District Amritsar, instituted by the plaintiff-appellant against the respondent, the District Board of Amritsar. It was alleged in the plaint that the plaintiffs are the owners of the land, that 11 years ago they had given it temporarily to the District Board, Amritsar, for the purposes of an agricultural farm attached to the Board School at Raya on the condition that they would be entitled to resume possession at their option, at any time they liked. They averred that they required the land for their own purposes and had demanded possession from the District Board but the latter had refused to surrender it. The defendant Board resisted the suit on various grounds. It was denied that the land had been given temporarily to the defendant and could be resumed by the plaintiffs at their pleasure. On the other hand, it was pleaded that the plaintiffs had gifted the land to the Board for the purpose of an agricultural miniature farm attached to the school. It was further alleged that in order to make the land fit for use as a farm the Board had spent large sums of money on constructions of a permanent character including a well, boundary wall and a *pucca* gate and that the plaintiffs never objected to these constructions and, therefore, they were estopped from maintaining the suit.

The trial Judge held that the land had not been given temporarily to the defendant

but there was an out-and-out gift for the purpose of starting a miniature farm, and that as the land was being used by the defendant for that purpose the plaintiffs were not entitled to recover possession at their pleasure. He also held that the plaintiffs were estopped from maintaining the present suit. On these findings he dismissed the suit. On appeal, the learned Senior Sub-Judge concurred with the trial Judge in holding that there was a permanent gift and so long as the school at Raya continued and used the land in question for the farm, or for purposes akin to it, it could keep the land. He accordingly dismissed the appeal.

On second appeal to this Court, the learned Single Judge found that in finding that there was an out-and-out gift the Courts below had ignored important evidence on the record and had misread the depositions of some witnesses. He, therefore, held that this finding was not conclusive. He accordingly, examined the evidence himself and came to the conclusion that there was no out-and-out gift, but the plaintiffs had retained the ownership in themselves and had granted permission to the District Board to occupy the land and use it for the purposes of the school. He held that this possession was in the nature of a 'license' as defined in s. 52, Easements Act. He further found that though such a license is ordinarily revocable but it is not so if the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in its execution, as laid down in s. 60 of the Act. As the District Board had sunk a well on this land and erected compound walls, which were works of a permanent character, the learned Judge came to the conclusion that the Board was not liable to be ejected on account of the undertaking given by the plaintiffs that they would not claim the land so long as it was required for the school and also on account of works of a permanent character having been executed by the Board acting on that promise. In the result, he dismissed the appeal, leaving the parties to bear their own costs. He, however, granted a certificate to the plaintiffs for a further appeal under cl. 10 of the Letters Patent.

Before us, Counsel for the defendant-respondents challenged the finding of the learned Judge on the merits and contended that the transfer was in the nature of an out-and-out gift. After hearing him, however, I can find no force in this contention, and agree with the learned Judge that the grant was in the nature of a license, as defined in s. 52, Easements Act. The main contention

raised by Mr. Barkat Ali on behalf of the plaintiff-appellants is that the Indian Easements Act is not in force in the Punjab and, therefore, the rule laid down in s. 60 is not applicable, and that in this province the rule of English Law should be followed, according to which even where the licensee, acting on the license, has executed works of a permanent character, the licensor is entitled to revoke the license and recover possession of the land on payment of compensation to the licensee for the expenditure incurred by him in executing these works. In support of this contention the learned Counsel relied upon *Wood v. Leadbitter* (1), and three Calcutta cases, to which I shall refer presently. In *Wood v. Leadbitter* (1), the facts were materially different and the decision does not really touch the point before us. There, the licensor, on receipt of money, had allowed the plaintiff to go to a stand in his enclosure and witness the races; the plaintiff had gone to the enclosure but was asked to leave and on his refusal to do so was forcibly ejected; and he brought an action for assault and false imprisonment. The case was decided primarily on the ground that according to the law, as administered in England at the time (1845), the right to come and remain for a certain time on the land of another could only be granted by deed; and that a parol license to do so, though money had been paid for it, was revocable at any time and without paying back the money.

This common law doctrine, however, was not allowed to prevail in equity; and ever since the Judicature Act the Courts in England have been giving effect to equitable considerations, and *Wood v. Leadbitter* (1), has not been followed in its integrity: see the judgment of Lindley, L. J. in *Hurst v. Picture Theatres, Ltd.* (2) (at pp. 6 to 10) and *Lowe v. Adams* (3) see also Gale on Easements (Edn. 11), pp. 69 and 70. Further in *Wood v. Leadbitter* (1) a distinction was drawn between what is called a "naked license" and a "license coupled with a grant." Alderson B., who delivered the judgment in that case, observed at pp. 844 and 845*:

"A mere license is revocable, but that which is called a license is something more than a license; it often comprises or is connected with a grant, and then the party who has given it cannot in

(1) (1845) 13 M & W 838; 14 L J. Ex. 161; 9 Jur. 187; 67 R R 831.

(2) (1915) 1 K B 1 (6-10); 83 L J K B 1837; 111 L T 972; 30 T L R 642; 58 S J 739.

(3) (1901) 2 Ch. D 598; 70 L J Ch. 783; 85 L T 195; 50 W R 37; 17 T L R 763.

general revoke it so as to defect the grant, to which it was incident."

It cannot be said that in the case before us the license was a mere "naked" license. The case cited, however, does not deal with the principle underlying s. 60, Easements Act, and, therefore, it is not necessary to discuss it further. That principle appears to be based on equitable considerations and is really an application of the rule of estoppel to the case of a licensor, and I have not been able to find anything in English Law, to the contrary. Indeed, the following passage from Goddard on Easements (Edn. 8) p. 529 sums up the English Law in words, which are almost identical with s. 60 of the Indian Act:

"A license is also irrevocable if the licensee acting upon the permission granted, has executed a work of a permanent character, and has incurred expenses in its execution. This rule of law seems to be based upon the injustice which would be inflicted upon the licensee if, after he had laid out money and executed a permanent work, the licensor were permitted to revoke his licence and make him waste the money expended, or if he ever allowed to treat him as a wrongdoer and recover damages for the very act for which he gave permission."

Of the three Calcutta cases cited by Mr. Barkat Ali *Prosonna Coomar v. Ram Coomar* (4) is clearly distinguishable, as in that case no work of a permanent character had been executed; the plaintiff had merely been given the right to go to a corner of the defendants' land and use it as a privy and, following *Wood v. Leadbitter* (1) it was held that this being a "naked license" to use the land of the defendant, not coupled with a grant, was revocable at the will of the licensor, subject to the right of the licensee to damages if revoked contrary to the terms of any express or implied contract. The other two cases certainly support Mr. Barkat Ali's contention and have the high authority of Sir Asutosh Mookerjee behind them. In *Surnomoyee Peshakar v. Chunder Kumar Das* (5) it was observed that where a licensee acting upon the license has executed works of a permanent character and has incurred expenses in their construction, the grantor of the license is entitled to revoke it, if he makes compensation to the licensee for the loss he may incur by reason of the revocation of the license. The learned Judge based this conclusion upon certain English authorities, mentioned therein. This view was reiterated by the same learned Judge in *Moti Lal Rai v. Kalu Mondar* (6) (at p. 323). But as pointed out by Sulaiman, C. J. in

(4) 16 C 640.

(5) 12 C L J 443; 8 Ind. Cas. 793.

(6) 19 C L J 321 (323); 19 Ind. Cas. 853; A I R 1914 Cal. 173.

Mathuri v. Bhola Nath, 149 Ind. Cas. 389 (7) (at p. 391) the rule has been expressed in too wide terms in these Calcutta cases and is not supported by the English decisions cited therein. In one of these cases, *Plimmer v. Mayor, Councillors, etc. of Wellington* (8) the license was held to be irrevocable and the compensation actually granted to the licensor was not for revoking the license but for acquisition of certain other interests which he held in the land.

Similarly, in *Rochdale Canal Co. v. King* (9) the Court gave full effect to the rule of estoppel and refused to the licensor the injunction asked for, as he had acquiesced in the construction of costly works by the licensee. The decision in *Bankart v. Tenant* (10) turned on its peculiar facts and it was held on the evidence that the undertaking given by the licensor did not form the foundation of an equitable right and therefore neither an injunction nor compensation was granted. In *Winter v. Brockwell* (11) an action in a case for nuisance was dismissed, as the license executed was held to be not countermandable, though it was remarked *obiter* that after the licensee had incurred expenses the license could not be recalled "at least not without putting him in the same position as before, by offering to pay all the expenses which had been incurred in consequence of it." No compensation was, however, actually granted and the verdict was entered for the defendant. Again in *Liggins v. Inge* (12) in an action for tort it was held that the license was not countermandable and injunction was refused: it does not appear from the judgment that compensation was in fact granted. The last case referred to is *Aidin v. Latimer Clark Muirhead and Co.* (13) in which a parol license by a lessor to the lessee to open ventilators in the walls of a building demised by the lease was held to be revocable, and on the lessor closing the ventilators, the lessee's action for injunction to restrain the obstruction was dismissed, but an enquiry was ordered to ascertain the amount of damage (if any) which he had suffered by reason

of the obstruction. In the judgment emphasis was laid on the circumstances that the license was not by deed but was parol and *Wood v. Leadbitter* (1) was followed the authority of which (as already stated) has since been shaken, so far as the particular matter is concerned.

In England, the present rule is as expressed in the passage from Goddard on Easements reproduced above and is substantially the same as that contained in s. 60, Easements Act. This rule being in consonance with equity, justice and good conscience should be given effect to in provinces like the Punjab, where the Act is not in force. This was done by Sulaiman, C. J. in *Mathuri v. Bhola Nath*, 149 Ind. Cas. 387 (7) in a case in which the license had been granted before the Easements Act was extended to the United Provinces and by the Judicial Commissioner of Central Provinces in *Dayaram v. Deorao*, 94 Ind. Cas. 923 (14) to a case from Berar where the Act is not in force. The contention of the learned Counsel for the appellant is without force and must be repelled. It is not denied that the land in dispute is being actually used by the District Board for the purpose for which it was given. It is also proved that more than ten years ago the defendant, acting on this license had sunk a well, erected a boundary wall and a pucca gate at considerable cost. These are works of a permanent character and therefore applying the rule laid down above, it is not open to the appellants to revoke the license at their option, and resume the land on offer of payment of compensation. I would accordingly affirm the judgment of the learned Judge and dismiss the appeal, but having regard to all the circumstances I would leave the parties to bear their own costs throughout.

Dalip Singh, J.—I agree.

D.

Appeal dismissed.

(14) 94 Ind. Cas. 923 (2); A I R 1926 Nag. 376; 22 N L R 162.

ALLAHABAD HIGH COURT

First Appeal No. 31 of 1936

November 22, 1940

BRAUND, J.

UJAGAR LAL AND OTHERS—PLAINTIFFS

—APPELLANTS

versus

BAHADUR LOKENDRA SINGH

AND ANOTHER—DEFENDANTS—RESPONDENTS

Transfer of Property Act (IV of 1882). ss. 58, 67—Remedy by way of foreclosure, if applicable to anomalous mortgage—Mortgage—Anomalous or by

(7) 149 Ind. Cas. 389 (398); A I R 1934 All. 517; 56 A 975; (1934) A L J 698; 6 R A 897; 1934 A L R 590.

(8) (1884) 9 A C 699; 53 L J P Q 104; 51 L T 475; 49 J P 116.

(9) (1853) 16 Beav. 630; 22 L J Ch. 604; 17 Jur. 1001; 96 R R 288.

(10) (1870) 10 Eq. 141; 39 L J Ch. 809; 23 L T 137; 18 W R 639.

(11) (1807) 8 East 308; 9 R R 454.

(12) (1831) 7 Bing. 682; 5 Moore & Payne 712; 9 L J C P 202; 33 R R 615.

(13) 1894 2 Ch. 427; 63 L J Ch. 601; 8 R 352; 71 L T 119; 42 W R 453.

conditional sale—Test to determine — Mortgage held anomalous — Civil Procedure Code (Act V of 1908), O. XXXIV, r. 4 (3) — Anomalous mortgage—Mortgagee's choice of remedy between sale and foreclosure — Discretion of Court in this respect.

The remedy by way of foreclosure is not exclusive to a mortgage by conditional sale. It is equally applicable to an anomalous mortgage.

The test whether a particular document is a mortgage by conditional sale or is some other kind of mortgage, is not what the parties have said it is, but is rather whether it fulfils those statutory requirements which the Legislature has laid down. The parties can call it by whatever name they like, but that will not make it a mortgage of a particular kind, unless it complies with the requirements of such a mortgage as defined by the Act. [p. 522, col. 2.]

A mortgage-deed stated that the property was mortgaged without possession. There was a covenant to pay interest, then a covenant to pay the principal and the accumulated compound interest, "at the stipulated period", that is, at the end of the period of five years, thirdly, a provision that the mortgagors were not to be entitled to redeem earlier than at the expiration of the five years, and finally it provided.....that in case of non-payment of the entire amount of principal, interest, and compound interest the mortgagees would after the expiry of the stipulated period, have power to obtain proprietary possession of the entire property mortgaged by bringing a suit for a decree for foreclosure and that the mortgagors would not have any objection thereto:

Held, that the mortgage was not a mortgage by conditional sale but an anomalous mortgage.

There is in O. XXXIV, r. 4 (3), a perfectly clear statutory provision that in the case of an anomalous mortgage the mortgagee's choice of remedy, between a sale and foreclosure, is to be subject to the discretion of the Court. This discretion, as every other discretion vested in a Court must be exercised judicially and not arbitrarily. The consideration that it is open to a mortgagee, where a sale is ordered, to bid for it and purchase it himself, a good deal enlarges the scope of a Judge's discretion. [p. 523, cols. 1 & 2.]

F. A. from a decision of the Second Sub-Judge, Cawnpore, dated February 12, 1935.

Messrs. N. P. Asthana and B. N. Sahai, for the Appellants.

Mr. M. L. Chaturvedi, for the Respondents.

Judgment.—This is a first appeal arising out of a mortgage suit of a quite simple character. The suit was by certain plaintiffs suing as mortgagees to enforce their security against two defendants, who were mortgagors. The result of the suit was that the plaintiffs were given the usual preliminary mortgage decree for sale, and the only contest in this appeal is whether, instead of having a preliminary decree for sale, they are entitled to have as they desire, a decree for foreclosure. I find that this very simple suit has been pending for over seven years. The mortgagees started this endeavour to get this money back by instituting this suit on September 7, 1933, and they paid, as the

price of the justice that they hoped to get, a not inconsiderable court-fee of Rs. 1,470. They obtained their decree for sale on February 3, 1935, and it has taken till now a period of nearly six years for the matter to come in first appeal to this Court. The facts are that, on August 31, 1925, the defendants executed the mortgage in question. In view of the fact that the principal question in this appeal is whether this document constitutes a mortgage by conditional sale, as the plaintiffs contend, or an anomalous mortgage, as the defendants contend, I must look closely at its terms. The mortgage begins by reciting the title of the mortgagors, and then goes on to say :

"Now we have, of our own accord and free will while in a sound state of mind and without any undue influence mortgaged without possession the entire 'zamin-dari' property specified below.....to the extent of one-half, for a period of five years, for Rs. 30,000 of the King's coin....."

There then follow certain covenants, the first covenant to pay interest, then a covenant to pay the principal and the accumulated compound interest, "at the stipulated period," that is to say, at the end of the period of five years, thirdly, a provision that the mortgagors were not to be entitled to redeem earlier than at the expiration of the five years, and finally it goes on in these terms :

".....that in case of non-payment of the entire amount at principal, interest, and compound interest the mortgagees shall, after the expiry of the stipulated period, have power to obtain proprietary possession of the entire property mortgaged by bringing a suit for a decree for foreclosure and that we shall not have any objection thereto....."

The document then concludes with an attestation clause in these words :

"We have therefore executed this simple mortgage deed carrying interest by conditional sale so that it may serve as evidence and be of use when needed."

I should say that the word "simple" does not appear in the original before the words "mortgage deed". The amount due for principal and interest, at the date of the institution of the suit, was apparently Rs. 42,000, and at the date of judgment, as the learned Judge says, was approximately Rs. 45,000. There is no contest upon the facts, and the point which has taken nearly six years to bring an appeal to this Court is a very simple one, whether the plaintiffs are entitled to insist upon a decree for foreclosure, instead of the decree for sale, which they have obtained. This question turns primarily upon whether the mortgage is a mortgage by conditional sale, or whether it is an anomalous mortgage. If it is a mortgage by conditional sale, then it must be

conceded that the plaintiffs are entitled to insist upon a decree for foreclosure and that they cannot, by any means, be prevented from obtaining it. If, however, this is not a mortgage by conditional sale but an anomalous mortgage, then it would appear, for reasons with which I shall deal in a moment, that it is open to the Court in its discretion to give a mortgagee-plaintiff either a decree for foreclosure or a decree for sale. In this case, the learned Judge in the Court below has found that the mortgage was an anomalous mortgage and, in the exercise of his discretion, he has further determined that the plaintiffs' proper remedy is by a decree for sale and not by a decree for foreclosure. The first thing to consider therefore is whether the learned Judge is right in the conclusion he has arrived at that this is an anomalous mortgage. A mortgage by conditional sale is described in s. 58 (c), T. P. Act, 1882. That section says :

"(c) Where the mortgagor ostensibly sells the mortgaged property—

on condition that on default of payment of the mortgage money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale."

An anomalous mortgage is defined by s. 58 (g) as a mortgage which is not a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, an English mortgage or a mortgage by deposit of title deeds within the meaning of that section. I agree with the learned Judge in thinking that this, upon the face of the mortgage, has not the characteristics of a mortgage by conditional sale. The first question we have to ask in the terms of s. 58 (c) is, whether by the deed the mortgagor 'ostensibly sells' the mortgaged property. Looking at this deed, there is not, to my mind, a trace of a sale about it from beginning to end. The word 'sale' is not mentioned, but, on the contrary, it is said that the property is 'mortgaged without possession.' There is, to my mind, nothing, and *a fortiori*, nothing 'ostensible', in this deed to indicate that there is in contemplation a sale of any kind, whether conditional or not, to the mortgagees. Nor is there any single one of the three conditions set out in s. 58 (c) to be found in this mortgage. The only condition covering the event of default of payment of the mortgage money, which is one of the events contemplated by s. 58 (c), is that the mortgagee shall have power to

obtain proprietary possession of the entire property by bringing a suit for a decree for foreclosure. That is, I think, a long way from a condition that, to use the words of s. 58 (c), "the sale shall become absolute." In my view, on the face of this deed it is not a mortgage by conditional sale.

But then two things are said by the appellants. It is said that the Court is not entitled to go behind the description of the deed, which the parties themselves have provided, in what I have described as the attestation clause, which is set out above. The parties themselves have described it as a "mortgage deed.....by conditional sale....." This is perfectly true and is a perfectly legitimate comment. But, in my view, the test whether a particular document is a mortgage by conditional sale or is some other kind of mortgage, is not what the parties have said it is, but is rather whether it fulfils those statutory requirements which the Legislature has laid down. The parties can call it by whatever name they like, but that will not make it a mortgage of a particular kind, unless it complies with the requirements of such a mortgage as defined by the Act. The second thing that is said, is that the provision, to which I have already drawn attention, allowing the mortgagee, upon a default in payment of the principal and interest at the expiration of the stipulated period, to obtain proprietary possession by bringing a suit for foreclosure points strongly to the conclusion that the mortgage is a mortgage by conditional sale. I do not think that that is so. The remedy by way of foreclosure is not exclusive to a mortgage by conditional sale. It is equally applicable to an anomalous mortgage, and, indeed, if we turn to s. 67, T. P. Act, we find it is stipulated that an anomalous mortgage must contain a provision for foreclosure in order to allow a mortgagee under such a mortgage to obtain a decree for foreclosure. That shows, quite clearly, that the remedy by way of foreclosure is well known in the case of an anomalous mortgage, and is, in no way, peculiar to a mortgage by conditional sale. It seems to me therefore that the force of this second contention is greatly lessened.

It is not suggested that, if this mortgage is not a mortgage by conditional sale, it can be any other form of mortgage than an anomalous mortgage. I have come to the conclusion that it is not a mortgage by conditional sale, and it must, therefore, be an anomalous mortgage. That disposes of the first point in the case. But even upon this finding, it was well within the rights of the

plaintiffs to come to the Court and ask for a decree for foreclosure. They possessed an anomalous mortgage, and that mortgage, by its very terms, gave them the power to foreclose. They were, therefore, under s. 67 (a), T. P. Act, 1882, entitled to institute a suit for foreclosure. And that they did. That, however, is not the end of the matter, because of O. XXXIV, r. 4, sub-r. (3). By this it is provided as follows :

"(3) In a suit for foreclosure in the case of an anomalous 'mortgage,'—that is, this case—'if the plaintiff' succeeds, the Court may, at the instance of any party to the suit or of any other person interested in the mortgage security or the right of redemption, pass a like decree (in lieu of a decree for foreclosure) that is to say, a decree for sale on such terms as it thinks fit, including the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of the sale and to secure the performance of the terms."

The learned Judge, in reliance upon that rule, has declined to give a decree for foreclosure. He says, in effect, that the value of the security is at least Rs. 65,000, and that the amount charged on it is only Rs. 45,000 at the most. He considers therefore that if the plaintiffs are allowed, as they want to do to foreclose, they will "get an unfair advantage", and therefore he gives them a decree for sale. The appellants say before me that, in any case, this is wrong, because they were entitled to have the form of relief which they themselves chose; and the learned Judge ought not to have interfered with that right. The only difficulty in this case, which I have experienced, is upon this aspect of the matter. I am a strong believer in the principle that, if a man lends money to another upon a particular security, he is entitled to the full fruits of that security, and all the remedies under it, whatever they may be, and that it is not, as a rule, for the defendant to be heard to complain of the very bargain which he was willing to submit to at the time he was in need of, and borrowed, the money. But that general view of the sanctity of contract must yield to any statutory provision to the contrary, and we find, I think, in O. XXXIV, r. 4 (3), a perfectly clear statutory provision that in the case of an anomalous mortgage the mortgagee's choice of remedy, between a sale and foreclosure is to be subject to the discretion of the Court. That is a statutory limitation of the Court. That is a statutory limitation upon what I should otherwise have regarded as a salutary principle. The only difficulty is to determine upon what principles the Court should exercise the discretion with which it is vested. It goes without saying that this discretion, as every other discretion vested in a Court, must be exercised judicially and not arbitra-

rily. The question is upon what judicial principles a discretion such as this should be exercised. Now, it is possibly worth observing that O. XXXIV, r. 4, sub-r. (3) is so far as this discretion is concerned, in very much the same terms as s. 25, English Conveyancing Act of 1881. The relevant sub-section of that section says :

"(2).....in any action.....the Court.....may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit, including, if it thinks fit, deposit in Court of a reasonable sum fixed by the Court, to meet the expenses of sale and to secure performance of the terms."

It is possibly therefore relevant to look and see upon what principles English Courts of Equity have chosen between the remedy by way of foreclosure and the remedy by way of sale. In *Hurst v. Hurst* (1), the Master of the Rolls, Sir John Romilly, says :

"The next question is with respect to the sale of the estate. I apprehend that the statute, enabling the Court to direct a sale, intended to give the Court a very considerable discretion, in order to avoid the great delay and expense which is occasioned by foreclosure and redemption in a case where there is great number of successive mortgages ; and the Court will, upon the terms and according to the directions contained in the section, exercise that power in such a manner as not to operate injuriously or oppressively on any person interested....."

And he goes on to point out that in a case in which a sale could take place as beneficially and profitably to the parties concerned as a foreclosure, then it would be a proper thing to exercise the discretionary power to order a sale. In *Heath v. Crealock* (2), Lord Cairns says :

"The next objection made to the decree was on the score that in place of ordering a foreclosure it ordered a sale. It appears to me that under the recent Act of Parliament, it is within the discretion of the Court in a mortgage suit whether a foreclosure or a sale shall be ordered; but a sale is not to be ordered as of course. There may be cases of complication where a sale is eminently desirable, and there may be cases where, by reason of there being little or no complication or for other reasons a sale ought not to be ordered by this Court. It is sufficient for me to say that in this case there appear to be no special reasons on the one hand why a sale ought to be ordered and on the other hand there is at least one very special reason why it ought not...."

It has always been recognized, I think, that where the security is deficient or where it is a matter of speculation whether it is sufficient or deficient a mortgagee will not be deprived of his remedy by way of foreclosure if he prefers it. That is a principle to be found, I think, in *Merchant Banking Co., of London v. London and Hanseatic Bank* (3). There, Chitty, J. says :

(1) (1852) 16 Beav 372; 22 L J Ch. 538; 1 W R 105; 96 R R 179.

(2) (1875) 10 Ch. A 22; 44 L J Ch. 157; 31 L T 650.

(3) (1886) 55 L J Ch. 479.

"Section 25, sub-s. (2) of the Conveyancing Act, 1881, no doubt confers upon the Court a discretionary power; but it is a discretion which must be exercised judicially. Where the question of value is merely speculative, it is not just that the rights of first mortgagees should be postponed to a speculative sale at the instance of second mortgagees."

It appears to me that it makes no difference in principle whether it is a second mortgagee, or a mortgagor, who objects to the foreclosure :

"If a sale were ordered, the reserved price would be fixed at an amount which would cover the first mortgage and costs; and if no bid were made, the market value of the property would be depreciated by the knowledge that there had been an abortive attempt to sell it. Therefore, were the Court to direct a sale, the plaintiff's rights might be seriously prejudiced. The plaintiffs have satisfied me as to the insufficiency of their security."

And he goes on to say that a mere speculation that in a year or two the property may increase in value is no reason for depriving a mortgagee of his right to foreclose. Those are the principles, I think, so far as the English Law goes. They may be summarized possibly very simply by saying that the Court has a wide discretion, that it must be exercised judicially, and that it will be exercised in any case in which for a proper reason foreclosure is not in the interests of the parties or in which as a matter of practical business, a sale is clearly indicated as the more desirable course. I have been a little tempted to take the view in the present case that, had I been dealing with the matter in the first instance, I should have hesitated to deprive the mortgagee of what after all is one of his *prima facie* rights, merely because there is a margin—and not an overwhelming margin—between what is due on the mortgage and the estimated value of the security. But there is, I think, one further consideration to be borne in mind, which is peculiar to India. That is, that it is open to a mortgagee, where a sale is ordered to bid for it and purchase it himself. That, of course, is not open to an English mortgagee. And, it appears to me to make a considerable difference. One of two things must happen on a sale; either the property will be sold for sufficient or more than sufficient to cover the principal, interest and costs due on the mortgage, or else, it will be sold for less than is sufficient to do so. In the former case, the mortgagee will have nothing to complain of, because he will get back everything that is due to him. In the latter case, it is always open to him to purchase himself, and to set off, *pro tanto*, the amount of the purchase money against what is due to him on the mortgage. In other words, he could, in that event, get the very thing that

he is seeking by foreclosure, the only difference being that he gets it at a cheaper price.

It appears to me therefore that this is a consideration which a good deal enlarges the scope of a Judge's discretion in this country. It appears to me to deprive a mortgagee of an argument that he might otherwise have had, to the effect that he was not entirely satisfied that he would get his money back by means of a sale, and preferred not to take the risk, but to endeavour to get his money back over a longer period by taking possession of the property by foreclosure. The learned Judge appears to have exercised his discretion in this case, and to have exercised it judicially. He has based it upon the ground that there is every probability that the mortgagee will get his money back by means of the sale. It is true that there is no actual professional evidence as to what the value of the property is, and that it is merely estimated upon a conservative basis. It would have been better, perhaps, if there had been actual evidence of the market value of the property. But the estimate that the learned Judge has made has not been challenged in this Court. For all these reasons, I do not think it right to interfere with the exercise by the learned Judge of his discretion, and I shall, accordingly, dismiss this appeal with costs.

S,

Appeal dismissed.

LAHORE HIGH COURT

Second Appeal No. 1967 of 1939

March 26, 1940

ABDUL RASHID, J.

NIDHAN SINGH AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

PREM SINGH—PLAINTIFF—

RESPONDENT

Civil Procedure Code (Act V of 1908), O. II, r. 2—Mortgage-deed providing that mortgagee could secure payment of principal and interest by bringing mortgaged property to sale or he could secure payment of interest and compound interest by bringing separate suit thereafter—Suit by mortgagee for interest and decree obtained—His second suit for principal and interest, if barred.

A mortgage-deed provided as under—".....It would be open to the mortgagee at his will to secure payment of the principal together with the balance of interest by bringing the mortgaged property to sale at any time. It would be open to the mortgagee to let the interest accumulate till the time provided by law for payment, or to obtain the payment of interest and compound interest by bringing a separate suit. In this contingency the principal mortgage amount shall remain secured on the mortgaged property." So far as the payment of interest

and compound interest was concerned, no reference was made to the mortgaged property in this clause. The mortgagee instituted a suit for interest only and got a decree. Subsequently he brought another suit for principal and interest :

Held, that the subsequent suit was not barred under O. II, r. 2, Civil P. C., since the first suit was based on a cause of action distinct from the second. 65 Ind. Cas. 79 (1), distinguished. 72 Ind. Cas. 187 (2), *Yashwant v. Vithal* (3) and 91 Ind. Cas. 403 (4), relied on.

Held, also as the mortgage-deed contained a separate personal covenant for the payment of interest and compound interest, such a covenant could not be ignored simply because in the previous suit this stipulation in the mortgage deed was not made the basis of the claim.

S. A. from the decree of the Additional District Judge, Ferozepore, dated August 30, 1939.

Mr. Dwarka Nath Aggarwal, for the Appellants.

Mr. Mela Ram, for the Respondent.

Judgment.—The suit, which has given rise to the present appeal, was instituted on August 31, 1933, for recovery of Rs. 630 on the basis of a mortgage deed. On November 8, 1932, the defendants, Nidhan Singh and Hardit Singh, had executed a registered mortgage deed (Ex. P-2) in favour of Prem Singh, plaintiff, for a sum of Rs. 510, in respect of a house. The following passage from the mortgage deed may be reproduced *in extenso* :

"The conditions are that the mortgaged house shall remain in possession of the mortgagors. The mortgage debt shall bear interest at Re. 1-9-0 per cent. per mensem. If we, the mortgagors, do not pay interest every year, we will be liable for compound interest..... It would be open to the mortgagee at his will to secure payment of the principal together with the balance of interest by bringing the mortgaged property to sale at any time. It would be open to the mortgagee to let the interest accumulate till the time provided by law for payment, or to obtain the payment of interest and compound interest by bringing a separate suit. In this contingency the principal mortgage amount shall remain secured on the mortgaged property. If any amount on account of principal or interest is still due after the sale of the mortgaged property, the other property and the person of the mortgagors shall be liable for this amount."

On August 28, 1936, the mortgagee sued the mortgagors for Rs. 236, consisting of interest and compound interest due from November 8, 1932, till August 25, 1936. It was prayed in this suit that a decree for Rs. 236 may be awarded to the plaintiff on the security of the mortgaged house. This suit was decreed, and it was provided in the decree that the mortgaged house shall be brought to sale in execution of the decree. The mortgagors, however, deposited the amount in Court soon after the final decree, and the mortgaged property was not brought to sale. The present suit was resisted by

the defendants on the ground that it was barred under the provisions of O. II, r. 2, Civil P. C. This contention was accepted by the trial Court and the plaintiff's suit was dismissed. On appeal the plaintiff was granted a decree for Rs. 510 by the learned Additional District Judge on the basis of the mortgage dated November 8, 1932. Against this decision the defendants have preferred a second appeal to this Court, while cross-objections in the sum of Rs. 120 have been preferred on behalf of the plaintiff.

It was contended by Mr. D. N. Aggarwal, for the appellants, that on August 28, 1936, when the plaintiff filed the previous suit for a sum of Rs. 236, he was entitled to claim the entire principal amount as well as interest. As he sued for the interest only, he cannot now be allowed to bring a separate suit for the principal amount. It was urged by the learned Counsel that under O. II, r. 2, it is incumbent on the plaintiff to include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action in a single suit; and that he cannot split the relief due to him on one cause of action into two suits. If he chooses to include only a part of the cause of action in the first suit, he is not entitled to bring another suit for any relief that may be due to him in respect of the cause of action on which the first suit was based. The learned Counsel contended that it was clearly stated in the Explanation to r. 2 O. II, Civil P. C., that an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action. According to the learned Counsel, the claim for Rs. 236 on account of interest and the present claim for Rs. 630 were successive claims in respect of one and the same cause of action, and as both of these claims were not included in the first suit, no second suit is competent with respect to the second claim, that is the sum of Rs. 630, consisting of Rs. 510 as the principal mortgage debt and Rs. 120 as interest thereon.

Reliance was placed in this connection on a ruling of their Lordship of the Privy Council reported in *Muhammad Hafiz v. Mirza Muhammad Zakariya* (1). In that case a simple mortgage executed in 1910 provided by cl. 2 that the interest should

(1) 44 A 121; 65 Ind. Cas. 79; A I R 1922 P C 23; 49 I A 9; 20 A L J 17; 26 C W N 297; (1922) M W N 89; 35 C L J 126; 42 M L J 248; 15 L W 377; 24 Bom. L R 341; 30 M L T 224; 3 P L T 279; 1 P W R 1922 (P C).

be paid monthly; and that if it was not paid for six months the mortgagee could realize either the unpaid interest only, or both the principal and interest, by bringing a suit, without waiting for the expiration of the time provided for repayment of the principal; by cl. 7 it was provided that if the principal and interest were not paid within three years, the mortgagee could sue for principal and interest, together with incidental expenses. In 1914 the mortgagee sued in respect of the interest due and obtained a decree. In 1915 he brought a second suit in respect of the principal and the interest then due. In these circumstances, it was held that the second suit could not be maintained, having regard to the provisions of O. II, r. 2, Civil P.C. In this case it was observed by their Lordships that when the first suit was instituted the cause of action was the default in the payment of interest. The same cause of action entitled the plaintiff to claim as the principal also. At the date of the institution of the first suit it was open to the plaintiff to claim principal and interest and as he failed to claim the principal, he was not entitled to claim it in a subsequent suit, because the cause of action was the default which formed the foundation of both the suits.

The learned Counsel for the appellants also relied on *Kishan Narain v. Pala Mal* (2). It was held in this case that if a mortgage deed provides for the payment of principal and interest as independent obligations, O. II, r. 2, Civil P. C., 1908, does not preclude the mortgagee from suing to recover the principal by reason of his having previously sued for a personal decree for the interest due. But in the case of a mortgage deed which upon a default in the payment of interest gives the mortgagee the right to realize both the principal and interest, if, upon such a default occurring, the mortgagee sues to realize the interest from the property, the rule above referred to precludes him from afterwards suing to realize the principal due, even if by his plaint in the first suit he has purported to reserve the right to do so. In my opinion, on a proper construction of the mortgage deed in the present suit, both the Privy Council rulings alluded to above are clearly distinguishable. In the first instance, the mortgage deed provides that the mortgagee can at any time secure payment of principal and interest by bring-

ing the mortgaged property to sale. In the second place, it provides that if interest is not paid then the mortgagee can either allow the interest to accumulate for a period of 12 years, or he can secure payment of the interest and compound interest by bringing a separate suit therefor. So far as the payment of interest and compound interest is concerned, no reference is made to the mortgaged property in this clause of the deed. It appears to me, therefore, that the parties intended that the mortgagee would have the option to secure payment of the interest separately irrespective of the mortgaged property. If he chooses this alternative, only the principal amount will thereafter remain as a charge on the property mortgaged. The following observations from the judgment of their Lordships of the Privy Council in *Kishan Narain v. Pala Mal* (2), at p. 36* are of great importance:

"It does not appear to their Lordships that if the mortgage had provided, as mortgages always do in this country, for an independent obligation to pay the principal and the interest, that in a suit brought to obtain a personal judgment in respect of the interest alone the rule (O. II, r. 2) would have prevented a subsequent claim for payment of the principal. In such a case the cause of action would have been distinct. The matter is, however, different if the non-payment of the interest causes the principal money to become due, as in that case the cause of action, the non-payment of the interest, gives rise to two forms of relief which the Code provides shall not be split."

In the present case the cause of action, so far as the first suit is concerned, was the non-payment of interest from November 8, 1932, till August 25, 1936. A separate remedy is provided for in the mortgage deed so far as this cause of action is concerned. The first suit, therefore, was based on a cause of action distinct from the one which forms the foundation of the present suit. Reference may be made in this connection to certain observations in *Yashvant v. Vithal* (3). In that case the mortgage deed contained a covenant to pay interest each year. It was held that this covenant was distinct from and independent of the claim of the mortgagee to recover the principal sum, and its performance was secured in a different manner. It was held that this covenant was similar to the covenant to pay interest which is inserted in well-drawn English mortgage deeds for the purpose of enabling the mortgagee to sue for overdue interest without calling in the principal after the date fixed for the payment of the latter. Similar observations were made by Krishnan, J. in *Sawmy Rao*

(2) 4 L 32; 72 Ind. Cas. 187; A I R 1922 P C 512; 50 I A 115; 44 M L J 123; 25 Bom. L R 220; 32 M L T 41; 27 C W N 802; 18 L W 341; 50 C 126; 6 P W R 1923; 9 O & A L R 488 (P C).

(3) 21 B 267.

*Page of 4 L.—[Ed.]

v. *Official Assignee, Madras* (4). A number of other rulings were quoted on behalf of the respondent by Mr. Mela Ram, such as *Par-meshri Das v. Fakeria* (5), *U. Po Naing v. Burma Oil Co. Ltd.*, (6), *Maung Kyin Pein v. Ma Pwa Me*, 64 Ind. Cas. 953 (7), but it is unnecessary to refer to them as they are clearly distinguishable: *Ganda Ram v. Shiva Nand Ganesh Das* (8), was also relied upon by Mr. Mela Ram.

The learned Counsel for the appellant also contended that as the previous suit had not been based by the mortgagee on any personal covenant embodied in the mortgage deed and as he had obtained a decree on the security of the mortgaged property, he was not entitled to institute the present suit again, asking for the sale of the property mortgaged for non-payment of the principal. In my opinion this contention is without any force. If the mortgage deed contains a separate personal covenant for the payment of interest and compound interest, such a covenant cannot be ignored simply because in the previous suit this stipulation in the mortgage deed was not made the basis of the claim. For the reasons given above, I hold that the present suit is not barred under the provisions of O. II, r. 2, Civil P. C. I accordingly dismiss this appeal with costs.

There is no force in the cross-objections. It is stated in the mortgage-deed that if a separate suit is brought by the mortgagee to secure payment of interest and compound interest, the principal mortgage amount shall remain secure. Rupees 510 being the principal mortgage amount, the learned District Judge was right in passing a decree in favour of the plaintiff only in the sum of Rs. 510. I accordingly dismiss the cross-objections also with costs.

D. *Appeal dismissed.*

(4) 48 M 703; 91 Ind. Cas. 403; A I R 1925 Mad. 1120; 49 M L J 474; 22 L W 17.

(5) 1 L 457; 59 Ind. Cas. 71; A I R 1920 Lah. 1; 56 P W R 1920; 2 Lah. L J 466 (F B).

(6) 7 R 157; 115 Ind. Cas. 705; A I R 1929 P C 108; 56 I A 140; 29 L W 690; 33 C W N 545; (1929) M W N 378; 31 Bom. L R 750; 49 C L J 527; Ind. Rul. (1929) P C 121 (P C).

(7) 64 Ind. Cas. 953; A I R 1922 UB 1; 4 U B R 62.

(8) A I R 1937 Lah. 757; 175 Ind. Cas. 853; 40 P L R 465; 11 R L 86.

MADRAS HIGH COURT

Referred Trial No. 114 and Criminal Appeals Nos. 469 and 470 of 1939

November 7, 1939

BURN AND MOCKETT, JJ.

In re KATTAMEEDI CHENNA REDDI
AND ANOTHER—PRISONERS

Criminal trial—Evidence—Medical witness giving

evidence relying on text-books—Value of—Identification—Value of—Murder—Sentence—Youth by itself, if reason for not passing death sentence—Evidence Act (I of 1872), s. 27—Duty of Police in recording statement of accused—Statement leading to discovery.

Where a medical witness gives evidence relying largely on statements in text-books as to the time of the death from the appearance of blisters on the dead body, the theoretical evidence of this description is not of value unless it is exhaustive with regard to all possible circumstances. [p. 528, col. 1.]

It is not illogical to say that the evidence of identification by itself might be unreliable, but that, when substantial evidence is added to it, the identification evidence assumes a totally different aspect. When therefore a man is identified as being one of three persons engaged in a murder and when that person states that a jewel produced by him from a hiding place came to his share, it is reasonable to hold that he was concerned in the murder in the absence of any explanation. [p. 532, col. 2.]

Youth by itself is not a reason why the Court should evade its duty of sentencing the accused to death especially in the case of a cruel murder. [p. 533, col. 1.]

The duty of the Police, if they desire to record a statement of the accused is to record it as given and to leave it to the Court to decide what evidence is admissible. 180 Ind. Cas. 590 (1), referred to. [p. 531, col. 1.]

It is the first statement of the accused to whomsoever made, that leads to the discovery of the fact, if a fact is discovered. 171 Ind. Cas. 245 (2), referred to. [p. 531, cols. 1 & 2.]

Messrs. C. Narasimhachariar and M. Ranganatha Sastri, for the Accused.

The Public Prosecutor, for the Crown.

Mockett, J.—Accused Nos. 1 and 2 together with one Guddi Peeran were charged before the learned Sessions Judge of Cuddappah with the murder on March 12, 1939, of a woman Golla Nagamma. Guddi Peeran who was accused No. 3 was acquitted; accused Nos. 1 and 2 were convicted and sentenced to death and they now appeal. The plan Ex. P indicates roughly the scene of Nagamma's death. She lives at Venkatapuram which is 2½ miles from Prodattur. On March 12, some time before midday, she was alive. P. W. No. 3, her husband, said that she gave him his food before he left for Prodattur, and P. W. No. 2, her sister, was with her in her house on that morning. Some time after noon she was found dead, having been throttled. There is no doubt whatever that she met her death at about midday on the 12th. No cross-examination was addressed to her sister, P. W. No. 2, or to her husband, P. W. No. 3, to suggest that the deceased had in fact met her death long before noon, on the 12th, even so early as late on the previous night. This aspect requires a passing reference because the Lady Sub-Assistant Surgeon, relying largely on statements in text-books, was inclined to say

that from the appearance of blisters on the body death must have taken place from 22 to 35 hours prior to her examination which was at 7 A.M. on the 13th. Even 22 hours before 7 A.M. when blisters were seen on the body would mean, if the doctor's premises are correct, that the woman was alive in the early hours of the 12th; and 36 hours before would mean that she met her death on the 11th.

Theoretical evidence of this description is not of value unless it is exhaustive with regard to all possible circumstances. This body had been left in a March sun from about noon to sundown on the 12th, if the prosecution story is correct, and all night in the open air. The text-books do not deal with circumstances such as these, but ordinary experience shows that in those circumstances decomposition sets in with great rapidity. It is notorious that bodies are burnt or buried in this country within a few hours of death. We should require the clearest possible evidence of the time when blisters appear under circumstances such as those before us in order to prefer the deductions based on such theories to the clearest evidence of the fact that this woman was alive late in the morning of the 12th. There is no question in our minds that she met her death at about noon on that day. It is clear also from the medical evidence that she was strangled. P. W. No. 2, Sayamma, claims to have witnessed Nagamma's death. She bears out P. W. No. 3, the husband, who says that he had gone to Prodattur on the morning of the 12th for work. P. W. No. 2's story proceeds as follows: The deceased was wearing, as was her custom, on her body gold *katlu*, gold *kantini gundulu*, gold *thalakulu*, gold *rettakadiyam*, gold *bendu kammalu*, gold upper ear-rings and silver *kala kadiyalu*. P. W. No. 2 took the buffaloes out leaving her sister in the house. She grazed the buffaloes, brought them back, collected the buffalo dung and stacked it. A little before noon she returned home and told her sister that she had stacked the collected buffalo dung near the palmyrah tope. The deceased left, bidding P. W. No. 2 to follow after she had her food. When she left the deceased was wearing the jewels mentioned.

After the meal P. W. No. 2 went to the scene and states that she saw accused No. 1 "accompanied by two strangers" throttling her sister. Her conduct was then just what one would expect of a little girl, namely, she became afraid and ran home and reported the matter to her aunt and three

other persons who have not been examined. There is however ample evidence on the record that this little girl at once reported to her aunt and told her what she had seen. P. W. No. 6, Chinna Bali, bears out the latter part of P. W. No. 2's statement. He says that P. W. No. 2 came crying and told P. W. No. 5 that accused No. 1 and two strangers were throttling and killing her sister. It is convenient to mention here that the examination-in-chief in this case does not appear to have been very satisfactory. The statement of P. W. No. 2 that she saw the accused accompanied by two strangers throttling her sister was obviously not an adequate recording of her evidence; but it is plain beyond doubt that she at once reported to her aunt in the hearing of others that all three were throttling her sister deceased, and no cross-examination was directed to suggest that the two strangers were not taking part.

It is obvious from the learned Judge's judgment who after all recorded the evidence that in the words of his judgment "there she (P. W. No. 2) saw the three accused in the act of throttling the deceased." P. W. No. 6 and others went to the scene and P. W. No. 6 at the request of P. W. No. 2, went to Prodattur to tell P. W. No. 3 and he found P. W. No. 3, told him and brought him back to the village. P. W. No. 2 identified two of the jewels—*kantini guntulu* and *bendu kammalu* after the accused's arrest. She says she was able to identify the *bendu kammalu* especially because there was a dent on one side of it due to her niece (the deceased's daughter) treading on it. There remained on the body the gold *thalukulu*, gold upper earrings and the silver *kala kadiyalu* and the other jewels were missing. It does not seem to us that any cross-examination was addressed to P. W. No. 2 to suggest that her identification of the jewels was faulty. It may be said that the cross-examination in the case of accused No. 1 was especially directed to suggest that she was swearing falsely owing to enmity against accused No. 1 and naturally her identification of accused Nos. 2 and 3 was questioned. It should be stated here that there was material on the record brought out by the defence suggesting that accused No. 1 had previously been involved in a case of theft, for it appears, according to Ex. 6, that the deceased had given information regarding this to the authorities and that as a result the village elders ordered the accused to pay Rs. 80 to Kondayya, the man from whom the jewels had been stolen.

The defence relies on this incident to suggest that it was for this reason that accused No. 1 has been implicated in this case. This was put directly to P. W. No. 3 in cross-examination. P. W. No. 3 received the news at about 4 p. m. from P. W. No. 6—it may be stated that some of the times are vague in this case—and he (P. W. No. 3) returned at once to Venkatapuram. He sent P. W. No. 11 to fetch the village Munsif who resides in Prodattur. P. W. No. 3 has been much criticised. His conduct is said to be remarkable. Why did he not when he received the news at Prodattur at once complain in Prodattur? And why did he go first to his village? The answer to all this is that it is unsafe to say what any man might or might not do on receiving the news that his wife had been strangled. It is at least safe to say that there is nothing remarkable in his at once going to where the body of his wife lay. The village Munsif states that he was informed (and it must have been at about 5 o'clock) by P. W. No. 5 whereupon he proceeded to the spot and examined P. W. No. 3 at the scene. He states that he recorded P. W. No. 3's statement but did not take his thumb impression. The reports Exs. D and D-1 were sent to the Sub-Magistrate and the Police. That by the Police was received at 10-20 p. m. and by the Sub-Magistrate at 1 a. m. P. W. No. 3 stated in his evidence that he gave a *dhava*—or complaint—to the village Munsif and that it was attested by five persons including P. W. No. 11, but the village Munsif states that no written complaint was given and P. W. No. 11 states he knows nothing about this *dhava*. On this the defence build the theory that a written *dhava* was given stating probably that persons other than the accused had committed the murder or that persons unknown had done it, that it has been destroyed after it was decided to foist this case on accused No. 1.

We entirely reject this theory. Exhibits D and D-1 were sent by 8 in the evening. They are consistent with the prosecution case as they name accused No. 1 and mentioned two strangers and give in detail the stolen jewels and that P. W. No. 2 saw what happened. It is extremely unlikely that the village Munsif was participating in the concoction of a false case. The evidence for the prosecution of many different people had been consistent throughout that this little girl at once identified accused No. 1 together with two strangers as the murderers. The real question in this case is whether the identification of P. W. No. 2 and that of other witnesses to

whom reference will be made taken with further evidence relating to dealings with these jewels by the accused, is sufficient as a whole to bring home the guilt for this crime. We accept the position that P. W. No. 2 reported in the manner she says she reported. We think there is no ground for supporting that this is a foisted case. It is quite possible that P. W. No. 3 has confused the statement he made to the Magistrate with the *dhava*. It must be remembered that at the time he must have been suffering from great mental distress and his memory may not be accurate. But we think the evidence of the Munsif P. W. No. 13 entirely disposes of a wholly concocted case. There is no cross-examination addressed to him, a Munsif of 23 years standing on which it can be said that he was a party, as he must presumably have been, to such a conspiracy.

The criticism that before sending his report he preferred to go to the spot does not, in our view, affect his credibility in any manner whatever. The report of the murder was second hand hearsay and there was nothing unreasonable under the circumstances in his deciding to verify the fact. That P. W. No. 2 immediately reported that she had seen accused No. 1 and two strangers murdering the deceased is borne out by P. Ws. Nos. 4, 5 and 6. P. W. No. 2 is the only eye witness who claims to have witnessed the murder, but other witnesses say they saw accused No. 1 and two strangers near by at or about the time. Those witnesses are P. Ws. Nos. 7, 8, 9 and 10, all villagers of Venkatapuram. They all claim to have seen the accused and two strangers in the neighbourhood of the scene of the crime shortly after about midday. P. W. No. 7 was in his mango *tope*. Accused No. 1 and two strangers, according to him, were going towards Prodattur coming from the west. Nagamma was murdered a little away to the west of this mango *tope*. At 1 p. m. the witness went home and learnt from P. Ws. Nos. 4 and 6 what had happened, whereupon the witness stated that accused No. 1 and two strangers had been seen by him going towards Prodattur. P. W. No. 4 was not asked whether P. W. No. 7 spoke to him and therefore, P. W. No. 7's statement to P. W. No. 4 should not have been admitted in evidence. This witness also claims to identify the jewels of the deceased. The witness states that he identified the three accused at an identification parade. It may be mentioned that this witness together with the other Venkatapuram witnesses was examined on the morning of March 13. The identification of the accused

and of the jewels by this witness was attacked by the defence.

As to the jewels, neither by the prosecution nor by the defence was the question as to how he was able to identify the jewels fully investigated. P. W. No. 8 was looking at his buffaloes in the neighbourhood and he tells the same story. Here again, the inadequacy of the examination-in-chief is apparent. This witness was allowed to give the effect of conversations between him and the villagers on his return, but the villagers were not asked about those conversations. P. W. No. 9 had gone to plough up the onions in his field. He too states that he saw the accused in Kalamalla Venka shown on the plan. He describes how they were occupied. P. W. No. 10 says he was grazing goats and actually saw accused No. 1 and two strangers. The evidence of these witnesses can be dealt with together. On the assumption that they are giving honest evidence, it is difficult to criticize the identification of accused No. 1 who belonged to the same village, but their identification of accused Nos. 2 and 3 is naturally vulnerable because they were strangers. The identification parade was held on March 17, in the morning. The conventional *mahazar*, Ex. Q was taken and signed by P. Ws. Nos. 21 and 22. This identification parade was attacked as identification parades invariably are. P. W. No. 21 says that the identifying witnesses had no opportunity to see accused Nos. 2 and 3 before identifying them when they were mixed up with about 40 persons. In cross-examination he said that the lock-up doors provided with iron bars had no shutters and that persons inside the lock up can be seen from the verandah. Apparently a number of persons interested in the case had come to Prodattur on the 16th and at that time accused Nos. 2 and 3 were in the lock up. The learned Judge on this says :

"It is seen from the evidence of P. W. No. 21 that persons from Venkatapuram had ample opportunities to see accused Nos. 2 and 3 in the Police lock up. No reliance can therefore be placed on the evidence of the identification."

It seems to us that that finding is not wholly justified, and does not accurately represent the evidence of P. W. No. 21. It would appear that, if his view is to be accepted, the only lock up in which persons intended for identification can be safely put is one without any bars or windows, which would hardly be possible in the climate of Madras. It does not follow that, because the witnesses might have seen the accused, they did in fact see him. However, the learned Judge took the view that the identification of accused

No. 3 was unsatisfactory in the absence of further evidence and acquitted accused No. 3. Reviewing the evidence so far as it stands, the position is that P. W. No. 2 claims to have seen the murder and she at once reported it to her aunt. P. Ws. Nos. 7 to 10 claim to have seen the accused in the neighbourhood of the scene of murder at about the time of the murder. So far as accused No. 3 was concerned, that is all the evidence, and the learned Sessions Judge thought that that evidence was insufficient to convict accused No. 3. There was however in the case of accused Nos. 1 and 2 further evidence. It is obvious that, if that evidence was accepted, the evidence of P. W. No. 2 must obviously be true and it is probable that the evidence of P. Ws. Nos. 7 to 10 was also true although, if they were untruthfully reinforcing the case, it does not follow that the evidence of P. W. No. 2 is untrue.

It will be remembered that two of the jewels missing from the body of the deceased woman were *katta kadiyam* and *bendu kammadu*, both of gold. P. W. No. 18, a shroff in Prodattur town, says that accused No. 1 came to his shop at about 3 o'clock on March 12, giving the name of Ganga Reddi and sold the above jewels for which he was paid Rs. 59-1-0 and his thumb impression taken in the account book. Exhibit F is the entry in the book and Ex. F-1 is the thumb impression. It is not denied that this thumb impression is that of accused No. 1. P. W. No. 18 says he melted the *katlu* and *kadayam* but retained the *kammalu* and that he sold the gold of the *katlu* and *kadayam* to one Venkatasami who was not examined. The Police four days later came with *panchayatdars*. Accused No. 1 pointed out P. W. No. 18 to the Police and at the request of the Police P. W. No. 18 produced the *kammalu*, M. O. No. 2. The date of Ex. F appears at the top of the page above another entry. It is mistakenly written as Sunday, *Bahula* 6, when it should be Sunday, *Bahula* 7. The correct date is the 6th, being March 11, but an examination of the account book shows that this mistake is a continuation of the same mistake which has been made earlier in the book and no significance can be attached to it.

This witness was vehemently attacked by the defence and the reasons for the attack may best be stated by the accused's answer to his evidence. It is a complete denial that he ever went to the shop. He states that the thumb impression was obtained from him under pressure at the Police Station by the Police who had taken the book of P. W. No.

18 for the purpose. The *kammalu* M. O. No. 2, is stated not to be that of the deceased at all but one bought from D. W. No. 1, a Prodattur shroff, who said that he himself sold this jewel to P. W. No. 18, on the 15th. It is a fact that Ex. 23, P. W. No. 1's book, shows a sale of *bendu kammalu*, corresponding precisely in weight to M. O. No. 2. It must be remembered that M. O. No. 2 was identified by P. W. No. 2, because it had a dent caused by a child treading on it. P. W. No. 3, also identified it. It has in fact got such a dent. It appears, and it is obviously a fact, that the accused made a statement to the Police which might well be admissible under s. 27, Evi. Act, and the statement was admitted by the Magistrate. The statement was made in the presence of *panchayatdars*, but it is obvious that this was not the first statement that had been made. A statement had been made to the Police which P. W. No. 20, had thought it wise to get repeated in the presence of *panchayatdars*.

It is obvious that the statement cannot be complete. It is remotely improbable that the accused said simply, "I and accused Nos. 2 and 3 removed the jewels from the person of the deceased" without any sort of initial narrative as to how he came to be where the deceased was, or whether the woman was alive or dead at the time. This is an example of the mutilation of a statement made by the accused person, due apparently to the Circle Inspector supposing that it was his duty to decide what evidence was admissible and what was not. The duty of the Police, if they desire to record a statement, is to record it as given and to leave it to the Court to decide what evidence is admissible. In *Public Prosecutor v. Subba Reddi* (1), this Court had condemned the practice of Police Officers giving not statements made to them in the first instance in evidence but statements made obviously for the second time before *panchayatdars*. Such statements have been held to be inadmissible. The result of the handling of this statement by the Police is that what probably was a simple and admissible statement under s. 27 must, in our opinion, be ruled out entirely for reasons which may be re-stated as follows: (1) that the statement is obviously incomplete and (2) that obviously what was stated by the accused was a repetition of something that he had previously said to a Police Officer. It is the first statement of the accused to whomsoever

made, that leads to the discovery of the fact if a fact is discovered.

The attention of the trial Judge may usefully be directed to the Full Bench decision of this High Court in *Athappa Goundan v. Emperor* (2). Excluding any statement by the first accused, there remains the fact, if true, that he pointed out P. W. No. 18 to the Police and that P. W. No. 18, stated that on the afternoon of the murder the accused sold to him M. O. No. 2, said to be the property of the deceased. It is most important to remember, when considering whether this story can be accepted, that on March 15, the date of Ex. 23, the Police had no idea that the first accused was supposed to have sold the *kammalu* to P. W. No. 18, because it was not until the next day, the 16th that he was brought to Prodattur having been arrested at Thumulur and on that day took the Police to P. W. No. 18. It is therefore incredible that the Police should be attempting to identify the accused with a jewel procured from D. W. No. 1, on March 15, when they did not know until the 16th of any connection between P. W. No. 18, and the accused. Evidence of this is based largely on the book of D. W. No. 1, and it is unquestionably remarkable that *kammalu* of precisely the same weight as that said to have been taken from the deceased's body is shown to have been sold on the 15th. But it is curious that D. W. No. 1, was never asked in chief to identify the *kammalu* at all; he was only asked by the Court. The book of D. W. No. 1, is not above suspicion. The explanation about the sheet corresponding to Ex. 23 being blank that it was the last day of the financial year is not very convincing. So far as the time of these events is concerned Ex. 23 is the first entry of the day on the 15th and the accused was arrested at 4-30 on that day at Tumulur. The theory of this jewel being foisted must in our opinion be rejected. The question arises, was M. O. No. 2 the property of the deceased? Its identification by those who are familiar with it, especially of the description of the dent on the side by P. W. No. 2, seems to us entirely satisfactory. P. W. No. 3's identification of both M. O. No. 1 and M. O. No. 2 was attacked.

The defence were driven to such criticisms as that P. W. No. 3 hesitated in his identification of M. O. No. 1 in the Magistrate's Court, a circumstance satisfactorily explained by him by the statement that he was much overcome with being confronted

(1) (1938) M W N 1118; 180 Ind. Cas. 590; A I R 1939 Mad. 15; 40 Cr. L J 433; 48 L W 780; 11 R M 728.

(2) I L R (1937) Mad. 695; 171 Ind. Cas. 245; A I R 1937 Mad. 618; 38 Cr. L J 1027; (1937) 2 M L J 60; (1937) M W N 442; 46 L W 152; 10 R M 321 (F B).

by his murdered wife's jewels, because that this woman was murdered there is no doubt. Another criticism was that P. W. No. 3 said that he did not know where his wife got the *kammalu* from and that she had told him that she bought it. But these criticisms entirely disappear in the face of the fact that the accused took the Police to P. W. No. 18, that there was a *kammalu* and that in P. W. No. 18's books was the thumb impression of the accused and that, as will later be shown, accused No. 2 revealed where M. O. No. 1 was hidden. The alternative, accepting those facts, is to suppose that the Police by some mysterious manner, having heard that a *kammalu* was in the possession of P. W. No. 18, thought fit to invent the story that the accused had taken it there, and having invented it obtained by force a thumb impression of the accused in the book of P. W. No. 18. If the Police had descended to this method surely it may be supposed that they would have ascertained the source of the foisted jewel and arranged that that source should be amenable to their wishes as well.

It is impossible for the defence in this case to avoid the argument that, beginning with the villagers and ending with the Police, there has been a conspiracy to convict accused No. 1 of a crime of which at least there is no evidence. The villagers are supposed to have selected him because he had been concerned in a robbery before and therefore he was the likely person to have committed the murder. This is a theory which at least requires consideration, but the learned Counsel for defence has been quite unable to suggest any explanation as to why, having selected accused No. 1 as the victim, the villagers have elected to complicate what would have been a relatively simple case by attaching to him two unidentified strangers. The only explanation suggested was that, as accused No. 1 was no more than seventeen, it was safer to associate others with him lest it be said that he was physically incapable alone of murdering the deceased. But why two other men should be introduced has never been explained especially as accused No. 3 was a Muhammadan. The defence have argued, and rightly argued, that the combination of accused No. 1, a Reddi, with accused No. 2 a Hindu of totally different caste and accused No. 3, a Muhammadan, is remarkable and improbable. It is certainly remarkable; but when considering the hypothesis of a carefully thought out false case the introduction of three such different persons as acting together is equally

unlikely. Then, so far as the foisting of the jewels is concerned, why should the Police, who could quite easily have 'planted' these jewels on the accused in a simple manner, involve themselves in a much more complicated transaction involving the assistance of a bazar shroff?

The evidence against accused No. 2 consists very largely of his conduct after arrest in relation to a jewel (M. O. No. 1) identified as the property of the deceased. It is not illogical to say that the evidence of identification by itself might be unreliable, but that when substantial evidence is added to it, the identification evidence assumes a totally different aspect. When P. Ws. Nos. 7 to 10 identified two unknown persons whom they had no particular reason to notice, it is permissible to doubt whether that identification can be trusted, but when those very people are found dealing with the jewels of the murdered person, it is reasonable to hold that they were making no mistake when they picked out the accused as the culprits. Accused No. 3 has of course been acquitted, but in the case of accused No. 2 there is evidence of the precise nature which we have indicated. After his arrest accused No. 2 told P. W. No. 23, the Sub-Inspector, that the *kantini gundulu* which came to the shares of accused Nos. 2 and 3 was concealed by him in the cattle shed of his uncle and that he would show it. Here again his statement is obviously shorn of much of its context, but there is no reason to suppose that any part of a statement made by accused No. 2 would have assisted the accused's case nor is it suggested that this was the case. Accused No. 2 thereupon took the Police Officer and the *panchayatdars* to his uncle and removed M. O. No. 1 from under a slab in the cattle shed.

We have been asked to say that what might have happened was that, after the murder, accused No. 2 in some way became possessed of this jewel and no hostile conclusion can be drawn from the statement. But when a man is identified as being one of three persons engaged in a murder and when that person states that a jewel produced by him from a hiding place came to his share, it is to put it no higher, reasonable to hold that he was concerned in the murder in the absence of any explanation. What explanation has been given by the accused? Accused No. 1, completely denied the offence and said that he was at a *jathra* in Kothapallee, Cuddappa taluk, where he had gone to stay in his maternal uncle's house three days prior to the occurrence, that after the *jathra* he

went to Tummalur to his relation's house where he was arrested, and that his revelation of P. W. No. 18, and his thumb impression in the witness's book, were induced by Police coercion. If that is so, he could have called witnesses to establish an impregnable *alibi*, but no witnesses were called from his maternal uncle's house to say that he was at Kothapallee three days before the murder or from the other relation's house in Tummalur to say that he was there on the day of the murder itself. As to accused No. 2, he denies entirely that he ever produced the jewel at all or that he even knows (Muganna) Muga-vadu at whose house the *kantini gundulu* was alleged to have been recovered. Here again we see, according to accused No. 2, that the Police chose for the scene of foisting this jewel on accused No. 2, the house of a stranger. With regard to this jewel it is true that it is of a sort commonly worn by women, but there is nothing in the evidence of identification to suppose that it was not the property of the deceased. In the case of accused No. 2 we are invited to say that the whole of the evidence against him is false.

This is a remarkable case because of the difference in caste and creed of the three accused and we have already noticed the curious fact that the book entry of D. W. No. 1, purports to deal with a jewel identical with M. O. No. 2. But in spite of these matters we are satisfied that the inferences of guilt to be drawn from the evidence are overwhelming and we reject entirely the theory that the charge arising from this combination of facts owes its inception to the hasty—for it must have been hasty—agreement among the villagers of Venkatapuram and that the Police gladly and enthusiastically co-operated from the moment the matter came into their hands. The learned Sessions Judge was satisfied and we are satisfied that the evidence brought home beyond all reasonable doubt the guilt of this murder to accused Nos. 1 and 2. We therefore confirm the convictions. With regard to the sentence, accused No. 2, is 25 years old and accused No. 1, is stated to be 17, although before the Court of Session his age was given as 19. In the case of accused No. 1, as we have frequently had occasion to remark before, youth by itself is not a reason why the Court should evade its duty of sentencing the accused to death especially in the case of a cruel murder, such as this. We think that the sentences of death were rightly passed and we confirm them. The appeals of the accused are dismissed.

N.S.

*Appeals dismissed.***OUDH CHIEF COURT**

Second Civil Appeal No. 256 of 1937

January 6, 1941

GHULAM HASAN, J.

BENI MADHO—DEFENDANT—

APPELLANT.

versus

RAM NATH—PLAINTIFF—RESPONDENT

Specific Relief Act (I of 1877), ss. 22, 22 (II)—Specific performance—Suit for, dismissed by trial Court—Findings leading to such decision set aside by Appellate Court—Appellate Court can decree suit in its own discretion—Contract of sale deliberately and solemnly entered into by vendor—Court cannot interpose its aid on ground of inadequacy of price.

Where the basic findings, which ultimately led the trial Court to dismiss the suit for specific performance, are set aside on appeal by the Appellate Court, no question of interference by the Appellate Court with the exercise of discretion by the trial Court arises, and the Appellate Court is competent in the exercise of its own discretion to decree the specific performance. 17 Ind. Cas. 732 (1), 122 Ind. Cas. 740 (2) and 107 Ind. Cas. 881 (3), distinguished. 98 Ind. Cas. 193 (4), referred to. [p. 535, col. 2.]

When a contract of sale has been entered into deliberately and solemnly by the vendor with open eyes in the presence of the Court and with the advice of Counsel without the slightest suggestion of the vendor having been imposed upon, a Court of Equity will not be entitled to interpose its aid on the ground of inadequacy of price. *Administrator-General of Bengal v. Juggeswar Roy* (5) and 145 Ind. Cas. 1023 (7), relied on. [p. 536, col. 1.]

S. C. A. against the order of the Additional Civil Judge of Lucknow, dated January 29, 1937.

Messrs. *Haider Husain and Ramapat Ram*, for the Appellant.

Mr. *L. S. Misra*, for the Respondent.

Judgment.—This is a defendant's appeal arising out of a suit for specific performance of a contract of sale which was dismissed by the trial Court whose decision on appeal has been reversed by the lower Appellate Court which has decreed the suit against the defendant-appellant.

It is no longer disputed that the defendant Beni Madho contracted to sell his house situate in Yahীগanj, Lucknow, to one Hakim Shiam Lal on April 27, 1935. Beni Madho had filed a suit for possession of certain property against Hakim Shiam Lal in the Court of the Subordinate Judge of Budaon. He had also filed an application *in forma pauperis* along with the plaint which was opposed by Hakim Shiam Lal, who contested the same on the ground that the defendant was possessed of a house in Yahীগanj in Lucknow, which he had not included in the schedule of property, and that the defendant was possessed of sufficient means to pay the court-fees. Hakim Shiam Lal offered to purchase the said house himself for Rs. 500. Beni Madho agreed to sell the house

and further agreed that he would deliver possession of the house if the plaintiff deposited the money in Court. He also promised to execute the sale deed within a fortnight provided the money was deposited in Court by Shiam Lal within that time. On September 28, 1935 Shiam Lal put forward Ram Nath, the present plaintiff, as the purchaser for the same house on the same terms on which Beni Madho had agreed to sell it to him (Shiam Lal). Ram Nath, who was present in Court, supported this statement of Shiam Lal and offered to deposit the sum of Rs. 500 that very day subject to the condition that the amount was not to be withdrawn by Beni Madho till possession was delivered to Ram Nath. Beni Madho accepted this condition. It was also agreed between Beni Madho and Ram Nath that the costs of the execution of the sale deed would be borne in equal shares by them but the entire costs of the registration of the sale deed would in the first instance be paid by Ram Nath and the sum of Rs. 500 in deposit would be paid to Beni Madho after deducting the costs of registration. The Subordinate Judge of Budaon before whom these proceedings took place ordered that the sale deed as agreed between Ram Nath and Beni Madho should be completed on October 12, 1935. On October 12, 1935 Beni Madho did not appear with the result that his application to sue *in forma pauperis* was dismissed for default. No sale deed having been executed by Beni Madho in favour of Ram Nath in pursuance of the contract of sale, Ram Nath filed the present suit against Beni Madho to enforce specific performance of the contract of sale. The contract of sale was alleged to have been embodied in Exs. 1, 2 and 3, which contained the original offer of Hakim Shiam Lal, the subsequent substitution of Ram Nath as a purchaser in place of Hakim Shiam Lal and the acceptance by Beni Madho of the terms of the sale referred to above.

Beni Madho contested the suit on the ground that the house in suit belonged to his mother who had constructed it and that he was therefore not in a position to deliver the possession of the house. It was also alleged that the plaintiff did not pay in advance the expenses of registration with the result that he was unable to execute the sale deed on October 12, 1935, the date fixed for the disposal of the application for permission to sue *in forma pauperis*. Beni Madho also asserted that the sale consideration agreed upon between the parties was Rs. 520 and not Rs. 500. The value of the house was

alleged in the written statement as being over Rs. 2,000. It was also alleged that there were certain family idols placed in a portion of the house to which the public had access. In regard to these family idols the plaintiff had asserted in the plaint that the defendant had agreed to put the plaintiff in possession of the same.

The trial Court held that the plaintiff duly deposited the sum of Rs. 500 by tender in Court and also held that the sale consideration agreed upon between the parties was Rs. 500 and not Rs. 520 as alleged by the defendant. The trial Court, however, held that the plaintiff did not tender to the defendant the costs of the execution and registration of the deed within the time fixed and having failed to comply with the terms of the contract he was not entitled to a decree for specific performance. As regards the defendant's plea that he was unable to deliver possession of the house because it belonged to his mother, the trial Court held that this fact was no bar to the maintainability of the suit. According to the trial Court, the defendant had contracted to sell and at the time of the contract he was fully aware of the rights of his mother and if he chose to enter into it with his eyes open he could not be permitted to resile from the contract on that ground. The trial Court finally held that the term relating to the delivery of possession over the house by the defendant as a condition precedent to his obtaining the sale consideration was one which could not be performed by the defendant.

In this connection it was observed by the trial Court that the house was the ancestral property of the defendant and the mother had obviously a right of residence and therefore the defendant could not be expected to deliver possession. Reading the terms of the contract in the light of the provisions of ss. 15 and 22 of the Specific Relief Act, the trial Court was of opinion that the contract was of such a nature that specific performance could not be granted. The suit was, therefore, dismissed.

In appeal the lower Appellate Court has confirmed the finding of the trial Court as regards the amount of the sale consideration but it has disagreed with the finding that the plaintiff did not pay the costs of registration of the deed in time to the defendant. After considering the evidence on the record the lower Appellate Court came to the definite conclusion that the plaintiff had offered Rs. 20 to defendant to meet the initial expenses of registration but the defendant

refused to take it without any reason. The lower Appellate Court has also found that the defendant was the owner of the house and the evidence regarding the construction of the house by his mother was neither reliable nor satisfactory. A further contention was raised on behalf of the defendant before the lower Appellate Court that the term that the defendant was not entitled to withdraw the sum of Rs. 500 till he delivered possession of the house to the plaintiff was a condition precedent to the execution of the sale deed, and since that condition was not and could not be complied with no sale deed could be executed. The lower Appellate Court however, held that the condition for the withdrawal of the price from the Court before the delivery of possession to the plaintiff was not a condition precedent and did not and could not affect the transaction of sale. It also found that the defendant was in a position to deliver the possession of the house. Having regard to the findings at which the lower Appellate Court arrived, it held that ss. 15 and 22 of the Specific Relief Act did not help the defendant's case. As regards the price of the house, the lower Appellate Court remarked that the transaction was entered into between the parties before the Subordinate Judge of Budaun and there could be no question of the plaintiff or Hakim Shiam Lal over-reaching the defendant. The parties entered into the transaction with the advice of their Counsel who were present in Court at the time. The appeal was, therefore, allowed and the suit decreed with costs.

In this second appeal preferred by the defendant to this Court two points have been urged on his behalf. The first point is that the trial Court had perfect discretion under s. 22 of the Specific Relief Act to refuse a decree for specific performance of the contract and that the lower Appellate Court should not on appeal have interfered with the exercise of discretion by trial Court. Reference has been made in support of this contention to *Balla Mal v. Chunni Lal* (10 All. L. J. 498) (1), *Dayal Singh v. Mahabir Singh* (A. I. R., 1930 All., 166) (2) and *Bishun Narain v. Mazharul Haq* (5 O. W. N. 35) (3). Section 22 of the Specific Relief Act lays down that the jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief, merely

because it is lawful to do so; but the discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles, and capable of correction by a Court of Appeal. The section itself stresses the necessity on the part of the Court to exercise its discretion in a sound and reasonable manner and not in an arbitrary fashion. That a Court of Appeal is competent to intervene and correct the wrong done to a party if the exercise of the discretion has been arbitrary, is clearly recognised by the latter portion of the section itself. Even in the case cited by the learned Counsel for the defendant-appellant, namely *Dayal Singh v. Mahabir Singh*, (A. I. R. 1930 All., 166) (2) it was held following a decision of the Calcutta High Court in *Habibur Rahman v. Ali Azhar*, (A. I. R. 1926 Cal., 1237) (4) that the discretion to grant or refuse specific performance can be exercised in second appeal. The trial Court in refusing to decree the suit for specific performance was influenced by the fact that the plaintiff had not paid the registration expenses before the date fixed for the execution of the sale deed and the further fact that the condition for the withdrawal of the price from the Court before the delivery of possession was a condition precedent to the execution of the sale deed. Its decision did not rest upon any express finding of hardship upon an examination of the various circumstances of the case. The basic findings referred to above, which ultimately led the trial Court to dismiss the suit for specific performance, were set aside on appeal by the lower Appellate Court. Consequently no question of interference by the lower Appellate Court with the exercise of discretion by the trial Court arose. In the case of *Balla Mal v. Chunni Lal*, (10 All. L. J., 498) (1) there was a finding of the lower Courts that the contract of sale conferred undue advantage on the plaintiff and caused hardship to the defendant which was not anticipated at the time when the contract was made. The learned Judge observed that the case was similar to those mentioned in illustrations (e), (h) and (j) of s. 22 and that he would not be justified in interfering with the discretion vested in the Courts below under s. 22 which they had exercised not arbitrarily but on reasonable grounds.

The case of *Dayal Singh v. Mahabir Singh*, (A. I. R., 1930 All. 166) (2) is a wholly different case and has no application to the present case. There it was held that specific

(4) A I R 1926 Cal, 1237; 98 Ind. Cas. 193; 44 C. L. J 162.

(1) 10 A L J 498; 17 Ind. Cas. 732.

(2) A I R 1930 All. 166; 122 Ind. Cas. 740; Ind. Rul. (1930) All. 292.

(3) 5 O W N 35; 107 Ind. Cas. 881; A I R 1928 Oudh 224.

performance of an agreement to sale of land against a subsequent purchaser where the latter is entitled to a right of pre-emption against the person seeking to enforce the agreement for sale, cannot be enforced.

The case of *Bishun Nardin v. Mazharul Haq*, (5 O. W. N. 35) (3) related to an order of the trial Court in the matter of awarding costs and has no bearing whatever upon the present case.

In the second place, it has been argued that the circumstances of the present case bring the case within cl. I read with Illustration (d) and cl. II read with Illustration (e) and of s. 22 of the Specific Relief Act, and it is argued that the specific enforcement of the contract would give the plaintiff an unfair advantage over the defendant and would also involve hardship upon him which he did not foresee. The first circumstance pointed out in this connection is that though the land upon which the house stands belonged to the defendant's father, yet it was constructed by his mother and being the *streedhan* property it must devolve not upon the defendant but on his sister who is alive. I have already upheld the finding of the lower Appellate Court on this point to the effect that the house belongs to the defendant and has not been proved to belong to his mother. There can, therefore, be no question of any hardship upon the defendant as it is his house which is being sold and not the house belonging to his mother.

The second circumstance pointed out is that the value of the house is much more than the sale consideration agreed upon between the parties. The lower Appellate Court has already disposed of this contention and I agree with its conclusion. The parties in this case were dealing at arms length. The contract took place in presence of the Court and both parties were represented by Counsel who gave their help and advice in the negotiation of sale and the preparation of the draft sale deed (Ex. 6). When a contract of sale has been entered into deliberately and solemnly by the vendor with open eyes in the presence of the Court and with the advice of Counsel without the slightest suggestion of the vendor having been imposed upon, a Court of Equity will not be entitled to interpose its aid on the ground of inadequacy of price. Reference may be made in this connection to a decision of their Lordships of the Judicial Committee in *Administrator-General of Bengal v. Juggeswar Roy*, (I. L. R. 3 Cal., 192 P. C.) (5) where it was

(5) 3 O 192; 1 O L R 107; 3 Sar. 760; 3 Suther 455; 1 Ind. Jur. 640 (P O).

held that a party seeking to set aside a transaction on the ground of inadequacy of consideration must show such inadequacy as will involve the conclusion that he either did not understand what he was about, or was the victim of some imposition. The following passage at p. 196* of the report may also be quoted with advantage as being fully apposite to the case :—

"The question then reduces itself to whether there was such an inadequacy of price as to be a sufficient ground of itself to set aside the deed. And upon that subject it may be as well to read a passage from the case of *Tennent v. Tennent* (L. R., 2 Scot. Ap. 6) (6), in which Lord Westbury very shortly and clearly stated the law upon this subject."

He says :

"The transaction having been clearly a real one, it is impugned by the appellant on the ground that he parted with valuable property for a most inadequate consideration. My Lords, it is true that there is an equity which may be founded upon gross inadequacy of consideration, but it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about, or was the victim of some imposition."

It was similarly held in *Pichai Moideen Rowther v. Chaturbuja Das Kushal Das & Sons* (A. I. R. 1933 Mad., 736) (7), that persons who have entered into contract to carry out certain things should not be allowed lightly by Court to break their given word on the ground of mere technical pleas or imaginary hardship. In the absence of adequate grounds specific performance should not be refused. It was observed in this case that the term "hardship on the defendant" used in s. 22 (2) of the Specific Relief Act is used in the sense of some collateral hardship and not merely the diminution of the purchase money. The illustrations which are all based on English Law clearly show this and the term hardship is used in the same sense as it is used in English Law (Vide Fry on Specific Performance, Chap. VI).

From the circumstances established in the present case it is difficult to see how the plaintiff obtained any unfair advantage over the defendant or in what manner the performance of the contract would involve any hardship on the defendant which he could not have foreseen.

It has been stated on behalf of the defendant-appellant that his client was interested in undervaluing his property so as to evade the payment of the court-fees and therefore had no alternative but to accept the offer of Rs. 500 which had been made by Hakim

(6) L R 2 Scot. Ap. 6.

(7) A I R 1933 Mad. 736; 145 Ind. Cas. 1023; 38 L W. 507; 6 R M 196; 65 M L J 491; (1933) M W N 1033.

Shiam Lal. It is admitted that there was a prior encumbrance of Rs. 700 upon this house and the offer to purchase the house for Rs. 500 subject to the prior encumbrance was made on April 27, 1935. The defendant agreed to sell the house on the same terms to Ram Nath on September 28, 1935, nearly five months after. There was ample time and opportunity for the defendant to resile from the position taken up by the defendant and either refuse to sell the house to Ram Nath or to sell it to some other person for a higher price.

Lastly it has been contended that the house being in the possession of *Mst. Bittan*, the sister of the defendant, the plaintiff might have to face litigation in obtaining possession of the house. Whether this is so or not, I cannot hold that this can be any reason for refusing specific performance of the contract nor can the existence of the family idols of which the defendant had agreed to give possession to the plaintiff be an insuperable bar to a decree for specific performance being made in favour of the plaintiff.

Reference has been made in course of the arguments on behalf of the defendant-appellant to the provisions of s. 15 of the Specific Relief Act. This section deals with the specific performance of a part of the contract, where the part unperformed is large. Having regard to the findings in the present case, no question of the applicability of s. 15 of the Specific Relief Act can possibly arise.

The appeal, therefore, fails and is dismissed with costs.

s.

Appeal dismissed.

NAGPUR HIGH COURT

First Civil Appeal No. 98 of 1938

October 16, 1939

STONE, C. J. AND BOSE, J.

ATMARAMSAO AND OTHERS—

PLAINTIFFS—APPELLANTS

versus:

BHUPENDRANATH AND OTHERS—

RESPONDENTS

Mortgage—Mortgage by undivided co-parcener of share in particular portion of family property—Rights of mortgagee and non-mortgaging co-parcener—Mortgage by undivided co-parcener of his share in particular part of family property—In subsequent partition in family, mortgaged property allotted to non-mortgaging co-parcener—Non-mortgaging co-parcener undertaking to pay-off mortgage—Mortgagee can sue non-mortgaging co-parcener on mortgage—Trusts Act (II of 1882), s. 94—"Beneficial interest," scope of—Non-mortgaging co-parcener is saddled with obligation in nature of trust and must hold property to benefit of mortgagee to extent necessary to satisfy his demand.

When an undivided co-parcener purports to mortgage his share in a particular part of the family

property something less than that interest which passes on a mortgage by a man severally seized of the mortgaged property is transferred. The mortgagee's main right is, after foreclosing or purchasing his mortgagor's rights, to get defined by partition what it is that is mortgaged. In a case where the subject-matter of the mortgage is the mortgaging co-parcener's share in a village the mortgagee would have the right to demand a partition and any Court entertaining such an application for partition, failing agreement, would be bound to partition the family property in accordance with justice and equity, that is to say, in the same way that a reasonable and honest co-parcener would agree to have the joint family property partitioned. The fact that there has been such a mortgage would not in the least debar a non-mortgaging co-parcener from having the family property partitioned as though there were no mortgage but it would debar the mortgaging co-parcener from assenting to any such partition as would imperil his mortgagee's rights. A Court entertaining such a suit for partition in such circumstances should, unless there are countervailing reasons due to interests other than those of the family calling for consideration, so divide the family property that the property mortgaged by the mortgaging co-parcener goes to that co-parcener and the non-mortgaging co-parcener gets other property. [p. 541, col. 2; p. 542, col. 1.]

Where an undivided co-parcener mortgages his share in a particular part of family property and on partition in the family the mortgaged property is allotted to non-mortgaging branch and the mortgage has not been taken into account (and of course where fraud or collusion does not enter into the story) the mortgagee cannot proceed against the subject-matter of his mortgage but has substituted for his security any property that has been given to his mortgagor in the partition. But if in fact the mortgaged property has been taken by a non-mortgaging branch and that branch has at the same time and as part of the partition arrangement undertaken to pay that mortgage-debt, then the true position is that the non-mortgaging co-parceners have in effect obtained the equity of redemption only and are liable in the first place to the mortgagee who may sue them on the mortgage. [p. 542, col. 1.]

The term "beneficial interest" as used in s. 94, Trusts Act should not be given any restricted or technical meaning. The sum total of the interests of a beneficial owner contains among other things freedom from encumbrances. If the property is encumbered, then there is something missing from the whole beneficial interest, namely the interest which the mortgagees have acquired. In that sense the mortgagees can be regarded as having in them a fraction of the whole beneficial interest. As against their mortgagors this makes no difference for they have there in addition the legal interest into which the lesser equitable interest merges. But if for some reason they are unable to avail themselves of the legal interest, there is no reason why they should also be cut off from the equitable beneficial interest. Consequently where an undivided co-parcener has mortgaged his share and on partition the property is allowed to non-mortgaging co-parcener who undertakes to pay off the mortgage he is saddled with an obligation in the nature of a trust and is bound to hold the property for the benefit of the mortgagees to the extent necessary to satisfy their demands. [p. 543, col. 1.]

F. C. A. from the decree of the Court of the Additional District Judge, Raipur, dated June 30, 1938.

Mr. J. Sen with Rai Bahadur D. N. Chaudhuri, for the Appellants.

Mr. M. R. Bobde, for Respondents Nos. 1 to 4.

Judgment—The appellants are plaintiffs in a mortgage suit. The mortgage was effected over a 8 annas' share of a village called Risda. The mortgagor was one Brijlal and the subject of mortgage is expressed as follows: "I mortgage without possession my eight anna share of *Mouza* Risda, Tahsil Baloda Bazar, District Raipur" and then are added the various rights and privileges mortgaged connected with that 8 annas' share. The date of the mortgage is August 15, 1922. At that date the mortgagor was a member of a joint Hindu family which was disrupted by partition in 1923. The defendants to the present suit comprise both branches of that joint family, the one branch being headed at all material times by Brijlal who since this suit was brought has died leaving behind him two major and one minor sons and the other by Sheodutt and comprising his grandson and his (Sheodutt's) sons two of whom are majors and one minor at the time of suit which was brought in 1934. Sheodutt's branch whom we shall refer to as the non-mortgaging co-parceners, are sued as the persons primarily responsible for this mortgage debt for the following reasons:—

By the partition the family properties, which were considerable consisting of $9\frac{1}{2}$ villages, and debts, which amounted to Rs. 68,000 (including the mortgage debt), were divided up as follows: Brijlal was given three villages and some houses and was made responsible for Rs. 44,000 of the Rs. 68,000 debts together with interest thereon. That left $6\frac{1}{2}$ villages and Rs. 24,000 of debts partly unsecured, and partly secured by the suit mortgage. The suit mortgage debt is taken as of the value of Rs. 12,000 though there was due at the time of the suit, according to the plaint, Rs. 25,457-12-6 a major part of that being due to interest. This property and the remaining debts were divided as follows: Brijlal was directed to pay off the Rs. 12,000 unsecured debts and obtained $3\frac{1}{4}$ villages and the other branch was directed to pay the suit mortgage and also got $3\frac{1}{4}$ villages but in their $3\frac{1}{4}$ villages was included the village half of which was the subject-matter of the suit mortgage. In other words, though Brijlal had mortgaged his half share in the village Risda the whole of the village Risda was given on partition to the other branch, the other branch undertaking with Brijlal to pay off the mortgage. It is perhaps not quite accurate to say that the above results

from the partition, for the partition was brought about apparently, though this is by no means clear, as a consequence of a reference to arbitration and was preceded by an agreement which made the above allocation. The steps so far as we can see are as follows:—

By an agreement come to on August 1, 1923, the sons of Sheodutt, two of them under the guardianship of Sheodutt's widow *Mst. Gondibai*, came to the arrangement with regard to the Rs. 68,000 and the Rs. 44,000 with the Brijlal branch and also arranged as to the debts amounting to Rs. 24,000 which were treated as joint debts owing by the family, and the various component parts were treated in the following way; Rs. 12,000 due on the bond to Bal-kishenseth was arranged to be paid by Brijlal. The major and minor sons of Sheodutt undertook to pay the debt of Rs. 12,000 with interest due to *Atmaram Sao* under the suit mortgage and they state: "Besides the above as a result of partition *Mouza* Risda 16 annas.....have fallen to the share of we people", that is to say, the sons of Sheodutt. On August 28, 1923, nearly a month after this agreement, arbitrators were appointed to settle the details of the partition. What exactly happened thereafter is not clear but both sides agree that in the result the property was so divided that the non-mortgaging co-parceners got the whole of the village half of which had been mortgaged by Brijlal and that they agreed with Brijlal that they would be wholly responsible for the mortgage debt. At the same time Brijlal agreed to be responsible for the Rs. 12,000 above mentioned due to an unsecured creditor. It is common ground that Brijlal failed to pay that creditor; that the debt being a joint one the creditor was at liberty to proceed against Sheodutt's branch as well as against Brijlal, that he did so proceed, obtained a decree, and was paid by Sheodutt's branch, which in turn proceeded against Brijlal's branch got a decree, executed that decree in part but has not as yet been able to recover the whole of the Rs. 12,000 and costs.

The award and the agreement remained for a time, to long as we know, within the knowledge only of the family and the arbitrators. There was no recording in any public register of this arrangement but at latest by 1929 the mortgagee became aware that there had been a partition and that the half share mortgaged by Brijlal had gone, together with the rest of the village in question, to the other branch. Doubtless on

learning those facts he was anxious about his security. He wrote to the non-mortgaging co-parceners asking about his debt and he received back the following reply, dated January 23, 1929:

".....It is to be written that your letter has been received. It has been read and its contents have been noted. According to the partition as stated in the *ikrarnama* (deed of agreement), the amount of your *khata* is my liability. In this respect the settlement between us has not taken place through Court. Only within three months there will be a settlement through Court. After the settlement, I will pay your amount in full in a lump. You need not be anxious at all. I am anxious to credit the amount."

The person signing that letter is the managing member of Sheodutt's branch and in it he accepts liability for the mortgage debt, but he is not sought to be made liable upon that contractual liability. The position taken up by the plaintiffs is that Sheodutt's branch, having accepted liability for this mortgage, took the village subject to the mortgage. Reliance is placed upon a passage in Ghose's Law of Mortgage (5th edition) and the case, *Joy Sankari Gupta v. Bharat Chandra Bardhan* (1) on which that view is based and on *Bhup Singh v. Chedda Singh* (2). The learned author is concerned with the well-known rule, set out with all the authorities to date in Mayne's Hindu Law p. 506, note (c), that where a member of a joint Hindu family mortgages an item of joint family property (the mortgage debt not being binding on the other co-parceners) and later on a partition that item of property is given to a co-parcener other than the mortgaging co-parcener, the mortgagee's right is to obtain a substitution of security for the security mentioned in the mortgage. The learned author (Ghose) observes:

"But if in making the allotments, the incumbrance is taken into account in valuing the share which is subject to it, the partition will not, for obvious reasons, affect the security of the mortgagee. It is hardly necessary to add that the mortgagee will not be bound by an unequal partition effected by fraud and collusion between the mortgagor and his co-sharers, whether such partition is made by private arrangement or by the Court....."

Unfortunately the learned author does not give his reasons, nor are any to be found in the two cases cited. We do not think the conclusion is obvious for the non-mortgaging co-parcener does not claim through or under the one who mortgaged; there is no assignment or transfer of title or interest at partition; consequently there is no privity of estate and it is clear that there is no privity of contract.

As to the cases cited the questions did not

(1) 26 C 434 (440); 3 C W N 209.

(2) 42 A 506 (599); 58 Ind. Cas. 171; A I R 1920 All. 34; 18 A L J 807.

arise, and so naturally the learned Judges did not enter into it. They merely indicated, in each case in a single sentence, that this would probably form an exception to the general rule.

The only case we have been able to discover which at all decides the point is *Sundar Lal v. Brij Lal* (3) and even that is not on all fours.

There two brothers A and B owned, along with other *zamindari* property, a 10 *biswa* share in a certain village. In the year 1879 they jointly executed a mortgage of their joint undivided 10 *biswa* share in this village to the plaintiff's father. In the year 1881 each of the two brothers executed two separate mortgage bonds in which each separately mortgaged his undivided 5 *biswa* share in the village to the same mortgagee for half the amount due on the earlier bond. Thus the two mortgages together satisfied the earlier one. Each brother signed the other's bond as a witness.

After this, in the year 1888, the family property was privately partitioned and the entire 10 *biswa* share of the village was then allotted to be. B's mortgage was then discharged. The mortgagee's son thereupon sued transferees from B on the mortgage executed by A in 1881 and claimed the remaining 5 *biswa* share which had been allotted to B at the partition. It was held that he could proceed against that share and was not bound to accept as substituted security the property which had been allotted to his mortgagor A.

But here again, unfortunately, the ground on which this could be done was not disclosed. It seems to have been taken for granted that that was the only possible course. For instances, Ryves, J., said at p. 547*:

"Could Baldeo [the brother we have called B] himself after partition, have claimed the benefit of the rule in Byjnath's case? (1 I. A. 106) I think not. He knew that his brother was mortgaging his undivided 5 *biswa* share in Chauwar, and when, at the time of the partition, he accepted 10 *biswas* in Chauwar in exchange for something else, he knew perfectly well how it was incumbered."

The other Judge Piggott, J., seems to ground his decision on estoppel for he says:

"In the present case I look on the transaction of November 16, 1881, as little more than a novation of the older contract of 1879, and seeing that each of the brothers signed the other's mortgage deed as a witness, it is obvious that the mortgagee was dealing with the two of them and had the consent of both to the transaction then entered into."

With the utmost respect we do not think the matter is obvious. Mere knowledge can-

(3) 35 A 543; 21 Ind. Cas. 734; 11 A L J 916.

not affect the non-mortgaging co-parcener's rights; otherwise it would always be possible for one co-parcener to prevent another from getting mortgaged property free of the incumbrance by telling him about it. Such a rule might work fairly to the mortgagee but on the other hand it might well prevent the possibility of a fair partition; and in any case it is not the rule indicated by their Lordships of the Privy Council and by the cases in India which have followed it.

Nor does estoppel seem possible. There was no misleading. The mortgagee knew the facts and acted with his eyes open. He chose to sever the interests of the two brothers and must therefore be taken to have known the legal consequences which that would involve.

Before us it is said that here the incumbrance was taken into account and the partition was made subject to the incumbrance and that therefore the mortgagee can proceed against that branch which has got the subject-matter of his mortgage. On the other hand it is said that that is not so, that this is not a case where one branch has been given a large property because what is really given to that branch is only the equity of redemption in that property but it is a case where each branch has been given an equally valuable immovable property and each branch has had imposed upon it equal debts and that the true way of looking at this position can be expressed as follows:

Each branch has contracted with the other to pay certain debts. That contractual obligation does not confer any right upon a stranger to the contract. The creditors are not in any way prevented by such a contract from suing their debtor and in fact the creditor to whom was owed the debt allocated to Brijlal's branch has sued Sheodutt's branch, has got a decree against Sheodutt's branch, has been paid by Sheodutt's branch and Sheodutt's branch's only remedy is to get, as they are endeavouring to get, reimbursement from Brijlal's branch that right being given them by the fact that Brijlal's branch agreed to pay those debts. In the same way Sheodutt's branch, though it has agreed to pay this debt, cannot be made to pay it by the mortgagee but if Brijlal's branch has to pay it and if, in the meantime, Sheodutt's branch has become recompensed for the amounts that they have spent in paying the debts that Brijlal's branch should have paid then doubtless Brijlal's branch having paid the mortgage debt, having reimbursed Sheodutt's branch, could sue Sheodutt's branch on the

contract contained in the partition arrangement and get reimbursement. But this is a right possessed by Brijlal and springing out of contract. It is not a right possessed by Brijlal's mortgagee who is a stranger to that contract.

Further it is urged that the only remedy that a mortgagee, who has the temerity to lend money on the security of a co-parcener's share to a co-parcener, has is to obtain a substitution of security. It is said that there is ample security here. On the other hand it is suggested that in all the years that have elapsed since this partition Brijlal's branch has dissipated the property allocated to their share. This is only suggested. There is no evidence one way or another, but we must consider, in order to see the principles of equity involved, the position that arises on the assumption that in point of fact Brijlal's branch has wholly dissipated the properties allocated to that branch's share.

It will be noticed that a specific share belonging to a specific co-parcener in a specific village is mortgaged. That mortgage is registered and that register is open to all the world. Any person wishing to purchase or lend money on that village or any part of it would be warned once he looked in the register that already half of it was mortgaged. On the other hand the partition arrangement and the award given by the arbitrators, if indeed there was an award, are unregistered and so far as we know remained unknown to anybody but the family and the arbitrators until sometime in 1929 and, when testing the principle one must bear in mind that the partition might have remained unknown for an untold number of years thereafter. As a consequence of that partition this co-parcenary was broken into two parts. One part got the village half of which was mortgaged and the other part got certain other villages and became liable for certain debts. To enable Brijlal's branch to pay those debts some, and it may be, for aught we know, all, of the villages would have to be sold. Accordingly had Brijlal carried out his bargain and had he paid those debts it may well be that the property allocated to his share would have been all exhausted in paying the family's unsecured debts. Were that so then unless, as was argued on the authority of *Byjnath Lall v. Ramodeen Chowdry* (4) from the very moment of partition there is a substitution of one security for another the mortgagee driven to rely on a substituted security would

(4) 1 I A 106; 21 W R 233; 3 Sar. 333; 2 Suther. 942 (P O).

find that there was nothing to substitute, for all the property had been sold.

It is said, however, that the substitution takes place instantaneously with the effecting of the partition even though that partition is by a private family arrangement. If this be so then the position is that according to the public registers village Risda is, as to a half, mortgaged but owing to a partition privately made unknown to the world there is instantaneously substituted for half Risda some other property because the whole of Risda has been given to a co-parcener who is not a mortgagor and the mortgagor has been given the other property. It is said that from the very moment of partition the mortgage ceases to be over half village Risda and becomes a mortgage over the other property which we will call Misda. If the co-parcener who has got Misda should sell Misda the day after the partition to a *bona fide* purchaser for value who knows nothing of the partition that *bona fide* purchaser for value will only get the equity of redemption and he will only get this equity of redemption because that is all that his vendor had; his vendor only had that because of the private and secret, though *bona fide*, partition made between the various co-parceners. The vendee could not in the least know that what he was buying was subject to that mortgage which the public records of his country show to have been effected over Mouza Risda. This proposition of a somewhat startling nature is founded upon their Lordships' decision in *Byjnath Lal v. Ramoodeen Chowdry* (4) and upon *Amar Singh v. Bhagwan Das* (5). The Privy Council case above mentioned is, it is true, very difficult completely to understand on the facts so far as the purchase in the auction of December 23, 1862 is concerned, but we apprehend that the decision turns on the fact that there was a revenue partition which no one could interfere with, that that revenue partition allocated the mortgaged item to the non-mortgaging branch, that as a consequence it must be deemed that as from the effecting of this partition there was substituted for the security mentioned in the mortgage that property which was allocated to the mortgaging co-parcener and that accordingly any person purchasing in Court auction from the mortgaging co-parcener with knowledge of that revenue partition must be deemed to have bought only the right, title and interest of the mortgaging co-parcener which after partition by the revenue authority was subject to the

mortgages, notice or no notice. We do not understand their Lordships to have decided that where there is a private partition then from the moment of that partition purchasers buying without notice *bona fide* and for value from one co-parcener run the risk of finding that they have only purchased the equity of redemption. On the other hand if the mortgagee's rights over the substituted security are really those of a chargee the *bona fide* purchaser for value without notice would get a good title and the mortgagee would lose his security.

If the purchaser has priority in title over the mortgagee the mortgagee's title only attaches to the substituted security as and when it was substituted. If that be so it is clear, in our opinion, that in a case such as the present the mortgagee might find himself with no real remedy unless he could attack the branch that had accepted liability for the mortgage debt. Indeed although the facts are not before us—and it is not necessary to arrive at any decision on the point—the general course that all parties to this litigation have taken suggests that in the opinion of the mortgagee and in the opinion of Sheodutt's branch the assets available in the hands of Brijlal's branch are not such as to make it likely that the mortgagee will be able to recover his money were substitution his only right. We think that in principle the matter can be expressed as follows:

When an undivided co-parcener purports to mortgage his share in a particular part of the family property something less than that interest which passes on a mortgage by a man severally seized of the mortgaged property is transferred. The mortgagee's main right is, after foreclosing or purchasing his mortgagor's rights, to get defined by partition what it is that is mortgaged. In a case such as the present where the subject-matter of the mortgage is the mortgaging co-parcener's share in a village the mortgagee would have the right to demand a partition and any Court entertaining such an application for partition, failing agreement, would be bound to partition the family property in accordance with justice and equity, that is to say, in the same way that a reasonable and honest co-parcener would agree to have the joint family property partitioned.

The fact that there has been such a mortgage would not in the least debar a non-mortgaging co-parcener from having the family property partitioned as though there were no mortgage but it would debar the mortgaging co-parcener from assenting to any such partition

(5) 14 L. 749; 149 Ind. Cas. 104; A. I. R. 1933 Lah. 771; 35 P. L. R. 550; 6 R. L. 652.

as would imperil his mortgagee's rights. A Court entertaining such a suit for partition in such circumstances should, unless there are countervailing reasons due to interests other than those of the family calling for consideration so divide the family property that the property mortgaged by the mortgaging co-parcener goes to that co-parcener and the non-mortgaging co-parcener gets other property, of course if the mortgaging co-parcener has mortgaged more than his share different considerations arise. As that would be the duty of a Court so it would be the duty of a reasonable and honest man and accordingly the duty of the mortgagor who could not properly assent to any partition which gave this half to a non-mortgaging co-parcener.

That is the position if the mortgagee after foreclosure or purchase demanded a partition. Can that right and can that result be affected by the family privately, or through arbitrators, arranging a partition which so allocates the property as to free the subject-matter of the mortgage from the mortgage that is, which prevents the mortgagee from realising his debt out of the security which has been given to him by a co-parcener to secure the mortgage-debt? The answer is that, in the normal case, where the mortgage has not been taken into account (and of course where fraud or collusion does not enter into the story) the mortgagee cannot proceed against the subject-matter of his mortgage but has substituted for his security any property that has been given to his mortgagor in the partition.

But if one finds that in fact the mortgaged property has been taken by a non-mortgaging branch and that that branch has at the same time and as part of the partition arrangement undertaken to pay that mortgage-debt then, in our opinion, the true position is that the non-mortgaging co-parceners have in effect obtained the equity of redemption only and are liable in the first place to the mortgagee who may sue them on the mortgage according to the principle extracted from Ghose's Law of Mortgage as explained above. We consider that that is the position here.

This is not a case, in our view, where the mortgagee is driven to rely on a contract made between co-parceners. Were that so one would have to consider the line of cases which are to be found examined in two conflicting decisions of the Calcutta High Court the one reported in *Khirodebehari Dutta v. Mangobinda Panda* (6) the other in *Adhar*

(6) 61 C 841; 152 Ind. Cas. 351; A I R 1934 Cal. 682; 38 C W N 682; 7 R C 363.

Chandra Mandal v. Dole Govinda Das (7) See also the recent Privy Council decision in *Rana Uma Nath v. Jang Bahadur* (8). Nor do we place the obligation of the branch to pay this debt upon any contract arising out of their promise to pay contained in Ex. 3-D-7. We found it mainly on the view that Sheodutt's branch has taken the equity of redemption only in this village and are in the position of assignees of this property subject to the mortgage. This position, is, of course, marked by the fact that the transfer of interest has passed on partition which does not create a transfer there being no case of A transferring to B but a co-parcenary breaking up each taking part of what once belonged to both. We do not, of course, intend in any way to make an inroad upon the well-settled rule that, apart from any such arrangement whereby the non-mortgaging branch accepted the mortgage liability, the mortgagee cannot proceed against the mortgage security in the hands of the non-mortgaging branch but is restricted to his remedies against any security in the hands of the mortgaging branch that may be substituted for the mortgage security. On this view of the case it is not, in our opinion, necessary to amend the claim as asked by, in the alternative, claiming substitution of security. Nor is it necessary in any way for the plaintiffs to rely on the principle that where A and B contract together for the benefit of C, C may sue A or B in contract.

In our opinion another ground on which this can be placed is s. 94 of the Indian Trusts Act which is in the following terms:

"In any case not coming within the scope of any of the preceding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands."

When Sheodutt's branch obtained the property at the partition they did not take the whole beneficial interest in it. The interest of the mortgagees had already been carved out of the sum total of rights which constitute the whole beneficial interest. Of course they had the right to claim the whole beneficial interest, but in that event they would have been obliged to forego something else which, on the assumption that the partition was fair and equitable, they had obtained

(7) 63 C 1172; 167 Ind. Cas. 604; A I R 1936 Cal. 663; 63 C L J 287; 40 C W M 1037; 9 R C 707.

(8) 43 C W N 1; 176 Ind. Cas. 883; A I R 1938 P C 245; 32 S L R 907; (1938) O W N 796; 11 R P C 84; 48 L W 371; (1938) M W N 928; 1938 A L J 744; 1938 O L R. 391; 4 B R 854; 68 C L J 458 (P O).

to compensate them for the lesser rights in the mortgaged property. Therefore, with their eyes open, and for consideration, they deliberately accepted and took possession of this property without the whole beneficial interest in it, agreeing to hold it, to the extent of that interest for the benefit of the mortgagees.

That being so, they were saddled with an obligation in the nature of a trust and were bound to hold the property for the benefit of the mortgagees to the extent necessary to satisfy their demands.

We are aware that the interest of a mortgagee cannot ordinarily be regarded as a beneficial interest. As against his mortgagor it is clearly not that but a legal interest: but Sheodutt's branch were not the mortgagors and all that the mortgagees can enforce against them, if they can enforce anything at all, is on equity; and this is the only equity that we can find.

We see no reason why the term "beneficial interest" as used in s. 94 should be given any restricted or technical meaning. It is perhaps relevant to observe that in England the term "beneficial owner" is taken by s. 7 of the English Conveyancing Act of 1881 to imply the covenants for right to convey, for quiet enjoyment, freedom from encumbrances and for further assurance. The comment of the learned authors of Halsbury's Laws of England, Hailsham Edition, Vol. 10, p. 313, on this is that these four covenants

"are not four separate and distinct covenants, but parts of one entire covenant."

It would seem, therefore, that the sum total of the interests of a beneficial owner contains among other things freedom from encumbrances. It must follow that if the property is encumbered, then there is something missing from the whole beneficial interest, namely the interest which the mortgagees have acquired. In that sense the mortgagees can be regarded as having in them a fraction of the whole beneficial interest. As against their mortgagors this makes no difference for they have there in addition the legal interest into which the lesser equitable interest merges but if for some reason they are unable to avail themselves of the legal interest, we can see no reason why they should also be cut off from the equitable beneficial interest.

However, unusual it may be to look at the matter in this way we can find nothing either in practice or in principle against it. Indeed that seems to have been the ground on which their Lordships of the Privy Coun-

cil acted in *Muhammad Khan v. Husaini Begum* (9).

If we are right in this, then under s. 95 of the Trusts Act Sheodutt's branch would be obliged to perform the same duties and be subject, so far as may be, to the same liabilities and disabilities as if they were trustees for the persons for whose benefit they are holding the property, namely the mortgagees, to the extent of their interest in it.

Now a person who takes property in trust for a mortgagee on condition that he will either pay off the mortgage or suffer the property to be foreclosed or sold would be compelled to fulfil that trust, and s. 95 places him, in cases to which s. 94 applies, in the same position as if there had been a trust. Therefore, as we see it, the plaintiffs' rights in this suit are not grounded on the mortgage but on the obligation in the nature of a trust which Sheodutt's branch took upon themselves at the partition. The results, so far as this suit is concerned, are the same as if the suit was grounded on the mortgage *qua* mortgage, but it is conceivable that in other circumstances, especially if the rights of strangers intervene, the effect might be different.

Accordingly, in our opinion, there can be and should be a mortgage decree for foreclosure in favour of the plaintiffs as prayed. No further interest. The appeal is allowed with costs in both Courts. There will be one year allowed in which the defendants may redeem.

D.

Appeal allowed.

(9) 32 A 410 (413); 7 Ind. Cas. 237; 37 I A 152; 7 A. L. J. 871; 14 C. W. N. 865; (1910) M. W. N. 813; 8 M. L. T. 147; 12 C. L. J. 205; 12 B. O. L. R. 638; 20 M. L. J. 614 (P. C.).

ODUH CHIEF COURT

Civil Revision Application No. 41 of 1940.

April 30, 1941

AGARWAL, J.

JAGANNATH SINGH AND OTHERS—

DEFENDANTS—APPLICANTS

versus

SITA RAM AND OTHERS—OPPOSITE PARTIES:

U. P. Tenancy Act (XVII of 1939), ss. 276, 243—Civil Procedure Code (Act V of 1908), s. 115—Revision—Suit under s. 108, Oudh Rent Act (XXII of 1886), when it was in force—Order restoring suit dismissed for default passed when U. P. Tenancy Act was in force—Application for revision is governed by Tenancy Act—S. 115, Civil Procedure Code does not apply—Revision not maintainable under s. 276, Tenancy Act.

The revisional remedy is not the right of any party

and so it cannot be said that the U. P. Ten. Act could not affect the rights acquired by a party before it came into force. Where the suit was instituted under s. 108 (15), Oudh Rent Act on September 18, 1939, when the Oudh Rent Act was in force, but the U. P. Ten. Act, was in force on March 16, 1940, when the order complained of restoring suit dismissed for default was passed, the application for revision of the order is governed by the U. P. Ten. Act. The revision is not maintainable under s. 115, Civil P. C., in view of s. 243, U. P. Ten. Act, nor is it maintainable under s. 276, U. P. Ten. Act, as the order complained of was not appealable to the District Judge. 143 Ind. Cas. 307 (1), referred to.

C. R. App. of the order of the Assistant Collector, First Class and Sub-Divisional Officer Tarabganj, Gonda, dated March 16, 1940.

Mr. K. N. Tandon, for the Applicants.

Mr. S. N. Srivastava, for Opposite Parties No. 1 (a, c and d).

Order.—This is an application in revision under s. 115, Civil P. C. against an order dated March 16, 1940, passed by an Assistant Collector, first class.

The suit was brought by the opposite parties under s. 108, cl. (15) of the Oudh Rent Act against the present applicants. The Assistant Collector passed the following order on March 5, 1940.

"The plaintiff has failed to summon the relevant records to enable the *pattuari* to prepare profit statement although it was definitely ordered that all evidence should be summoned to to-day and no further adjournment would be allowed. I therefore, dismiss the plaintiff's suit for default."

This order as already stated on March 5, 1940, and the order sheet of that date shows that the Court had taken action under O. XVII, r. 1, Civil P. C. On March 16, 1940, the Assistant Collector made the following order—

"The *ex parte* order dated March 5, 1940, is set aside and the suit is restored to the file".

This order was passed without any notice to the defendants who are the present applicants and they have come up to this Court in revision against this order.

A preliminary objection has been taken that no revision lies. The suit was instituted on September 18, 1939, when the Oudh Rent Act was in force, but the U. P. Ten. Act was in force on March 5, 1940 and March 16, 1940. I think this application should be governed by the U. P. Ten. Act. The suit was no doubt instituted before the Ten. Act came into force but the revisional remedy is not the right of any party and so it cannot be said that the U. P. Ten. Act could not affect the rights acquired by a party before it came into force. I think we have to see whether the revision is maintainable under

the provisions of the U. P. Ten. Act. It is clearly provided in s. 243 and List I of the Second Schedule of the U. P. Ten. Act that s. 115 of the Civil P. C. is not applicable to suits or other proceedings under the Act, Section 115 under which the application has come to this Court is therefore not applicable. The applicants were expressly asked by the office whether they would like to have the application treated as one under s. 115 or one under s. 276 of the Ten. Act and they stated that they would like to have it treated as an application under s. 115. Section 276 of the Ten. Act is applicable only when an appeal from an order complained of lies to the District Judge. The order complained of in this case is dated March 16, 1940 and was not appealable to the District Judge. A revision is therefore not maintainable. This view was taken in *Panna Lal v. Basdeo* (A. I. R. 1933 All., 118) (1) on an interpretation of s. 253 of the Agra Ten. Act which corresponded to s. 276 of the U. P. Ten. Act. The learned Counsel for the applicant has relied on *Gobardhan Das v. Dau Dayal* (Revenue Decisions 1932 p. 293) (2). In that case it was held that a revision lies from an order of an Assistant Collector whether an appeal has been filed before the District Judge or not but it nowhere lays down that a revision would lie even if the order complained of is not appealable to the District Judge.

I think this revision is not maintainable under s. 276 of the U. P. Ten. Act and s. 115 does not apply.

The application is therefore dismissed with costs.

s.

Application dismissed.

(1) A I R 1933 All. 118; 143 Ind. Cas. 307; (1932) A L J 1100; L R 14 A 31 Rev; 17 R D 154; Ind. Rul. (1933) All. 226.

(2) (1932) Rev. Dec. 293.

MADRAS HIGH COURT Spécial Bench

Original Petition No. 225 of 1939
March 14, 1940

LEACH, C. J., KING AND KRISHNASWAMI
AYANGAR, JJ.

COMMISSIONER OF INCOME-TAX,
MADRAS—PETITIONER—
versus

MADRAS AND SOUTHERN
MAHRATTA RAILWAY Co. LTD.—

RESPONDENTS

Income Tax Act (XI of 1922), s. 4—Railway Company in accordance with contract paying into Bank of England certain amount as its share capital and

Secretary of State undertaking to pay in London out of revenue of India interest on this amount—Guaranteed interest received by Company in London held liable to assessment.

In accordance with a contract entered into with the Secretary of State for India in 1882, the Madras and Southern Mahratta Railway Co., paid into Bank of England certain amount as its share of capital and the Secretary of State had undertaken to pay in London out of the revenues of India a guaranteed interest on this amount:

Held, that all the profits of the Company accrued or arose in British India and the guaranteed interest, therefore, received by the Company was liable to assessment. *M. & Sm. Ry. Co. v. Commissioner of Inland Revenue* (2), approved. 70 Ind. Cas. 46 (1), not approved.

O. P. Reference by Commissioner of Income-tax, Madras.

Mr. K. V. Sesha Ayyangar, for the Petitioner.

Messrs. Nugent Grant and C. Krishna-swami Iyer, for the Respondents.

Leach, C. J.—The assessee in this case is the Madras and Southern Mahratta Railway Co., Ltd., which was incorporated in England in 1882. The main object of the incorporation of the company was the fulfilment of a contract with the Secretary of State for India in Council for the construction and carrying on of a railway in India. After the incorporation, the contract was duly entered into and in accordance therewith the company constructed, equipped and maintained the railway to which the contract related and supplied the necessary staff for its working. The Secretary of State provided the land required for the railway and also the moneys necessary for its construction and working. All the assets of the undertaking including the rails, plant, machinery and rolling stock were to be and are his property. The company manages the railway under the supervision and control of the Secretary of State, who is empowered to appoint one member of the Board of Directors. The Court has been informed that the director appointed by the Secretary of State possesses a power of veto. By virtue of the contract of 1882 the company undertook to pay into the Bank of England to the credit of the Secretary of State a sum £30,00,000, and the Secretary of State undertook during the continuance of the contract to pay half yearly to the company out of the revenues of India interest at the rate of $3\frac{1}{2}$ per cent. per annum on the amount. The £30,00,000 was duly paid by the company into the Bank of England to the credit of the Secretary of State, who has paid to the company in London half yearly the amount required to meet the interest due, but the Secretary

of State has reimbursed himself at the end of the year out of the profits of the undertaking. The £30,00,000, represented the company's capital and the Secretary of State guaranteed interest on it at the rate mentioned. The contract also provided for division of the surplus profits between the Secretary of State and the company according to their respective shares in the capital of the undertaking.

The contract of 1882 continued to govern the relations between the company and the Secretary of State until June 26, 1908 when a further contract, expressed to be supplemental to the contract of 1882, was entered into. The contract of 1908 provided for the continuance of the original contract subject to certain variations and modifications. It was agreed that the capital of the undertaking should be taken to be the sum of £1,62,50,000 of which £1,27,50,000 was to be the capital of the Secretary of State, and £35,00,000 to be the capital of the company. The Secretary of State was given the right to require the company to issue new capital stock not exceeding £15,00,000 to be allotted as fully paid up to such share-holders as he might direct. This new stock was issued in the same year with the result that the amount of the company's capital became £50,00,000 the figure at which it now stands. After the issue of this new stock the capital of the Secretary of State was deemed to be £1,12,50,000 for the purposes of determining the proportion in which the profits should be distributed. All moneys received by the company in the course of the working of the railway have to be paid over to the Secretary of State. The company is not entitled to use any of the receipts of the undertaking for the purposes of meeting working expenses. These expenses are met from a grant made each year by the Secretary of State. As I have indicated the net receipts of the undertaking are divided at the end of each year between the Secretary of State and the company in proportion to their respective shares in the capital. The distribution of the profits rests with the Secretary of State, who is entitled in calculating the surplus to deduct the equivalent in rupees of the amount he has paid to the company by way of guaranteed interest in the course of the year. The surplus has always been more than sufficient to enable the Secretary of State to reimburse himself.

The reference arises out of the assessment of the company for the year 1937-38. The company returned an income of Rs. 24,36,479 for 1936-37. In arriving at this figure, the

company. deducted Rs. 23,33,333 which it had received from the Secretary of State as interest under his guarantee. This deduction was in accordance with the practice which had been previously followed, a practice which received the approval of the Calcutta High Court in *B. N. Ry. Co. v. Secretary of State* (1). This decision however conflicts with a later decision in England affecting the company, *M. & Sm. Ry. Co. v. Commissioner of Inland Revenue* (2), and it is this conflict which has given rise to the reference. The income-tax authorities say that the Calcutta decision is wrong and that the company in calculating its annual profits must include the amount of guaranteed interest received in London. In order that the question may be decided the Commissioner of Income-tax, in agreement with the company, has referred to this Court under the provisions of s. 66 (1), Income Tax Act, 1922, the following question :

"Whether the said sum of Rs. 23,33,333 being the equivalent in rupees of the guaranteed interest paid by the Secretary of State for India under the terms of the contracts dated June 1, 1882 and June 26, 1908, between the Secretary of State and the company which was deducted for the purpose of the company's return for the accounting year 1936-37 is liable to assessment in the hands of the company ?"

In *B. N. Ry. Co. v. Secretary of State* (1) that Company was called upon to pay tax on an income of Rs. 1,72,60,595, which included a sum of Rs. 13,07,440 being the equivalent of the amount of the guaranteed interest paid in sterling by the Secretary of State on the share of the capital of the Company. For the purposes of the present reference the contract of the Company with the Secretary of State may be taken to be on all fours with the contract of the Bengal Nagpur Railway Company Limited with the Secretary of State. The Bengal Nagpur Railway Company Limited claimed that it was only taxable in respect of the amount which it received in India at the end of the year as its share of the surplus profits. A Full Bench of the Calcutta High Court held that the Company was only liable in respect of its share of the surplus profits received in return for its services in the management of the railway, and not in respect of the moneys received in London. It was considered that the payment of the guaranteed interest in London was independent of the earnings of the railway and that the repayment of the amount of the guaranteed in-

terest constituted the payment of a debt due from the Company to the Secretary of State.

In *M. & Sm. Ry. Co. v. Commissioner of Inland Revenue* (2) the question was whether the Company was liable to Corporations profits tax in respect of the amount which it received from the Secretary of State as guaranteed interest. Admittedly, there is no difference in principle between assessment in England to the Corporations profits tax and assessment to Indian income-tax. It was held by Roylatt, J. that the guaranteed interest paid by the Secretary of State formed part of the Company's profits and that the recoupment to the Secretary of State out of the surplus profits represented a distribution of profits within the prohibition of deduction from profits in s. 53 (2), Finance Act, 1920. Rowlatt, J. put the question this way :

"Are the profits of the Company for the purpose of Corporation profits tax the amount of their share before the Secretary of State is recouped, or are they only the balance which is left to them after the Secretary of State is recouped ? That is what the question is, or to put it in another way, are they to be taxed on that balance, or are they to be taxed on the balance plus the amount of the guaranteed interest; which is only putting the same thing in another way ?"

In deciding the case against the Company, the learned Judge said :

"If you put it in commercial or financial language or look at it from the commercial or financial point of view, the position simply is that these share-holders have been paid out of the proceeds of the working of the railway, and the revenues of India have not paid them a penny. The money they have got is simply because the railway has been so successful, and for no other reason they have got it. If it had not been successful they would have got some of it from the Secretary of State for India, but that position has not arisen; or, if you use language framed more exactly with respect to tax law, this, in my judgment, is the position, that the Railway Company have earned all these profits, all their one-fifth share, or whatever it is profits of the Railway Company, and it does not matter in the least that they have had to apply those profits, being profits from the working of the railway, in making good to the Secretary of State a guarantee which he had honoured provisionally in favour of the share-holders.....The Secretary of State is recouped out of what is called the company's share of the surplus receipts and as I have pointed out, the extent of his recoupment depends upon the amount of the profits. I think that this is a distribution of profits within the prohibition in s. 53, sub-s. 2 (b), Finance Act, 1920. I think it is a distribution of profits. It is a distribution of profits in recoupment of a guarantor, who guaranteed those profits—guaranteed them if you like to the share-holders, but what he guaranteed are the profits. He has guaranteed that the people who put up the capital shall have a return on the capital, and if the profits unaided give that return, the person who gives the guarantee gets them to make good his guarantee. It seems to me the very simplest case of the application of profits after they have become profits, by way of distribution of them to make good to somebody who

(1) 49 C 815; 70 Ind. Cas. 46; A I R 1922 Cal. 503; 27 C W N 34.

(2) (1928) 12 Tax. Cas. 1111.

has taken the risk of those profits not reaching that amount."

Both the Company and the income-tax authorities accept the decision of Rowlatt, J. in *M. & Sm. Ry. Co. v. Commissioner of Inland Revenue* (2) as correctly stating the law and consequently are agreed that *B. N. Ry. Co. v. Secretary of State* (1) ought not to be followed. While accepting the judgment of Rowlatt, J. in *M. & Sm. Ry. Co. v. Commissioner of Inland Revenue* (2) Mr. Grant has contended on behalf of the Company that the payment of interest on the £ 50,00,000 in London cannot be regarded as profits accruing or arising in British India within the meaning of s. 4, Income Tax Act, 1922. In fact this is the only point taken on behalf of the Company. As the correctness of the decision in *M. & Sm. Ry. Co. v. Commissioner of Inland Revenue* (2) is not challenged, I fail to see any basis for the argument that the receipt of the interest in London must be taken to be income earned there. The decision of Rowlatt, J. emphatically negatives the contention. The basis of his judgment is that all the profits of the undertaking are earned in India and the payment by the Secretary of State in London is merely a provisional payment which he recovers out of the profits in India. There are cases arising under the Income Tax Act, which also militate against Mr. Grant's contention. In *Commissioner of Income Tax, Bombay v. Sarupchand Hukamchand* (3) the Bombay High Court had to consider whether s. 4 (1), Income Tax Act, 1922, applied in these circumstances. A Company registered in Indore, a Native State, entered into an agreement with a firm in Bombay under which the firm was to open and maintain at the Company's expense shops in Bombay and elsewhere for the sale of the Company's goods, to keep the books of account in Indore in respect of all sale proceeds and disbursements of the Company to charge a commission of $1\frac{1}{4}$ per cent. on the gross sale proceeds of all cloth and yarn produced by the Company, and to pay itself out of the moneys of the Company all sums due to it by way of commission or otherwise. The sale proceeds of the Bombay shop were all sent to Indore and the commission was paid there. It was contended that in these circumstances no income accrued or arose in British India, but the contention was rejected and the decision was approved of by the Privy Council in *Commissioner of Income*

Tax; Bombay v. Chunilal B. Mehta (4). In *Saunders v. Commissioner of Income Tax, United Provinces* (5) the Allahabad High Court held that a sum of money paid annually in London to the Bishop of Lucknow by the trustees of a certain fund as a gratuitous and unconditional personal allowance of the holder of the Lucknow See was income accruing or arising in British India and was assessable as salary under s. 7 (1) of the Act. In *In the matter of V. G. Every* (6) the Calcutta High Court held that commission earned by an assessee in British India for services rendered there as an employee of a company, which was received by him in the United Kingdom while on leave, was income which had accrued or arisen in British India within the meaning of s. 4 (1).

It is not necessary to carry the discussion any further. There is ample authority in the cases which I have quoted to support the contention of the Income-tax authorities that all the profits of the Company accrue or arise in British India, and therefore I would answer the question referred in the affirmative. I would add that the Court is not called upon to consider whether the payment in London would constitute profits arising in British India in the event of the working of the undertaking not realizing sufficient to reimburse the Secretary of State at the end of the year, as this situation has not arisen. As the reference has been made by consent in order that there should be a pronouncement by the Court on the question there will be no order as to costs.

King, J.—I agree.

Krishnaswami Ayyangar, J.—I also agree.

N.-S.

Answered in affirmative.

(4) I L R (1938) Bom. 752; 176 Ind. Cas. 15; 1938 O L R 337; 1938 A L R 651; 11 R P C 41; 48 L W 204; A I R 1938 P C 232; 4 B R 756; 67 C L J 554; 42 C W N 1070; (1938) M W N 948; 1938 O W N 846; 40 Bom. L R 916; 32 S L R 862; 65 I A 332 (P O).

(5) 5 I T C 454; 137 Ind. Cas. 84; A I R 1932 All. 151; 54 A 223; (1931) A L J 1107; Ind. Rul. (1932) All. 275.

(6) I L R (1932) 2 Cal. 327; 41 C W N 823.

RANGOON HIGH COURT

Criminal Appeal No. 963 of 1940

November 26, 1940

ROBERTS, C. J. AND DUNKLEY, J.

NGA MOE—APPELLANT

versus

THE KING—RESPONDENT

Penal Code (Act XLV of 1860), ss. 324, 304, 302—
Injury by accused on deceased's head not of nature to

(3) 5 I T C 108; 132 Ind. Cas. 505; A I R 1931 Bom. 236; 33 Bom. L R 382; 55 B 231; Ind. Rul. (1931) Bom. 345.

entail serious consequences in man of normal health—Deceased suffering from chronic malaria—Formation of abscess due to lowered vitality—Offence held fell under s. 324—Use of dangerous weapon held no indication of intention to cause injury likely to cause death—Offence, therefore, held did not amount even to culpable homicide.

The injury inflicted by accused on the head of the deceased was not such as to entail serious consequences to a man in normal health. It had healed up at the end of seven days, but he had a temperature, and on this account the doctor advised him to remain in the hospital until the temperature had subsided. However, the deceased stated that he suffered from chronic malaria and that his fever was due to malaria, and he insisted on leaving the hospital. He was brought back to the hospital again. He was then partially paralyzed on the left side, and there was an abscess over the seat of the first injury, which, was healed. An operation was performed on the same day; the abscess was lanced, and about eight ounces of pus were removed, but he became unconscious and died. Had the deceased stayed in hospital as advised, even if the abscess on the injury had formed, it would have been a simple matter to have cured it and no abscess on the brain would have formed at all and the deceased would have recovered. The deceased suffered from chronic malaria, and this malaria lowered his power of resistance and helped the formation of pus when there was an open wound. Death was not due directly to the enlarged spleen or to the heart, but these contributed indirectly because they lowered the vitality and power of resistance of the deceased. Thus the immediate cause of his death was his debilitated condition for which the injury was in no way responsible.

Held, that the accused was guilty of causing simple hurt, with a weapon for cutting, punishable under s. 324, I. P. C.

Held, further that the fact that a dangerous weapon was used was often, and might be indeed generally, a matter to be taken into account in deciding questions of intention; but circumstances alter cases, and, having regard to the medical evidence as to the wound itself, it was impossible to say that there was an intention to cause such injury as was likely to cause death. The offence could not, therefore, amount even to culpable homicide. 159 Ind. Cas. 1032 (4), 157 Ind. Cas. 667 (5), discussed. 171 Ind. Cas. 574 (1) and 165 Ind. Cas. 245 (2), distinguished. [p. 551, col. 2.]

Cr. A. from an order of the Sessions Judge, Bassein. in Sessions Trial No. 16 of 1940.

Mr. Lambert, Govt. Advocate, for the Crown.

Dunkley, J.—The appellant, Nga Moe, has been convicted of two offences by the learned Sessions Judge of Bassein, namely: (1) under s. 452, I. P. C., of having committed house trespass, having made preparation for causing hurt, on January 14, 1940, and (2) under s. 302, I. P. C., of having committed murder by causing the death of one Oo Swi on the same date. He has been sentenced to two years' rigorous imprisonment for the first offence, and transportation for life for the second offence, the sentences to run concurrently.

The facts out of which these charges arose

have been clearly established by the evidence led at the trial, and the appellant, although not admitting the offences, was not able to throw any doubt on the prosecution evidence. He called no evidence in his defence. On the evening of January 14, the appellant and a companion went to the shop of Kyaung Ngan, who keeps a shop at Shankwin village, and demanded to speak to Kyaung Ngan. He was armed with short *dah*, and his companion also had a longer *dah*. Kyaung Ngan spoke to them on the verandah of his shop, and the appellant, who was somewhat under the influence of liquor, tried to pull him down from the verandah, but Kyaung Ngan was able to push the appellant off the verandah. Then the appellant and his companion raised their *dahs* in a threatening manner, and so Kyaung Ngan entered his shop and closed the doors; thereupon the appellant and his companion cut at the doors with their *dahs*; and the appellant called out to Kyaung Ngan to open the doors. After a short interval the appellant and his companion went away. At that time the Township Magistrate happened to be staying in the village, and so it was decided that Oo Swi, who is the nephew and employee of Kyaung Ngan, should go and make a report to the Township Magistrate. Oo Swi and his wife left Kyaung Ngan's shop by the back door and went to the house where the Township Magistrate was staying. They found that the Magistrate had gone to bed; but some of his followers were seated in the house talking to the Headman's agent and another person who had come to pay land revenue. Oo Swi and his wife came on to the verandah of this house and began to report the occurrence at Kyaung Ngan's shop to the Headman's agent, and then the appellant also came on to the verandah and delivered blows with his short *dah* at Oo Swi. He struck two blows and then ran away. Oo Swi was not seriously injured. He was brought to the Bassein Hospital on the next day, and the medical witness states that he had three injuries, namely (1) an incised wound, one and a half inches long by a quarter inch broad, scalp deep, on the right side of the head one and half inches above the tip of the right ear, (2) a linear contusion one and a quarter inches long on the upper part of the right shoulder blade, and (3) a superficial incised wound, one and a half inches long and one-eighth inch deep, on the lower part of the left side of his back. All these injuries were simple injuries and only the first was deserving of any attention at all.

Oo Swi was detained as an in-patient in the hospital and this injury was treated. It had healed up at the end of seven days, but Oo Swi had a temperature, and on this account the doctor advised him to remain in the hospital until the temperature had subsided. The doctor now deposes that on account of this temperature there was a suspicion that sepsis might be forming underneath this injury. However, Oo Swi stated that he suffered from chronic malaria and that his fever was due to malaria, and he insisted on leaving the hospital. He was brought back to the hospital by his relatives on February 5. He was then partially paralyzed on the left side, and there was an abscess over the seat of the first injury, which, as I have said, was healed. An operation was performed on the same day; the abscess was lanced, and about eight ounces of pus were removed, but on February 7, Oo Swi became unconscious and died. The *post mortem* examination revealed that in addition to the abscess over the seat of the injury, there was another internal abscess on the top of the head between the two lobes of the brain, and death was due to this abscess on the brain which had been caused by sepsis.

According to the medical witness, the brain abscess had formed as a result of infection spreading into the brain through the blood stream after the formation of pus under the first injury. This injury had not cut the skull at all, and there was no direct communication between the external injury and the abscess on the brain, which was not near the injury. The doctor has stated that, had the deceased stayed in hospital as advised, even if the abscess on the injury had formed, it would have been a simple matter to have cured it and no abscess on the brain would have formed at all and the deceased would have recovered. The *post mortem* examination revealed that the spleen of the deceased was greatly enlarged, his liver was congested and somewhat enlarged, his heart was hypertrophied and the valves of the heart were slightly thickened, and malarial parasites were found in the blood stream. The medical witness stated that the deceased suffered from chronic malaria, and opined that this malaria lowered his power of resistance and helped the formation of pus when there was an open wound. In his evidence before the Court of Session the medical witness said:

"Death was not due directly to the enlarged spleen or to the heart, but these contributed indirectly because they lowered the vitality and power of resistance of the deceased."

Dealing first with the first charge of house

trespass, having made preparation for causing hurt, this offence was clearly established on the facts. But as nothing whatever was alleged against the previous character of the appellant, the sentence passed was, in my opinion, somewhat severe. I would uphold the conviction on this charge, but reduce the sentence to one of rigorous imprisonment for one year.

Turning now to the second charge of murder, the learned Sessions Judge rightly laid down that in order to constitute the offence of culpable homicide it is necessary, first that the death of the deceased should have been caused by the act of the accused, and, secondly, that the accused did this act with the intention of causing death, or of causing such bodily injury as is likely to cause death. The learned Sessions Judge then came to the conclusion that the appellant caused the death of the deceased, and in coming to this conclusion he referred to the case in *King v. Abor Ahmed* (1) and *Emperor v. Nga San Pai* (2). He quoted a passage from the judgment of Spargo, J. in *King v. Abor Ahmed* (1) to the effect that if death results from an injury voluntarily caused, the person who caused that injury is deemed to have caused the death. With all due respect, this passage, when read alone, is too broadly stated, and it must be construed in conjunction with the facts of the particular case, which showed that the injury inflicted was of itself likely to cause death. The proposition of law laid down by the Full Bench in *King v. Abor Ahmed* (1), is stated in the judgment of my Lord the Chief Justice, and is that where an injury is intentionally inflicted the defence that no proper medical treatment was administered does not exonerate the person who inflicted the injury from guilt of culpable homicide if death ensues as a natural or likely consequence. In order that the accused may be held to have caused the death of the deceased, the injury inflicted must be a proximate cause of death, and not a remote cause connected with the death by a chain of intervening events. Thus, in a case not officially reported, in *Nga Paw v. Emperor*, 38 Cr. L. J. 103 (3) where the injury inflicted was itself likely to cause death, but death in fact ensued as a result of gangrene induced by tying up the injury with a dirty cloth,

(1) (1937) Rang. 384; 171 Ind. Cas. 574; A I R 1937 Rang. 396; 38 Cr. L. J. 1097; 10 R. Rang. 165 (F B).

(2) 14 R. 634; 165 Ind. Cas. 245; A I R 1936 Rang. 442; 37 Cr. L. J. 1119; 9 R. Rang. 199; (1936) Cr. Cas. 866.

(3) 38 Cr. L. J. 103; 165 Ind. Cas. 911; A I R 1936 Rang. 526; 9 R. Rang. 229. (1936) Cr. Cas. 1068.

my Lord the Chief Justice and myself, sitting as a Bench, held that the accused was guilty of murder.

On the other hand, in another case not officially reported, in *Nga Ba Min v. Emperor*, 37 Cr. L. J. 205 (4) where the injury inflicted was slight and the immediate cause of death was the effect of the village remedies applied to the injury, I held that the accused was not guilty of culpable homicide. The Chief Court of Oudh has come to the same conclusion in *Sobha v. Emperor* (5) the facts of which case were exactly the same as those in *Nga Ba Min v. Emperor*, 37 Cr. L. J. 205 (4). In this latter case I said that in order that a person should be guilty of culpable homicide, the death of the deceased must be connected with the act of violence or other primary cause, not merely by a chain of causes and effects, but by such direct influence as is calculated to produce the effect without the intervention of any considerable change of circumstances. The principle involved is stated in Hale's *Pleas of the Crown*, Vol. 1, p. 428 in the following terms:

"If the wound or hurt be not mortal and it shall be made clearly and certainly to appear that the death of the party was caused by ill-applications by himself or those about him of unwholesome solves or medicines, and not by the wound or hurt, it seems that this is no species of homicide. But when a wound, not in itself, mortal, for want of proper applications or from neglect, turns to a gangrene or a fever, and that gangrene or fever is the immediate cause of the death of the party wounded, the party by whom the wound is given is guilty of murder or manslaughter according to circumstances, for, though the fever or gangrene, and not the wound, be the immediate cause of the death, yet the wound, being the cause of gangrene or fever, is the immediate cause of the death *causa causati*."

The injury inflicted by the appellant in the present case was not such an injury as would be likely to entail any serious consequences to a person in normal health, and even in the case of the deceased Oo Swi his death would not have resulted from the injury if he had not insisted on leaving the hospital against medical advice. His death really ensued because of his weak physical condition due to his suffering from chronic malaria and because his powers of resistance to infection had been so much lowered by the effects of this disease. It seems clear that no abscess would have formed on the brain if the deceased had been in a normal state of health, and he died from the abscess

on the brain, not from the injury, which had only a remote connection with this abscess. The immediate cause of the death of the deceased was his debilitated condition, for which the injury was in no way responsible. Therefore it cannot be held that the act of the appellant caused the death of the deceased. The only case in which the infliction of an injury of this nature under similar circumstances could be held to amount to culpable homicide or murder is a case falling within cl. 2 of s. 300, I. P. C., namely, if the act is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused. If there had been evidence to show that the appellant was at the time aware of the state of the deceased's health and therefore knew that even a slight injury was likely to result in his death, his act might have been brought under this clause, but there is no such evidence. No doubt, in his examination in the committing Court the accused did make this statement:

"The injuries received by him were not serious. He had been ailing for 15 years. Then about a year ago he was struck on the head, and on this account he became ill and died;"

but this statement is not evidence that the appellant was aware of these facts before he struck the deceased, and in making this answer he was merely repeating, in familiar language, the medical evidence which had already been given. In my opinion, the appellant cannot be held to be guilty of culpable homicide, and his offence was the offence of causing simple hurt with a weapon for cutting, punishable under s. 324, I. P. C. I would therefore set aside the conviction and sentence of the appellant under s. 302, I. P. C., and, instead thereof convict him of an offence under s. 324, I. P. C., and sentence him to undergo rigorous imprisonment for a term of two years for this offence, the sentence to run consecutively with the sentence passed on the first charge.

Roberts, C. J.—I entirely agree, but as this case comes to us on a reference I wish to add a few words. It really is plain commonsense that, if a man strikes another such a blow as will not in the ordinary course of events cause more than simple hurt, he is answerable for causing simple hurt and for no more. No doubt, the natural effect of some grave wounds, if not medically treated, is septic inflammation, and if death proceeds from this in the ordinary course the offender is *prima facie* guilty of murder, if death is merely the likely result of such an

(4) 37 Cr. L. J. 205; 159 Ind. Cas. 1032; A. I. R. 1935 Rang. 418; (1935) Cr. Cas. 1205; 8 R. Rang. 309.

(5) 11 Luck. 401; 157 Ind. Cas. 667. A. I. R. 1935 Oudh 446; 36 Cr. L. J. 1262; 1935 O. W. N. 940; 1935 O. L. R. 504; 8 R. O. 43; (1935) Cr. Cas. 1294.

injury it is culpable homicide. But here the dangerous condition which supervened was an unlikely consequence of a blow comparatively trivial in character, although the weapon was a dangerous one. The fact that a dangerous weapon is used is often, and may be indeed generally, a matter to be taken into account in deciding questions of intention; but circumstances alter cases, and, having regard to the medical evidence here as to the wound itself, it is impossible to say that there was an intention to cause such injury as was likely to cause death. The offence could not therefore amount even to culpable homicide. In *King v. Abor Ahmed* (1), at p. 391* I observed that:

"Where an injury is intentionally inflicted the defence that no proper medical treatment was forthcoming does not exonerate the person who caused the injury.....from guilt of culpable homicide if death ensues as a natural or likely consequence. Such a person is deemed to have caused the death."

The learned Sessions Judge has quoted the judgment of my learned brother Spargo who whilst in no way dissenting from the rest of the Court, used the shorter phrase "where death results from an injury voluntarily caused, the person who causes that injury must be deemed to have caused the death, although, etc."

Spargo, J. doubtless thought it unnecessary to overload this particular sentence by repeating the qualification which I had already expressly made, and which is derived from the I. P. C. The death of a person must be at least a likely consequence of the injury received before s. 299 can operate at all, much less before any consideration arises as to whether the offence of murder has been committed. In the case cited, the Full Bench was not dealing with a matter in which the likelihood of death from the injuries was ever in dispute. It turns out here, though there is no evidence that the appellant knew it at the time he struck the blow, that the deceased was in such bad health as to lower his power of resistance to a septic condition; and when, owing to his state of health, this supervened, he was unwilling to exercise common prudence or to abide by the proper remedies and skilful treatment available to him. These circumstances, in my opinion, explain the cause of death, which was due to a number of factors of which the appellant's wrongful act was only one. The learned Sessions Judge found him guilty of murder, but he cannot be said to have caused the death of the deceased so as to be guilty even of the offence of culpable homicide; for, he did nothing which was likely to cause it, or which would have

done so except in conjunction with other circumstances which no reasonable man could foresee.

Again, even in order to constitute the offence of voluntarily causing grievous hurt, s. 322, I. P. C., and the explanation thereto lay down that the offender must intend or know himself likely to cause grievous hurt. There was no such intention or likelihood proved here and the offence was thus one of simple hurt. I agree in the convictions and sentences proposed by my learned brother both in respect of this offence and of the other offence of house trespass having made preparation for causing hurt.

D.

Order accordingly.

PATNA HIGH COURT

Civil Review No. 32 of 1940

and

Letters Patent Appeal No. 28 of 1939

April 22, 1941

HARRIES, C. J. AND FAZL ALI, J.

GIRDHARAN PRASAD MISSIR AND OTHERS

—PLAINTIFFS—RESPONDENTS—PETITIONERS

versus

BHOLI RAM AND OTHERS—DEFENDANTS—

APPELLANTS—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1—Consent decree sought to be vacated or amended on ground of fraud—Proper course is by separate suit.

The proper course and indeed the only course, for a party desiring to have a consent decree amended or vacated upon the ground that it was fraudulently procured, is to proceed by a separate suit for the purpose. It is not competent under O. XLVII to obtain a review of a consent decree on the ground that the consent decree was obtained by fraud. 89 Ind. Cas. 946 (1), applied, 124 Ind. Cas. 525 (2), relied on, *Ram Gopal Mazumdar v. Prasanna Kumar Sanyal* (4) and *Barahmdeo Prasad v. Banarsi Prasad* (6), not followed, 2 Ind. Cas. 129 (3), 72 Ind. Cas. 566 (5) and 50 Ind. Cas. 497 (7), referred to. [p. 554, col. 1.]

L. P. A. from a decision of Mr. Justice Rowland, dated October 16, 1939.

Messrs. B. P. Sinha, B. N. Rai, and J. K. Ray, for the Petitioners.

Messrs. P. R. Das and K. Dayal, for the Opposite Party.

Order.—This is an application in review by the respondents in a Letters Patent Appeal who ask us to vacate the compromise decree passed in that appeal on August 16, 1940, on the ground that in fact they had not consented to the terms of the compromise and that the Advocates who appeared for them had consented to those terms against their instructions.

The subject-matter of the litigation which had given rise to the Letters Patent Appeal

was 1 *bigha*. 15 *dhurs* of *raiya* land in village Narainpur appertaining to *khata* No. 37. This land consisted of plots Nos. 457 and 465 which originally belonged to one *Mst. Dulari Kuer*. *Dulari Kuer* mortgaged plots No. 457 to defendant No. 7 for Rs. 25 and plot No. 465 to defendant No. 8 for Rs. 40. The present petitioners subsequently purchased from the defendants Nos. 9 and 10, who are alleged to be the daughters of *Mst. Dulari Kuer*, the two disputed plots and some other lands for a sum of Rs. 200 on May 25, 1936, and subsequently instituted a suit for the redemption and recovery of possession of the disputed plots against defendants Nos. 7 and 8 to whom *Dulari Kuer* had mortgaged the land and also impleaded in the suit the appellants in the Letters Patent Appeal, who were described in the plaint as defendants first party, as they had purchased the land subsequently by a registered sale-deed from defendants Nos. 7 and 8 and thereafter put up certain structures and machinery upon it and also constructed a railway siding thereon. Their case was that the defendants Nos. 7 and 8 had not the full right of ownership and could not transfer the land to the defendants first party. On the other hand the defence in the suit was that the land originally belonged to one *Jadhubans Gir*, but as he had no wife or issue, he had surrendered the land to the landlord and thereafter the land had been settled by the landlord with defendants Nos. 7 and 8, the vendors of defendants first party.

The First Court decreed the plaintiffs' suit but the decree was reversed in appeal and the plaintiffs' prayer for recovery of possession of the land and the demolition of the structure standing thereupon, was refused. A decree, however, was passed in favour of the plaintiffs directing the defendants first party to pay them a sum of Rs. 210-8-0 as the value of the land, the Appellate Court observing that as the plaintiffs had acted maliciously, they were not entitled to any cost. The plaintiffs thereupon preferred a second appeal to this Court and the learned Judge who heard the appeal set aside the judgment of the Subordinate Judge and passed a preliminary decree for redemption in accordance with O. XXXIV, r. 7. Then there was a Letters Patent Appeal in which a consent decree was passed in the following terms:—

"If the defendants first party pay to the plaintiffs within a period of two months from to-day a sum of Rs. 5,500 the plaintiffs' claim will stand dismissed in its entirety. On the other hand, if the defendants fail to pay the plaintiffs the said sum within the said period

this appeal will stand dismissed and the decree of the learned Single Judge affirmed. The said sum of Rs. 5,500 must be deposited in this Court within the stated period."

Before this order was made, we had on the oral application made on behalf of the parties given them leave to compromise the appeal as in our opinion the compromise was for the benefit of the minor plaintiffs. At the time of the compromise the plaintiffs who were respondents in the appeal were represented by Dr. Dwarika Nath Mitter and Mr. G. P. Shahi, and the defendants first party who were appellants were represented by Mr. P. R. Das, Mr. Hem Chandra Mitter and Mr. Kameshwar Dayal. In order to avoid confusion the plaintiffs (respondents in the Letters Patent Appeal) will be hereafter referred to as the petitioners and the defendants first party (the appellants in the Letters Patent Appeal) will be referred to as the opposite party.

Now the allegations upon which the present application is based may be summarised as follows:—On August 15, 1940, a day before the Letters Patent Appeal was taken up, the petitioners Nos. 1 and 3 had definitely instructed their Advocates Dr. Dwarika Nath Mitter and Mr. G. P. Shahi, not to compromise the appeal in any event. On the morning of August 16, 1940 Mr. Kameshwar Dayal, one of the Advocates appearing for the opposite party accompanied by some of their servants had gone to the house of Mr. G. P. Shahi, one of the Advocates appearing in the case on behalf of the petitioners. At the house of Mr. Shahi, *Pandit Ram Chandra Sukla* on behalf of the opposite party made a proposal to *Chandra Bhukhan Prasad Missir* that the appeal might be compromised and offered a sum of Rs. 10,000 as one of the terms of the compromise. *Chandra Bhukhan Missir*, however, did not agree. Thereafter when the appeal was taken up in Court Mr. G. P. Shahi called *Chandra Bhukhan Prasad Missir* and asked him whether he was willing to compromise the appeal to which he replied in the negative. Some time later *Chandra Bhukhan Missir* told Mr. Shahi that petitioner No. 3 *Girdharan Prasad Missir* was also not willing to compromise the appeal. Later on the petitioners Nos. 1 and 3 came to know about the compromise and then they asked their Advocates as to why the appeal had been compromised against their specific instructions and requested them to inform the Court that they had not given their consent to the terms of the compromise, but the Advocates did not listen to this request. The petitioners Nos. 1

and 3 then wanted to inform the Court personally after 2 p. m. as to what had happened, but as the Court was hearing arguments in another case, they could not do so. At 4 p. m. when the Court was raising, they informed the Court that they had not consented to the compromise, whereupon the Court ordered them to file a petition to that effect. The petitioners accordingly filed an application for review on September 30, 1940. Now if these facts were admitted or there were *prima facie* grounds for believing them to be true, we might have been inclined to consider this application. But the petitioners have come to Court with a strange story and the opposite party whose case is that this petition is only an attempt to blackmail them, strongly challenge the truth of the main part of the story. In such circumstances we can review the order, only if after an investigation, which must be more or less like the trial of a suit, we are satisfied that the allegations made in the petition are correct. In our opinion, therefore, this application must be rejected on the ground that the petitioners have, as they themselves admit, an alternative remedy by way of a suit, which is undoubtedly the more appropriate remedy in this case, inasmuch as the matters raised before us require an elaborate investigation.

We are also not fully satisfied on the materials before us that this is a *bona fide* application. Dr. Dwarika Nath Mitter, the leading Counsel for the petitioners was a Judge of the Calcutta High Court for many years and is one of the most distinguished and highly respected members of the local Bar. It seems to us incredible that Dr. Dwarika Nath Mitter would have compromised the case, if, as is alleged, he had been given clear and specific instructions not to compromise it. The other Advocate, Mr. Shahi, who appeared for the petitioners has been practising in this Court for many years and we see no reason why this learned Advocate should have also acted contrary to what the petitioners allege to have told him not only on August 15, but also at the time when the arguments in the case were in progress. If these learned Advocates had appeared before us and made a statement at the Bar that there was some misunderstanding on their part in regard to the instructions given to them, we would have been inclined to consider this application. But these Advocates are not before us and the petitioners have filed this petition through an Advocate, who did not represent them at the time of the hearing of the appeal and who has no personal

knowledge of what happened at the time of the hearing. It is practically admitted that two of the petitioners, that is to say, petitioners Nos. 1 and 3 who were apparently in charge of this litigation were present in Court on the day the appeal was heard. We find it somewhat difficult to believe that if the compromise had been recorded without their consent, they would not have then and there brought the fact to the notice of the Court. The story put forward in the petition that the petitioners came to know much later that the appeal had been compromised and they tried to bring the matter to our notice at 2 p. m. but refrained from doing so as another case had started does not appear to us to be at all a probable one. However that may be, there is a clear mis-statement at the end of the petition. Though it is a fact that when the Court was rising one of the petitioners told us that he was not satisfied with the compromise, yet after we had risen, we were informed by the Reader that that petitioner did not want to press the matter further. It is significant that though the order was recorded and signed by us on August 16, the application for review was not filed until September 30, 1940.

There was considerable discussion before us as to whether an application for review lies at all in the circumstances of this case. In *Nathumal v. Raghubir Singh* (1) it was held that when a compromise has been incorporated into a decree, the Court cannot review its order on the sole ground that the compromise has been entered into under undue influence or coercion. In *J. G. Galstoun v. Pramatha Nath Roy* (2) Rankin, C. J. expressed the opinion that if a party desires to have a consent decree amended or vacated upon the ground that it was fraudulently procured, his proper course and indeed the only course is to proceed by separate suit for the purpose, because the matter is certainly grave enough to deserve a separate suit. The learned Chief Justice then proceeded to deal with the question as to whether O. XLVII of the Civil P. C. was applicable to such a case and observed as follows :—

"The authorities in this Court are not uniform, but putting the matter at the highest in favour of the respondents, it may be said that there is some difference of opinion upon the question whether, and in what circumstances, a consent decree may be reviewed under O. XLVII of the Code. It was said in *Golab Koer v. Badshah Bahadur* (3) that 'while it must

(1) 48 A 160; 89 Ind. Cas. 946; L R 6 A 569 Civ.; 23 A L J 1029; A I R 1926 All. 50.

(2) 57 C 154; 124 Ind. Cas. 525; 33 C W N 883; A I R 1929 Cal. 470; Ind. Rul. (1930) Cal. 461.

(3) 13 C W N 1197; 2 Ind. Cas. 129; 10 C L J 420.

be conceded that a large preponderance of authority is against the contention that a consent decree cannot on any ground be challenged upon an application for review of judgment, there is no foundation for the suggestion that there is a preponderance of authority in favour of the contention that a consent decree may be reviewed on the ground of fraud.' The main proposition decided in that case was that a party who had applied unsuccessfully under O. XLVII for review of a consent decree on the ground that it has been obtained by fraud was entitled, notwithstanding his failure, to prosecute a remedy by suit. This decision was contrary to a previous decision in the case of *Ram Gopal Mazumdar v. Prasanna Kumar Sanyal* (4) and I desire to reserve my opinion upon the point. In *Gulab Koer's case* (3) (*supra*) it was pointed out that there are weighty reasons why a regular suit should be regarded as a more appropriate remedy in such cases. Now, I desire to say that, in my opinion, it is not competent under O. XLVII, to obtain a review of a consent decree on the ground that the consent decree was obtained by fraud. It appears to me that before such a doctrine can be taken as authorised by the Code, it is very necessary to lay one's finger upon some enactment which is clearly intended to make so large and inconvenient an exception to the general principles which govern this matter. Rule 1 of O. XLVII, after speaking of a case where a party has discovered new and important matter which was not within his knowledge or could not be produced by him at the time when the decree was passed, and of mistake or error apparent on the face of the record, introduces the words 'or for any other sufficient reason'. In *Chajju Ram case* (5) the Judicial Committee had occasion to point out that these words were not unlimited and must be taken to point to a reason which is sufficient on grounds at least analogous to those mentioned in the rule. It appears to me that if mistake or error is *prima facie* intended to be beyond the scope of the rule, unless the mistake or error be apparent on the face of the record it is curious, to say the least of it, that a party should employ this procedure for the purpose of making out a contentious case of fraud. In my opinion, the correct doctrine under the Civil P. C. is in no way different upon this point from that which is laid down for England in Daniel's Chancery Practice, 8th edition, 709. The authorities in this Court to the contrary are neither numerous nor impressive and had not infrequently been challenged *cf.* [*Barahamdeo Prasad v. Banarsi Prasad* (6).] On principle, and as a matter of construction of O. XLVII of the Code, I approve of the view taken in *Ramlagan Sadu v. Ram Birich Koeri* (7) and were it necessary I should desire to refer the matter to a Full Bench."

The learned Advocate for the petitioners tried at first to bring the present case under O. XLVII, r. 1 on the ground that there is a mistake or error apparent on the face of the record. This ground, however, had to be abandoned and the learned Advocate proceeded to contend that the petitioners were entitled to apply for a review on the ground that they had discovered a new and

important matter. The new and important matter is said to be the fact that the Advocates for the petitioners had consented to the petition of compromise though they had been told not to give such consent. In our opinion the case cannot be brought under O. XLVII, without straining the meaning of the words used in that rule; but even if it can be brought under it, it is difficult to hold that petitioners Nos. 1 and 3 who were undoubtedly present in Court at the time of the hearing of the appeal could not with exercise of due diligence have prevented their Advocates from consenting to a decree on terms which they were not prepared to accept. If their case is that the consent decree was due to some kind of fraud practised upon them by their Advocates, the case is directly hit by the decision in *Nathumal v. Raghubir Singh* (1). In any event we agree with Rankin, C. J. that the matter "is important enough to deserve a separate suit" and we accordingly reject this application with costs.

D.

Application rejected.

BOMBAY HIGH COURT

Criminal Appeals Nos. 179 and 180
of 1940

October 7, 1940

BROOMFIELD AND WASSOODIEW, JJ.

EMPEROR—COMPLAINANT

versus

RAGHUNATH RAMCHANDRA

KARLEKAR—ACCUSED

Electricity Act (IX of 1910), ss. 2 (n), 37—Definition of 'works' in s. 2 (n) not exhaustive—"Works," meaning explained—S. 37, rules under—Electricity Rules, 1922, r. 40-A (1) Proviso—Notification (No. 640/27-II) issued by Bombay Government on November 15, 1934, under—Words "works" and "their own works," meaning of—Installation works carried out by exempted electric company on other's premises at its own expense, remaining its own property—Whether fall within notification—Accused being exempt from operation of r. 40-A cannot be convicted under r. 46, Electricity Rules, 1932—Electricity Rules, 1937—Offence between March 27, 1937 and March 22, 1938—Neither r. 40-A of Rules of 1922, nor its corresponding r. 48 of the Rules of 1937, held applied—S. 24, General Clauses Act (X of 1897), held not applicable to Rules.

The definition of "works" in s. 2 (n), Electricity Act, is not exhaustive. Nevertheless, a reference to other provisions in the Act indicates that when the expression "works" is used it usually means works connected with the supply of energy, and not lighting installations.

The word "works" in the Bom. Govt. Notification (No. 640/27-II) issued on November 15, 1934, refers to installation works and not to works connected merely with the supply of energy and the words "their own works" in the same notification mean works carried out by the exempted bodies themselves, or perhaps works belonging to them and not merely the works

(4) 10 C W N 529; 2 C L J 508.

(5) 49 I A 144; 72 Ind. Cas. 566; 26 C W N 697; 30 M L T 295; 41 P L R 1922; 3 P L T 435; A I R 1922 P C 112; 16 L W 37; 17 P W R 1922; 3 L 127; 43 M L J 332; 24 Bom. L R 1238; 4 U P L R (P C) 99; 36 C L J 459 (P C).

(6) 3 C L J 119.

(7) 4 P L J 205; 50 Ind. Cas. 497; A I R 1919 Pat. 232.

carried out by them on their own premises. Hence the installation works which are carried out by exempted electric supply company on other's premises but at its own expense and which remain its own property fall within the notification and are, therefore, exempt. The accused thus being exempt from the operation of r. 40-A by reason of the notification cannot be convicted under r. 46, Electricity Rules, 1932.

The Electricity Rules, 1937, were made applicable in supersession of the Electricity Rules, 1922, on March 27, 1937. The Electricity Rules of 1937, came into force on March 22, 1938. The accused was charged under r. 40-A of the Electricity Rules, 1922, for an offence committed between March 27, 1937 and March 22, 1938:

Held, that neither r. 40-A of the Rules of 1922, nor its corresponding provision r. 48 of the Rules of 1937, applied to the offence.

Held, further that s. 24, General Clauses Act, could not be invoked to apply r. 40-A of Rules of 1922, to the offence as that section did not apply to rules framed under the Act.

Cr. As. from the order passed by the First Class Magistrate, Hungund.

Mr. R. A. Jahagirdar, Govt. Pleader, for the Govt. of Bombay.

Mr. K. G. Datar, for the Accused.

Broomfield, J.—These are appeals by the Govt. of Bombay in two connected cases in which one Raghunath Ramchandra Karlekar licensee and proprietor of an electric supply company at Ilkal in the Bijapur District, was prosecuted for an alleged breach of r. 48, Electricity Rules, 1937, and was acquitted by the Magistrate. There is no dispute about the facts of the case. In the months of February and March 1938, the accused carried out certain small installation works on the premises of some half a dozen inhabitants of Ilkal. The installation works consisted of putting in in each case one light point with switches and cut-outs. Three of these works were made the subject of one case and three of the other. The work was admittedly done at the expense of the supply company, and the light points, switches etc., remained the property of the company. Rule 48, which is alleged to have been infringed, is as follows:

"Precautions to be adopted by consumers and owners, electrical contractors and electrical workmen

—(1) No electrical installation work, including additions, alterations, repairs, and adjustments to existing installations, except such replacement of lamps, fans, fuses, switches and other component parts of the installation as in no way alters its capacity or character, shall be carried out upon the premises or on behalf of any consumer or owner for the purposes of the supply of energy to such consumer or owner, except by an electrical contractor licensed by the Provincial Govt. in this behalf and under the direct supervision of a person holding a certificate of competency issued by the Provincial Govt.:

Provided that the Provincial Govt. may by notification in the *Official Gazette* exempt on such conditions as it may impose any such description of work either

generally or in the case of any specified class or consumers or owners from so much of this sub-rule as requires such work to be carried out by an electrical contractor licensed by the Provincial Govt. in this behalf:

* Provided further that this rule shall not apply to any work carried out by or on behalf of the Govt. of India unless the Govt. of India so direct.

(2) This rule shall come into force in any province or part thereof on such date as the Provincial Govt. may by notification in the *Official Gazette* appoint."

The accused in this case holds a certificate of competency issued by the Provincial Govt. and it is not disputed that the works in question were carried out under his supervision. But the accused has not an electrical contractor's license. It is by reason of the want of this license that the prosecution alleges the rule has been infringed. The first difficulty in the way of the prosecution is that r. 48, under which the accused was charged did not come into force until March 22, 1938. That was the date fixed in the notification issued under part (2) of the rule. It is common ground that the installation works in question were carried out by the accused in February and March 1938, before March 22, 1938. But under the Indian Electricity Rules of 1922, there was a r. 40-A, which was in precisely the same terms as the present r. 48. It is suggested, therefore, that the reference to r. 48 of the rules of 1937 was a mere slip, that the charge should have been under r. 40-A of the rules of 1922, but that this mistake has not in any way prejudiced the accused, the wording of the two rules being precisely the same. That, however, does not get rid of the difficulty. The rules of 1937 were introduced by a notification dated March 27, 1937, which was as follows:

"In exercise of the powers conferred by s. 37, Electricity Act, 1910 (IX of 1910), and in supersession of the Indian Electricity Rules, 1922, the Governor-General in Council is pleased after previous publication to make the following rules applicable to the whole of British India."

Therefore, the old r. 40-A was superseded *prima facie* when the new rules were made applicable on March 27, 1937. As I have said the corresponding new r. 48, did not come into force until March 22, 1938, and, according to the contention of the learned Advocate for the accused, in February and the first part of March 1938, when he carried out these installation works, there was no rule corresponding to the present r. 48, in force. The learned Govt. Pleader attempts to get over this difficulty by relying on s. 24, General Clauses Act X of 1897. That provides, so far as is material, that where any Central Act or Regulation is repealed and re-enacted with or without modification, then, unless it is otherwise expressly provided, any rule

made under the repealed Act or Regulation, shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been made under the provisions so re-enacted, unless and until it is superseded by any rule made under the provisions so re-enacted. The learned Govt. Pleader's argument is that the old r. 40-A cannot be considered to have been superseded by the Electricity Rules of 1937 when they were made applicable on March 27, 1937, and was only superseded when the new r. 48, came into force in consequence of the notification issued under part (2) thereof. However, the notification by which the new rules were introduced expressly stated that they were in supersession of the Electricity Rules, 1922, and it is a little difficult to see how an exception is to be made in the case of r. 48. Another point is that s. 24 only comes into operation where a Central Act or Regulation has been repealed and re-enacted. According to the definitions in the General Clauses Act, neither Central Act nor Regulation would include a rule made under an Act, unless by some straining of language it is possible to say that the rule can be regarded as part of the Act, because it is provided that it is to have the same effect as though it were part of the Act. Assuming, however, for the sake of argument that the old r. 40-A can be regarded as having been in force at the time when the accused was prosecuted, we are not satisfied that a breach of the rule has in fact occurred. The accused has relied for his defence on the terms of a notification (No. 640/27-II) which was issued by the Bombay Govt. on November 15, 1934, (p. 2566, part I). It was as follows :

"In exercise of the powers conferred by the proviso to sub-r. (1) of r. 40-A of the Indian Electricity Rules, 1922, the Governor-in-Council is pleased to direct that the following Administrations, Institutions and Bodies shall be exempted from the operation of the said sub-r. (1) of r. 40-A in so far as their own works are concerned, namely :

1. The Electrical Branch of the Public Works Department, Bombay.
2. The State Railways.
3. The Victoria Jubilee Technical Institute, Bombay.
4. The College of Engineering, Poona.
5. The N. E. D. Civil Engineering College, Karachi.
6. All Electric Supply Companies.
7. All factories within the meaning of the Indian Factories Act, 1911 (XII of 1911).
8. The Royal Indian Navy Dockyard, Bombay.
9. Railways other than State Railways.

Provided that in the case of bodies referred to at items Nos. 7, 8 and 9 above, a person holding a Certificate of Competency is employed for supervising such works on their own premises."

The accused relies on the words "their own

works," in this notification and contends that as the installation works in question were carried out by the company itself, and after being carried out remained the property of the company, they are the company's own works, and therefore the exemption given by this notification in the case of electric supply companies is applicable to him. The case depends therefore on the interpretation of this notification and in particular of the words "their own works." The learned Govt. Pleader says that what is meant is works carried out on the premises of the various bodies referred to. There seems to be no very good reason however why the words "on their own premises" should be implied. It would have been very easy to say "works carried out by them on their own premises." Moreover, at the end of the notification there is a proviso that in the case of certain bodies "such works" (which would naturally mean their own works), when carried out on their own premises, are not exempted unless a person holding a certificate of competency is employed for supervising them. If the words "their own works" in themselves meant works on the premises of the body concerned, the addition of the words "on their own premises" in this last proviso would have been unnecessary. This interpretation of the words therefore seems to be unacceptable.

The learned Govt. Pleader has argued with more force that the word "works" should be interpreted with reference to the definition contained in the Act. According to that definition "works" includes electric supply lines and any buildings, machinery or apparatus required to supply energy and to carry into effect the objects of a license granted under part. II, which deals with the supply of energy. The definition is not exhaustive. Nevertheless, a reference to other provisions in the Act does seem to indicate that when the expression "works" is used it usually means works connected with the supply of energy, and not lighting installations of the kind with which we are concerned which have nothing to do with the supply of energy. It is usually a sound rule of construction to give the same meaning to words used in rules made under an Act as the words have in the Act itself. We were therefore at first somewhat impressed by the argument put forward on behalf of Govt. in this respect. But when we look at the language of r. 48, or r. 40-A, it becomes extremely difficult, if not impossible, to suppose that the word 'works' in the notification has the meaning ascribed to it in the definition in the Act.

The section begins by referring to "instal-

lation works" and the description of the work there given clearly covers the kind of work which was carried out by the accused in this case and in respect of which he has been prosecuted. The work referred to there is quite obviously not work connected merely with the supply of energy. Then the notification goes on to say that the Provincial Govt. may by notification exempt any such description of work either generally or in the case of any specified class of consumers or owners from the requirement that a licensed electrical contractor must be employed. So that the kind of work referred to in the rule is not work connected with the supply of energy but electrical installation work, and, that being so when we find the notification issued under the rule stating that certain bodies shall be exempted in so far as their own works are concerned, it seems reasonable to hold that by 'works' it meant the kind of works referred to in the rule and not the kind of works referred to in the definition.

The words "their own works," would naturally mean works carried out by the exempted bodies themselves, or perhaps works belonging to them. In the present case, the works were not only carried out by the electric supply company but were carried out at their own expense and remained their own property. Since it seems to be clear that the notification applies to the installation works, we find it impossible to say that the works carried out by the accused in this case are not such as can be fairly included in the expression "their own works" in this notification. If Govt. intended that the exemption was only to apply in the case of works carried out by the various bodies on their own premises, that intention has not been made sufficiently clear. On behalf of Govt. reliance was also placed on r. 46, of the rules issued on November 15, 1932, in connection with the issue of certificates of competency under r. 40-A of the Indian Electricity Rules, 1922. That rule is as follows:

"Supply companies to obtain contractor's licenses.—No electrical contracting work shall be carried out by any electric supply company unless they have obtained an Electrical Contractor's license and employed a separate staff of supervisors and wiremen, in compliance with these rules."

It is not clear however that the work carried out by the accused in this case can be described as electrical contracting work within the meaning of this rule. In any case, if he is exempted under the provisions of the notification from the operation of r. 40-A, he could not be convicted of a breach of that rule, and it is a breach of that rule which is

the subject of the charge. For these reasons we are of opinion that the learned Magistrate was right in acquitting the accused in this case, and we dismiss the appeals.

S.

Appeals dismissed.

OUDH CHIEF COURT

Criminal Appeal No. 723 of 1940.

THOMAS, C. J. AND GHULAM HASAN, J.

May 7, 1941

KING-EMPEROR—COMPLAINANT—

APPELLANT

versus

GAYA PRASAD AND OTHERS—ACCUSED—

RESPONDENTS

Criminal trial—Evidence—Appreciation—Practice of awarding rewards to Police witnesses before case is finally decided deprecated — Its effect stated — Appreciation of evidence — Prosecution evidence should be considered on merits and not rejected on consideration of defence evidence — Penal Code (Act XLV of 1860), ss. 149, 436—Common intention should be established.

Action of the Police authorities of rewarding Police witnesses before the case is finally determined is calculated to prejudicially affect the fair trial of the case against the accused. Such action may lead to a large body of otherwise good evidence being eliminated altogether from consideration. [p. 560, col. 2.]

[Their Lordships treated the evidence of such witnesses as suspicious and tainted.] [*ibid.*]

Where no common intention to burn the houses is proved all the accused cannot be convicted under ss. 436/149, I. P. C. [p. 562, col. 1.]

While dealing with the evidence of each prosecution witness the Judge should not unnecessarily introduce the defence evidence and reject the prosecution evidence largely because in his opinion the defence evidence established the innocence of the accused. The Judge should examine the prosecution evidence witness by witness on its own merits and reject it, if upon a careful analysis and scrutiny of the evidence he finds that it was not true or reliable to support the prosecution case. He should not test trustworthiness of the prosecution witnesses in the light of the defence evidence. [p. 563, col. 2.]

Cr. A. against the order of the First Assistant Sessions Judge, Gonda, dated July 8, 1940.

Mr. S. C. Das, Assistant Govt. Advocate assisted by R. B. Sarju Prasad Srivastava, Govt. Pleader, Gonda, for the Crown.

Messrs. H. G. Walford and J. W. Peters, for Accused No. 1.

Mr. H. G. Walford, for Accused Nos. 3 and 4.

Judgment.—Forty three persons were tried under ss. 147, 323/149, 325/149, 332/149 and 436/149, I. P. C. by the learned 1st Assistant Sessions Judge of Gonda and acquitted on July 8, 1940. The Provincial Govt. has preferred this appeal against the order of

acquittal of (1) Gaya Prasad Azad, (2) Hira Singh, (3) Ram Milan, and (4) Har Prasad Singh.

Hira Singh accused has not been arrested as it is said that he is on active service somewhere in Africa.

The charge against the accused was that on January 29, 1940, in *Mohalla Chain Tola*, Nawabganj, they were members of an unlawful assembly, the common object of which was to forcibly rescue four cows belonging to Mohammad Ishaq alias Gojai, (P. W. No. 1), as it was apprehended that they were going to be slaughtered; that in the prosecution of the said object they committed the offence of rioting punishable under s. 147, I. P. C.; that they caused simple hurt to Gojai and others, and grievous hurt to *Mst. Shubraton*, P. W. No. 5; that they set fire to the houses of Mohammad Ishaq, Mohammad Yasin and others and further voluntarily caused hurt to Abid Husain, Head Constable, P. W. No. 2, and some other constables in the discharge of their duties.

Nawabganj is about 23 miles from Gonda and the majority of the population in the town consists of Hindus.

Mohammad Ishaq alias Gojai is a beef seller in *Mohalla Chain Tola*, of Nawabganj, which is a short distance from the Police Station of Nawabganj.

The case for the prosecution is that Mohammad Ishaq on January 29, 1940, purchased four cows for Rs. 16 from Ali Raza, P. W. No. 3. Mohammad Ishaq did not pay the price of the cows but asked Ali Raza to accompany him (Mohammad Ishaq) and that he would pay the money and take a receipt at his house. Abdul Rahim, Mohammad Ishaq's cousin, Ali Raza and his five year old son Roshan went with the cows to Mohammad Ishaq's house. When they were near a school in Chain Tola they met two Hindus Ram Milan accused, and another man. It was 11 a. m. They asked them where they had got the cows from. Mohammad Ishaq replied that he had purchased them from Ali Raza. Ram Milan and his companion are alleged to have said that they would kill him and set his house on fire if he slaughtered the cows. Mohammad Ishaq kept quiet. The two Hindus then went towards the Bazar, and Mohammad Ishaq and his party proceeded to Chain Tola. Mohammad Ishaq tied the cows in his *ghari* and went to his shop with Ali Raza where they waited for Allah Bakhsh who had been sent for to write a receipt. Abdul Rahim who was sent to call Allah Bakhsh informed Mohammad Ishaq that Allah Bakhsh was not at his house. He was

then sent a second time, but Allah Bakhsh could not be found. This was about 2 p. m.

A mob consisting of 100 or 150 persons headed by Ram Milan accused and armed with *lathis*, bamboos, *kulhari* and brickbats arrived at Mohammad Ishaq's house. Ram Milan and Hira Singh accused, forcibly untied the four cows from the *ghari*. Mohammad Ishaq and his party protested against this high-handedness and tried to snatch the cows. On this some of the rioters beat Mohammad Ishaq and his party. On their shouts for help some Muslim residents of the *Mohalla* arrived. Gobardhan accused ordered his companions to set fire to Mohammad Ishaq's house. Lachhman and Ram Khelawan accused lighted a match and set the house on fire. The rioters are alleged to have next threatened to beat the Muslims who came to help Mohammad Ishaq and to burn their houses. The Muslim party which had come to help Mohammad Ishaq was chased by some of the rioters and beaten, and their houses set on fire.

A Police party consisting of Abid Husain, Head Constable, and three constables, Mohammad Yaqub, Sharafat Husain and Durga Din with Bashir Juman and Phurti Din *chaukidars*, armed with guns arrived on the scene. It appears that Bashir *chaukidar*, P. W. No. 14, received information that a riot was going on. He saw some houses burning and rushed to the *thana* which was four furlongs from his house and informed the Head Constable who was in charge at that time. His statement was reduced to writing in the general diary at 2-10 p. m. The Head Constable ordered the rioters to disperse, and when they refused to do so, he ordered the constables to arrest them. Thereupon Har Prasad accused struck the Head Constable with a *lathi* on the head which felled him. He was removed by the *chaukidars* to the *kachcha* road at a place shown as No. 12 in the sketch plan at a distance of 35 paces. The Head Constable's gun was picked up by Durga Din constable. The rioters are alleged to have caused injuries to some of the *chaukidars*, and when they advanced towards the Police party shouting "seize their guns and beat them", the Police fired from a distance of 4 or 5 paces in self-defence. One Jagmohan among the rioters was fatally wounded and nine other persons received gunshot wounds. The crowd then dispersed. The Head Constable was taken to the Police Station where his injuries were attended to by the Medical Officer of Nawabganj dispensary.

The Station Officer who was away at

village Newada returned by train, and was informed on the way that a riot had taken place. He went to the scene at about 4 p. m. when it is said that Mohammad Ishaq dictated the first information report, Ex. 3. He sent the injured persons for medical examination. Jagmohan died at the Hospital the following day and his dead body was sent for *post mortem* examination by the Second Officer, M. Mohammad Mirza, P. W. No. 30.

The Superintendent of Police reached the scene of occurrence about 6-30 p. m. Mr. Harpal Singh, Magistrate, First Class, reached about 7 p. m. in response to a telegram which was sent by the accused Gaya Prasad Azad, and the Deputy Commissioner reached about 8 p. m.

Gaya Prasad accused was arrested on January 29, 1940, that is on the day of the riot. Hira Singh was arrested on February 1, 1940, Ram Milan on February 16, 1940, and Har Prasad Singh presented himself in Court on February 23, 1940.

Abid Husain, Head Constable, had the following injuries:—

"1. Contused wound round, scalp everted, which is also torn in the middle 4" x 3" x 2" just behind the top of the head. This is scalp deep.

2. 5 small abrasions on the back of left middle and ring fingers. Each equal to size, small pea.

3. There has been slight bleeding from the nose.

4. small pea-sized abrasions over nose which is swollen." (Vide Ex. 12.)

Mohammad Yaqub constable had a swelling 2" x 2" on the back of the right shoulder (vide Ex. 27).

Sharafat Husain and Durga Din constables received no injuries.

Bashir *chaukidar* had a faint contusion 3" x 1" on the right side of the back (vide Ex. 28).

Jumman *chaukidar* had a faint contusion on the left knee 2" x 2" (vide Ex. 15).

Phurti Din *chaukidar* had no injuries.

It will thus appear that the Police party with the exception of one injury on the head of Abid Husain Head Constable had very minor injuries.

Mst. Shubratn had the following injuries:

"1. Fracture, compound, of the lower part of the right arm bone, Wound 1" x 3" bone deep (bone fractured) over the medial side of the right arm.

2. Swelling all over the back of right palm. A bone below the index finger is fractured.

3. Contusion 3" x 2" over the front and middle of right thigh", (vide Ex. 13).

Shakir Ali, P. W. No. 7, Mohammad Yasin, P. W. No. 6, Allah Bhej, P. W. No. 4, Abdul Rahim, Jhottoo, P. W. No. 11, Noorullah, P. W. No. 10, Natey Khan, P. W. No. 15, Gojai, P. W. No. 1, Ali Raza, P. W. No. 3, Mohammad Taqi Khan, P. W. No. 8, Roshan

and Badal Chikwa also received injuries. They were simple. Some of them had contused wounds, (vide Exs. 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26 respectively.)

The following persons received gunshot wounds:

- (1) Ram Het Ahir,
- (2) Nageshur,
- (3) Jagannath,
- (4) Sarju,
- (5) Gokul,
- (6) Nokhai,
- (7) Ram Daras Das and
- (8) Ram Parshad

(Vide Exs. 29, 31, 32, 33, 34, 42, 43 and 44 respectively).

There was another man named Ram Swarup who received six injuries of which five were contused wounds, (vide Ex. 35). He is not a witness in the case. The defence wanted to produce him, but he could not be traced and the allegation is that the Police made him disappear. There is nothing to show how he received these injuries though he has got more injuries than a good many others.

Jagmohan's *post mortem* report shows that the cause of death was shock and internal haemorrhage caused by gunshot wounds.

The accused denied the charge, pleaded enmity with the Police, and stated that they were not on the scene of occurrence.

The Hindus who received gunshot wounds stated that they were innocent passers-by, but as we are not concerned with their cases, no further comment is necessary.

Ram Milan accused works in the Sugar Mills at Nawabganj. He stated that he was not present at the scene of occurrence and did not join the rioters and that he did not go to Gojai's house and untie the cows. He further stated that he was run in by the Police in a dacoity case, but was acquitted on December 15, 1939. (Exhibit MM is the judgment of the Sessions Judge). In his defence he examined Ram Lal, D. W. No. 4, who produced the attendance register to show that the accused was on duty from 8 A. M. to 6 p. m. on January 29, 1940.

Har Prasad Singh pleaded enmity with the Police, and stated that the Police prosecuted him under s. 411, I. P. C., and in a riot case, but he was acquitted in both. He further stated that he was employed in the Sugar Mills, and was on duty from 10 A. M. to 6 p. m. on January 29, 1940. He denied beating the Head Constable.

It may be mentioned that he and Ram Milan are history sheeters.

Gaya Prasad Azad filed a long written statement in which he stated that cow slaughter was not permitted in Nawabganj, that Mohammad Ishaq with the help and connivance of the Police wanted to establish this as an old custom, that on January 29, 1940, it was known in the town that cows were going to be slaughtered, that he with Ram Swarup and 5 or 6 others went to Mohammad Ishaq's house to ask him not to slaughter the cows, that he saw a gathering of Muslims there who told him that they would not stop cow slaughter, that he left his companions at Mohammad Ishaq's house and went to the Police Station for help, that the Head Constable refused to record his report, that he went back to Mohammad Ishaq's house and saw a fight going on between the Hindus and Musalmans where Ram Swarup was seriously injured. Some *badmash* had set fire to Mohammad Ishaq's house and the fire spread to other houses, that soon the Police party arrived and fired indiscriminately injuring several innocent persons. He further stated that he was the President of the Congress Committee of Nawabganj and had been doing his best to stop corruption in the Police department which was very bad in Nawabganj. He filed a pamphlet Ex. AA which evidently was printed in November 1930. There are strong allegations against the Police for corruption.

Hira Singh was an employee of the Sugar Mills. He stated that he was an Aryasamajist and the Darogha who was a Muhammadan did not like him or his work. He further stated that on the day of the riot he was at the Mills from 10 A. M. to 6 P. M. In his defence he examined D. W's Nos. 3, 6 and 7 to prove that he was working at the Mills between 10 A. M. and 6 P. M.

The case for the prosecution may be divided into three parts namely the first incident which took place near Mohammad Ishaq's house at 11 A. M.; the second incident which took place at 2 P. M. when the Police party arrived to disperse the rioters and the third incident when the Station Officer reached the scene of occurrence about 4-30 P. M. and started the investigation.

In this appeal we are faced with three difficulties:—

(1) There is evidence to show that a large number of accused committed overt acts, but the Govt. has not appealed against their acquittal. We take it that the appeal has been filed against these four persons perhaps because they were the leaders and assailants of the Police party. There is overwhelming evidence to show that at the instigation of Go-

bardhan, Lachhman and Ram Khelawan accused set fire to Mohammad Ishaq's house, and some of the witnesses who testify to this incident are witnesses against the present four persons. If we accept their evidence against these persons it means that though their evidence was disbelieved on material points as far as the other accused persons were concerned yet we accept the remaining portion of their evidence as far as these accused are concerned which, to say the least, is unfair.

(2) It has come out in evidence that before the trial of this case was concluded in the Court of Session the D. I. G. rewarded all the Police witnesses and two outsiders, namely Mohammad Rafiq, P. W. No. 16 and Sultan Ali, P. W. No. 25. The date when the reward was distributed is not apparent from the record, but it certainly was before the trial was concluded. P. W. No. 37 M. Ghulam Ahmad, Station Officer of Nawabganj, has made the following statement:—

"From the Reward Grant Fund, D. I. G. sanctioned the reward of Rs. 100, to the Head Constable, Rs. 50, to each constable and Rs. 10, to each of the *chaukidars* Sultan Ali and Rafiq."

The word "sanctioned" used by the learned Judge is not accurate. The Urdu record shows that the D. I. G. distributed the amounts himself.

Durga Din constable P. W. No. 26, admits that he received a reward of Rs. 50, in this case.

This action of the authorities has given a chance to the defence to urge that the evidence of the witnesses who received rewards should not be accepted as it is tainted. It is regrettable that the distribution of the rewards was not delayed till the decision of the case. Such an action is calculated to prejudicially affect the fair trial of the case against the accused and we cannot help expressing our disapproval of the distribution of rewards to Police and other witnesses before Courts of Law had finally pronounced judicial findings. We confess we have not in our experience come across such action before, and we desire to lay down for future guidance that similar action repeated in future may lead to a large body of otherwise good evidence being eliminated altogether from consideration. Having regard to the circumstances of this case we are compelled to treat the evidence of such witnesses as suspicious and tainted.

In this case the action of the Police in firing on the mob is challenged. The defence urged that Durga Din constable was not in Nawabganj on January 29, 1940. He had gone out and returned on January 30, as the entry in the general diary shows.

Sultan Ali and Mohammad Rafiq, who were two independent witnesses, have not shown any act of bravery, and it is difficult to understand why they were rewarded.

Sultan Ali, who is a postman, sent a petition, Ex. Z to his superior officer in which he stated that about 2 P. M. when he started for the post office and came out of his house he saw a mob and rushed back to his house and locked himself in. According to this he cannot be said to be an eye-witness and yet we find that he has given a long statement in Court, and identified a large number of accused persons as rioters. It is unfortunate that Ex. Z was not put to the witness in cross-examination as the defence did not know about it until he had been examined, and it is doubtful whether it is admissible in evidence, though an attempt has been made to prove it by the evidence of Kunj Behari Lal, D. W. No. 8, only. We do not propose to make use of Ex. Z for the purposes of this case and have referred to it only incidentally.

If the evidence of the seven Police witnesses and Mohammad Rafiq, P. W. No. 16, and Sultan Ali, P. W. No. 25, is rejected as tainted, as we hold it to be, the case of the prosecution becomes very weak, and certainly the serious charge of assaulting the Police while in discharge of their duty cannot be maintained.

(3) Some of the important witnesses have not identified the accused on the spot. On the other hand there are some witnesses who have identified the accused among the rioters.

The prosecution have examined no less than 35 witnesses in this case.

We shall first take up the charge under s. 332/149, I. P. C., which arose out of the second incident as great stress has been laid upon it by the learned Assistant Govt. Advocate. His contention is that there is overwhelming evidence against each of the accused, and the learned Judge has wrongly and without sufficient reasons rejected this evidence. (Their Lordships considered the evidence and rejected it. The judgment then continued). It is thus clear that the charge against the accused under s. 332/149, I. P. C., is not proved.

There can be no doubt that there was a riot, (though the number of the rioters has been greatly exaggerated by the witnesses), that the houses were burnt, that the common object of the rioters was to forcibly take away the cows, and in the prosecution of their common object they caused simple and grievous hurt.

It was strongly urged by the learned Counsel for the defence that the Police fired indiscriminately and injured a large number of persons who were either sightseers, or passers-by, and in order to justify their action they have falsely stated that when the mob was at a distance of 4 or 5 paces they fired in self-defence. We are not holding an inquiry into the conduct of the Police, but the evidence and the circumstances of the case make it very improbable that the firing was resorted to by the Police when the mob was at a distance of 4 or 5 paces. When the Head Constable was knocked down by the accused Har Prasad Singh, and the gun was picked up by Durga Din constable, and the mob was so furious, as is alleged by the prosecution, one would have expected that the Police would fire then and there at Har Prasad Singh who was the actual assailant and well-known to the Police, but we find that the Head Constable was removed to the road about 35 paces away and then the firing was resorted to. It is said that when the Police reached the *kachcha* road 60 or 70 rioters advanced towards them shouting that the Policemen should be killed and their guns snatched, and that when they were at a distance of 4 or 5 paces they raised their *lathis* and then the Police constables fired, (*vide* the statement of Durga Din constable P. W. No. 26). Thirteen rounds were fired in all, and as far as we have been able to ascertain shots were fired from 303 rifles. No shots were fired in the air to frighten the mob, nor is there any evidence to show that the shots were fired to frighten the mob. They were actually fired at them, and if they were fired at a distance of 4 or 5 paces, we are of opinion that more serious injuries would have been caused to the rioters because from this close range the shots would not have spread out but gone in a bunch and shattered the part they hit. But we find from the medical evidence that Nageshwar had only one gun shot wound $4\frac{1}{2} \times \frac{1}{4}$ in diameter on the lower part of the right shoulder-blade (*vide* Ex. 31).

Jagannath had two wounds :

(1) G. S. wound $\frac{1}{2}$ in diameter $\frac{1}{2}$ deep over the medial side and right side of the thigh.

(2) G. S. wound $\frac{1}{2}$ in diameter "deep over the outer side and below the left knee joint" (*vide* Ex. 32) Sarju had 5 wounds all $\frac{1}{2}$ in diameter no doubt caused by five different pellets, (*vide* Ex. 33).

Ram Daras Das had :

"A bullet mark on the back of the left

thigh (middle) 1½ c. m. round", (*vite* Ex. 43).

We take it that it was not a bullet mark, but an injury caused by stray shot, similarly Ram Prasad had a bullet mark 1½ below the left shoulder blade.

The injuries to the other persons are also more or less superficial, and on a careful examination of the medical report it would appear that a good many injuries were caused on the back and not on the front of the body which suggests that they were caused when the wounded persons were running away. If they were advancing towards the Police party, the injuries would have been on the front part of the body. We therefore do not believe the evidence of the witnesses for the prosecution when they say that the shots were fired from a range of 4 or 5 paces.

The evidence as to the number of rioters is conflicting. Some witnesses put it down to 100 or 150. Durga Din P. W. No. 26, puts it down to 200 or 250. According to Mohammad Rafiq, P. W. No. 16, he saw 100 Hindus going towards Gojai's house. P. W. No. 17, Ibrahim, stated that he saw 30 or 32 men with 2 Nagas coming from the side of the Sugar Mills but according to him the crowd swelled later in the bazar to 100 or 150 men. The learned Judge has found that

"the original party of the rioters consisted of members not more than 50 and less than 20 and that of them 12 or 16 were armed."

After considering all the evidence we are inclined to take the view that the number of rioters did not exceed 50 or thereabout.

The charge under ss. 436/149, I. P. C., may be disposed of in a few lines. We are of opinion that the common intention of all the accused was not to burn the houses. There is definite evidence that at the instigation of one man (Gobardhan), Lachhman and Ram Khelawan set fire to one of the *chhapars*. In our opinion, no common intention is proved, and all the accused cannot be convicted under s. 436/149, I. P. C. This charge against the present accused must fail.

As regards the first incident which furnishes the basis for the charges under ss. 147, 323/149 and 325/149, I. P. C., the prosecution relied upon the evidence of Mohammad Ishaq alias Gojai, P. W. No. 1, Ali Raza, P. W. No. 3, and Noorullah, P. W. No. 10. According to their evidence Ram Milan accompanied by another Hindu, whom the witnesses were not able to identify, met Gojai, his cousin Abdul Rahim, Ali Raza and

his son Roshan in the bazar at 11 A. M. on January 29, 1940, while they were proceeding to Gojai's house with the four cows purchased by Gojai from Ali Raza. Ram Milan is alleged to have told Gojai and his party that he should not slaughter cows, else he would be beaten and his house will be burnt.

Abdul Rahim and Roshan have not been produced and the only witnesses to this particular incident are therefore Gojai and Ali Raza.

The evidence of Ali Raza, P. W. No. 3, can be disposed of with the remark that he did not mention the name of Ram Milan in the Court of the Committing Magistrate.

Gojai would have us believe that he took no notice of the threat and quietly went with his party to his house where he waited along with others up to 2 P. M. in order to obtain the services of some scribe to get a receipt written. We are not at all convinced that there was any very great difficulty to obtain a scribe for writing out an ordinary receipt for three hours from 11 A. M. to 2 P. M.

We cannot in the circumstances therefore rely upon the solitary statement of Gojai, a highly interested witness, in proof of the meeting of Ram Milan at 11 A. M. and the open threat held out by him to beat Gojai and burn his house.

At 2 P. M. Gojai states that he heard an uproar at his house. When he came out along with his companions he saw 100 or 150 persons standing armed with *lathis*, bamboos *kulhari* and bricks. Ram Milan and Hira Singh united the four cows and brought them outside the *ghari* and when he tried to stop them from taking away the cows he was beaten with *lathis* by some from the crowd of rioters, but he was unable to identify any of them. This incident was witnessed according to Gojai by Abdul Rahim, Noorullah and Ali Raza. Abdul Rahim has not been produced in the case and Noorullah, P. W. No. 10, frankly states that he did not know whether the two persons who brought the cows out of *ghari* were among the accused in the dock. Ali Raza, P. W. No. 3, states in his examination-in-chief that two of the rioters went inside the *ghari* and brought out the four cows round which was tied a rope, but he could not identify those two persons. Gojai himself did not state that he received any beating at the hands of Ram Milan and his companion and we are not prepared to hold upon the evidence produced in the case that the charges under ss. 147, 323/149 and 325/149 I. P. C. are brought home to the accused.

There is no doubt that 13 persons were injured on the complainant's side, including the Police party, out of whom one, namely, *Mst. Shubratani*, P. W. No. 5, received grievous hurt. There is however no satisfactory evidence on the record to show as to who were the assailants of the injured persons. We have already dealt at some length with the difficulties which confronted us in accepting the evidence of a number of prosecution witnesses. The evidence of these witnesses was disbelieved by the learned Assistant Sessions Judge on material points against the other accused persons against whom no appeal has been filed by the Provincial Govt. We find it hard to believe that important prosecution witnesses such as Mohammad Taqi, P. W. No. 8, Noorullah, P. W. No. 10, Allah Baksh, P. W. No. 12 and Hasan Ali, P. W. No. 13 could possibly have missed identifying the present four accused who were undoubtedly the ring leaders the rioters according to the prosecution case.

Mohammad Taqi identified Ram Milan and Gaya Prasad besides four others, but he did not identify Hira Singh and Har Prasad Singh. In his statement Exs. A and B recorded by the Sub-Inspector on April 15, 1940, he did not mention Gaya Prasad Singh but Ram Milan only.

Noorullah, P. W. No. 10, who, according to the prosecution evidence, witnessed the advent of Ram Milan and Hira Singh and the removal of the cows by them, was unable to identify them.

Allah Baksh, P. W. No. 12, mentioned only the name of Ram Milan but admitted that he was unarmed. He appears to bear some ill-feeling towards Ram Milan on account of the fact that the latter did not pass his cart of sugarcane about one or one and a half months before the occurrence and this led to a fight between the two.

Hasan Ali, P. W. No. 13, admits that all the 43 accused have been known to him from before the occurrence but he did not notice them among the rioters with the exception of six persons other than the present four accused.

Although these prosecution witnesses are alleged to have identified some out of the rioters in the crowd, it is at least remarkable that they failed to notice all the four accused who admittedly took a prominent part in the riot. The prosecution evidence as a whole does not, in our opinion, establish beyond reasonable doubt the participation of any of the four accused. We do not therefore find it possible to hold that the present accused

are guilty either of a charge under s. 147, I. P. C. or the charge under s. 323/149, I. P. C.

As regards the charge under s. 325/149, I. P. C. *Mst. Shubratani*, P. W. No. 5, no doubt received grievous injuries. She deposes to have seen Ali Raza, Roshan, Abdul Rahim, Gojai and Noorullah injured and bleeding at the door of their houses. She also deposes to have seen Khelawan and one other man set fire to Gojai's house. She herself was beaten by Ram Shankar accused with *lathis* at her house and Kedar Nath accused set fire to her house. She identified eight persons out of whom one was Gaya Prasad. Her son Mohammad Yasin, P. W. No. 6, did not identify Gaya Prasad but identified Hira Singh. No appeal has been filed against Ram Shankar or Kedar Nath. No part is alleged by these witnesses to have been assigned to Gaya Prasad and Hira Singh. In the absence of satisfactory or reliable evidence to connect any of the accused with complicity in the crime of committing riot and causing simple and grievous injuries, we are driven to the conclusion that the case against the accused is not free from reasonable doubt and the learned Assistant Sessions Judge was justified in giving the benefit of the doubt to the accused and acquitting them. We therefore hold that the charge under s. 325/149, I. P. C. also is not substantiated.

Nothing turns upon the third incident which merely relates to the investigation of the case by the Station Officer.

As the prosecution evidence in the case in our opinion does not satisfactorily establish the charges against any of the accused, it is not necessary to deal with the defence evidence. Before taking leave of this case we should like, however, to observe that the learned Assistant Sessions Judge's approach to the consideration of the prosecution evidence does not commend itself to us. While dealing with the evidence of each prosecution witness the learned Judge has unnecessarily introduced the defence evidence and has rejected the prosecution evidence largely because in his opinion the defence evidence established the innocence of the accused. The learned Judge should in our opinion have examined the prosecution evidence witness by witness on its own merits and rejected it, if upon a careful analysis and scrutiny of the evidence he found that it was not true or reliable to support the prosecution case. Instead of examining the prosecution evidence on its intrinsic worth the learned Judge tested its trustworthiness in the light of the de-

fence evidence, and here we think the procedure adopted by him was not justified.

The result is that we dismiss the appeal against all the accused including Hira Singh, although the latter has not been apprehended and has not been represented before us. We direct that they be set at liberty forthwith unless wanted in connection with some other matter.

D.

Appeal dismissed.

LAHORE HIGH COURT

Criminal Revision No. 1828 of

1940

January 14, 1941

SKEMP, J.

JAHANA AND OTHERS—CONVICTS

PETITIONERS

versus

EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), s. 379—In execution of decree property belonging to other person than the judgment-debtor taken away by bailiff—Property taken back by person owning it and by his associates—No offence under s. 379.

It is an absurd doctrine to apply to the people of a Punjab village that if their property is wrongly taken by some one acting under colour of Govt. office it is their duty to go to the Police or to the Court and that it is a crime to take back the property.

Where in execution of a decree against a certain person, property belonging to another person is being wrongfully taken away by the bailiff and the latter and his associates take back that property, this is not an offence under s. 379, I. P. C.

Cr. R. from an order of the Additional, Sessions Judge, Gujrat, dated October 2, 1940.

Mr. Manohar Lal Mehra, for the Petitioners.

Mr. Abdul Aziz Khan, for the Advocate-General, for the Crown.

Order.—Ismail, Mohammad Din and Jahana have petitioned against their convictions under s. 379, I. P. C., and sentences of six months rigorous imprisonment. In execution of a decree for Rs. 260 against, Bakhu, a party including the decree-holder, Amir Chand and his brother, two bailiffs and others went to attach Bakhu's property. According to the prosecution they found Bakhu tethering a she-buffalo. They attached it and Bakhu being unable to provide a *sapurdar* they were taking it away along with its *katta* or young one when Bakhu, the three petitioners and Bakhu's daughter *Mst.* Rahmon attacked them and rescued the buffalo. The decree-holder took the *katta* to his own house. Five persons were prose-

cuted of whom the Magistrate acquitted *Mst.* Rahmon, put Bakhu who is 65 years of age on security under s. 562, Criminal P. C., but convicted and sentenced the others. Their appeals were rejected by the Sessions Judge. *Musammam* Rahmon who is married to Dadu claimed the buffalo and the *katta* as her own. This was found as a fact by the Magistrate who said:

"It is however proved as stated by Jahan Khan Zaidar, Amir Chand and other defence witnesses that the she-buffalo does belong to *Mst.* Rahmon."

He did not believe her story that it was taken forcibly by the decree-holder's brother in front of her house. The learned Sessions Judge said that having read the defence evidence for himself he agreed with the Magistrate's conclusions. The bailiff's report and the prosecution witnesses said that the decree-holder and his brother were struck; the evidence in Court refers to one blow each. The Magistrate did not believe this because they did not get medically examined. I do not think that this is a good argument. It is probable that some force was used. Indeed there is an expression in the Magistrate's judgment which indicates that he thought that force might have been used. He said that

"when the she-buffalo was attached the proper course for *Mst.* Rahmon and the other accused was to file an objection petition in the Civil Court and not to take away the she-buffalo by force."

However, he found that there was no force and the offence was one under s. 379, I. P. C., only. The Magistrate appears to have thought that because *Mst.* Rahmon's buffalo had been taken by bailiffs acting under colour of their office it was wrong for *Mst.* Rahmon and her associates to take it back. I have quoted one passage which illustrates this view and elsewhere he said:

"Regarding the defence version if *Mst.* Rahmon had been robbed of her heifer she ought to have made immediately a report to the Police and her indifference has not been explained by the defence."

It is an absurd doctrine to apply to the people of Punjab village that if their property is wrongly taken by some one acting under colour of Govt. office it is their duty to go to the Police or to the Court and that it is crime to take back the property. Put in more technically legal form, the petitioners are not guilty under s. 379 because they did not commit theft as defined in s. 378, I. P. C. The definition says:

"Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft."

"Dishonestly" is defined in s. 24, "whoever does anything with the intention of

causing wrongful gain or wrongful loss." *Musammāt* Rahmon and the petitioners had no intention of causing wrongful gain or wrongful loss but merely of recovering *Mst.* Rahmon's property. There is no offence under s. 379. The convictions and sentences must be and hereby are set aside. The petitioners who were already enlarged on bail by Abdul Rashid, J. are to be discharged from their bail bonds. The conviction of Bakhu is also set aside and he is to be discharged from his bond.

D. Conviction set aside.

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Appeal No. 82/32 of 1940

December 23, 1940

ALMOND, J. C. AND MIR AHMAD, J.
MIRZA JAN GHULAM HAIDAR—

APPELLANT

versus

GHULAM RAZA MIAN MOHAMMAD

—RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXII, r. 4, O. XXI, rr. 90 to 93—Execution sale set aside—Suit by auction-purchaser against decree-holder, judgment-debtor and another decree-holder who had shared sale proceeds rateably, decreed—At hearing of appeal judgment-debtor dying and his representatives substituted—Second appeal by auction-purchaser impleading original defendants as parties in spite of judgment-debtor's death—Suit held abated only against representatives of judgment-debtor—Execution sale—Judgment-debtor proved to have no title to property sold—Auction-purchaser, if can sue to recover purchase price—His remedy—Limitation Act (IX of 1908), Arts. 97, 62—Execution sale confirmed—Objections subsequently allowed and confirmed in revision—Suit by auction-purchaser to recover purchase price—Article applicable—Starting point for limitation.

An auction-purchaser filed a suit for the recovery of the sale price, subsequent to the setting aside of the execution sale, against the decree-holder X, the judgment-debtor Y and another decree-holder Z who had shared the sale proceeds rateably along with X and the suit was decreed. All the defendants appealed. At the hearing of the appeal Y died and his legal representatives were substituted in his place. The appeal having been allowed, the auction-purchaser filed a second appeal against X, Y and Z although Y was already dead:

Held, that the appeal abated only against the representatives of Y but not against X and Z as the auction-purchaser could sue only X and Z without adding Y as a party to the suit.

Where an execution sale is confirmed and the objections to the sale are subsequently allowed and also confirmed in revision, a suit by the auction-purchaser for recovery of the purchase price on failure of consideration for sale, falls under Art. 97 and not under Art. 62, Lim. Act and the cause of action arises either from the date of the order allowing the objections or from the date of the order in revision confirming the objections. 171 Ind. Cas. 923 (4) and 135 Ind. Cas. 63 (5), relied on, *Hanuman Kamat v. Hanuman Man-*

dar (2) and 118 Ind. Cas. 203 (3), explained and relied on.

The auction purchaser in Court sale is not entitled to maintain a suit for the recovery of purchase money in the event of the judgment-debtor being proved not to have any title to the property sold. His remedy is confined within the limits of O. XXI, r. 93. 178 Ind. Cas. 1 (8) and 175 Ind. Cas. 347 (9), followed, 138 Ind. Cas. 47 (6) and 96 Ind. Cas. 64 (7), dissented from.

A. from the judgment and decree of the Additional Judge, Peshawar, dated March 28, 1940.

Sh. Mohammad Shafi, for the Appellant.

Sh. Allah Baksh and Mr. L. Nanak Chand, for Respondent No. 1.

Almond, J. C.—The facts of this litigation are as follows: Ghulam Raza obtained a decree for Rs. 300 against Ahmad Bakhsh and Ram Singh in 1924. The decree-holder got the house now in suit put up for auction in execution of his decree and sold on January 19, 1932 to Mirza Jan for Rs. 700 subject to a mortgage of Rs. 2,000 in favour of one Inzar Gul. On February 20, 1932 this sale was confirmed. Before it was confirmed, objections to the sale had been put in by Abdul Latif, *Mst.* Amina Begam and Iqbal Sultan; the representatives-in-interest of Mustaqim who had also been a defendant in Ghulam Raza's suit, and those objections were also dismissed on February 20, 1932. Abdul Latif thereafter died and further proceedings on the objections were continued by *Mst.* Amina Begam and Iqbal Sultan and eventually their ownership of the property was established by the order of the Additional Judge, Peshawar, dated March 7, 1935 in Civil Appeal No. 7 of that year. The finding was confirmed on an application for revision made to this Court—Civil Revision No. 156 of 1935 *Ghulam Raza v. Iqbal Sultan* (1) decided on June 17, 1935. One other preliminary fact need be stated *viz.*, that out of the sum of Rs. 700 paid by Mirza Jan for the house, Rs. 318-8-0 were paid to the decree-holder, Ghulam Raza, Rs. 175 were paid to Tila Mohammad who had made an application for rateable distribution of the assets and Rs. 146-8-0 were paid to Ahmad Bakhsh the judgment-debtor. The balance of the sum went in the expenses of the sale. Mirza Jan has now brought a suit against Ghulam Raza, Ahmad Bakhsh and Tila Mohammad for the recovery of Rs. 700 principal and Rs. 399 interest on the failure of the consideration for the sale. His suit was decreed by the trial Court in the following form: Ghulam Raza was ordered to pay Rs. 318-8-0 plus

(1) 160 Ind. Cas. 835; A I R 1936 Pesh. 41; 8 R Pesh. 132.

costs of the sale and the other two defendants were ordered to pay the sums which they had actually received.

Against that decree, Ghulam Raza alone appealed to the District Court, but the Additional Judge set aside the decree *in toto*. He held that in the first place the suit was time-barred and in the second place that even if the plaintiff had any cause of action for recovery of the purchase money in equity, there were clearly no equities in his favour in the present case as he had brought the suit with some delay and in the meantime the remedy of Ghulam Raza against his judgment-debtor had become time-barred. Against that decree of the District Court the plaintiff has presented this further appeal. The appeal was filed against the three original defendants in spite of the fact that at the hearing of the appeal before the District Judge Ahmad Bakhsh had already died and his legal representatives were substituted for him as respondents in that case. Learned Counsel for the contesting respondent have argued that the appeal abates *in toto* as it was filed against a defendant who was dead. Learned Counsel for the plaintiff-appellant concedes that his appeal must fail as against the representatives of Ahmad Bakhsh but contends that it does not abate *in toto*. We are of opinion that the appeal does not abate against the remaining respondents for it is evident that on the plaintiff's claim he is entitled to sue Ghulam Raza and Tila Mohammad even if he never made Ahmad Bakhsh a party to the suit at all. We are therefore of opinion that the appeal does not abate as against the remaining respondents.

The two other points which have been argued in this appeal are the question of limitation and the question whether a suit lies for the relief which the plaintiff claims. As regards the question of limitation learned Counsel for the appellant contends that Art. 97 applies, whereas learned Counsel for the respondent contends that Art. 62 applies but even on the cases on which Counsel for respondent relies Art. 97 is clearly applicable. The two cases which he refers to are *Hanuman Kamat v. Hanuman Mandur* (2) and *Abdul Rahim Fateh Mahomed v. Kadu*, 118 Ind. Cas. 203 (3). In the first of these cases it was held that either Art. 97 or Art. 62 applied and in the latter case it was laid down that Art. 62 applied if the sale was void *ab initio* and that Art. 97 applied if the consideration subsequently failed. That

(2) 19 C 123; 18 I A 158; 6 Sar. 91 (P O).

(3) 118 Ind. Cas. 203; A I R 1930 Sind 12; 24 S L R 172; Ind. Rul. (1929) Sind 171.

is also the *ratio decidendi* which has been given in the two cases relied upon by Counsel for the appellant, namely, *Hans Ram Singh v. Kishore Lal*, 171 Ind. Cas. 923 (4) and *Chanan Mal v. Maharaj* (5). We have no doubt that Art. 97 applies and that the cause of action arose either from the order of the District Judge in March 1935 or from the subsequent order of this Court in June 1935. From either of those dates the suit is within time.

As regards the maintainability of the suit there are conflicting rulings. The leading cases on the subject are, *Mehar Chand v. Milkhi Ram* (6) and *Reshee Case Law v. Manik Molla* (7), on the one side, and *Amar Nath v. Firm Chotelal Durga Prasad* (8) and *Paliram v. Laheria Sarai Central Co-operative Bank Ltd.* (9) on the other. These latter two rulings do not appear to have been brought to the notice of the trial Court which referred to rulings of earlier dates. The Lahore and Calcutta view is to the effect that a suit for the repayment of the sale money lies on equitable grounds. In the Calcutta case relief was actually refused to the plaintiff on the ground that there were no equities in his favour as the decree-holder had represented the property sold, by inadvertence or perhaps by carelessness, to be that of the judgment-debtor and that in the meantime the decree-holder's right to recover from the judgment-debtor had become time-barred. The Lahore view goes beyond this and holds that there is always an implied representation by the decree-holder that the judgment-debtor has some interest in the property which the decree-holder gets up for sale and if the judgment-debtor has no such interest, then the auction purchaser is entitled to recover his purchase money from the decree-holder unless there are equities against the auction purchaser. The view of the Allahabad and the Patna High Courts is that the remedy of an auction purchaser in cases in which the judgment-debtor has no interest in the property is confined to a right to recover his purchase money under O. XXI, r. 93, when the sale has been set aside under r. 92, and

(4) 171 Ind. Cas. 923; A I R 1937 All. 689; 1937 A L J 812; 10 R A 340; 1937 A L R 317.

(5) A I R 1931 Lah. 448; 135 Ind. Cas. 63; 13 L. 1; 32 P L R 457; Ind. Rul. (1932) Lah. 47.

(6) A I R 1932 Lah. 401; 138 Ind. Cas. 47; 13 L 618; 33 P L R 649; Ind. Rul. (1932) Lah. 596.

(7) A I R 1926 Cal. 971; 96 Ind. Cas. 64; 53 O 758; 43 C L J 418.

(8) A I R 1938 All. 593; 178 Ind. Cas. 1; I L R (1938) All. 922; (1938) A L J 955; 11 R A 259; 1938 A L R 842.

(9) A I R 1938 Pat. 150; 175 Ind. Cas. 347; 19 P L T 80; 10 R P 615; 4 B R 577.

that apart from that right he has no equitable relief by way of suit. In this connection they referred to the fact that r. 93, reproduced s. 315 of the Code of 1882 with an important modification. Section 315 of the old Code read as follows :

"When a sale of immovable property is set aside under s. 310-A, s. 312 or s. 313 or when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase money from any person to whom the purchase money has been paid."

The present rule reads as follows :

"When a sale of immovable property is set aside under r. 92, the purchaser shall be entitled to an order for the repayment of his purchase money against any person to whom it has been paid."

The argument of the Allahabad and Patna High Courts is to the effect that the Legislature by removing the additional clause in re-enacting the Code in 1908 intended to deprive the auction purchaser of any remedy except that given by the new rule. The argument of the Lahore and Calcutta Courts on the other hand is that the additional clause was removed by the Legislature as it was unnecessary in view of the fact that the auction purchaser had already another remedy by way of equitable relief to be sought in a separate suit. Under s. 9, Civil P. C., the Courts have jurisdiction to try all suits of a civil nature except suits of which their cognizance is expressly or impliedly barred, and the question for decision in this case is whether this suit is impliedly barred by the provisions of O. XXI, r. 93, Civil P. C.

We are of opinion that it is so impliedly barred. When the Legislature removed the additional clause in re-enacting the Civil P. C., they must have done so deliberately. There was no other provision of statute law under which the auction purchaser could recover the sale money when he was ousted by a paramount title and we think that the reasonable inference was that the Legislature intended that the rights of the auction purchaser to get a sale set aside were to be confined within the limits of O. XXI, s. 93. In dealing with the general subject of execution provision has been made in which under certain circumstances suits can be brought to establish rights which have been denied in execution. No such provision has now been made in O. XXI, in the case of an auction purchaser who is subsequently ousted by a paramount title although he had some remedy under the old Code. To grant the relief which the plaintiff now seeks by a separate suit would, in our opinion, amount to nothing more than granting him a relief

which the Legislature meant to deny him. The plaintiff in the present case sued solely on the basis of failure of consideration. At the hearing of this appeal, learned Counsel did make a suggestion that there had been some sort of misrepresentation or fraud on the part of the plaintiff who was well aware at the time he got the property put up to auction that the judgment-debtor had no interest in it, but that case was not set out in the plaint and where fraud is alleged it must be specifically pleaded. We are, therefore, not prepared to hold that the plaintiff has any other cause of action except the failure of consideration. We accordingly dismiss this appeal with costs.

S. Appeal dismissed.

LAHORE HIGH COURT

Second Appeal No. 682 of 1940

October 11, 1940

BECKETT, J.

MANAK KHAN—DEFENDANT—

APPELLANT

versus

Mst. MULKHAN BANO—PLAINTIFF—

RESPONDENT

Dissolution of Muslim Marriages Act (VIII of 1939) s. 2 (ii)—Failure to maintain wife, whether should be wilful—Cause of failure, is immaterial, for divorce—S. 2 (ii), if can be applied retrospectively.

There is nothing in the wording of cl. (ii) of s. 2, Dissolution of Muslim Marriages Act to suggest that the failure to maintain wife must be wilful. It is absolutely immaterial whether the failure to maintain is due to poverty, failing health, loss of work or to any other cause whatsoever. Divorce can be granted on grounds which do not necessarily involve any deliberate default on the part of the husband.

Section 2 (ii) must be taken as intended to apply with retrospective effect. When an Act is intended to provide a remedy for what is considered to be an existing unsatisfactory state of affairs, the intention is clearly that the remedy should be applied even though this may involve giving retrospective effect to some of its provisions.

S. A. from the decree of the District Judge, Jhelum, dated April 20, 1940.

Mr. Tek Chand, for the Appellant.

Mr. B. A. Cooper, for the Respondent.

Judgment.—The plaintiff is suing for a divorce under the Dissolution of Muslim Marriages Act, 1939, the main ground being that her husband has been in jail for several years and has failed to maintain her. The trial Court refused to grant her a divorce, holding that there had been no wilful default on the part of the husband. This decision was reversed by the District Court which granted a decree in favour of the plaintiff

holding that failure to provide for the plaintiff's maintenance for a period of two years had been proved. The first point urged in this second appeal is that it is only wilful default which entitles a Muslim woman to seek a divorce under the Act on the ground that her husband had not been maintaining her and that there is no question of wilful default when a man is unable to maintain his wife by reason of the fact that he has been put in prison. Section 2 (ii) of the Act merely provides that a woman married under Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on the ground that the husband has failed to provide for her maintenance for a period of two years. There is nothing in the wording of this clause to suggest that the failure must be wilful and the other clauses show that divorce may be granted on grounds which do not necessarily involve any deliberate default on the part of the husband. That such is the plain meaning of the clause is the view taken by Mr. A. C. Ghose in his Commentary on the Act. Before the passing of the Act, it had been held that mere inability to maintain a wife was no ground for granting a divorce. The author considers that the effect of the present clause is to supersede this view of the law. He considers that it is now absolutely immaterial whether the failure to maintain is due to poverty, failing health, loss of work or to any other cause whatsoever. I see no reason for differing from him as to the effect of the clause.

The second ground urged on behalf of the appellant is that the Act, which affects rights and obligations such as those of a husband, cannot be taken as intended to apply with retrospective effect, and that divorce cannot be granted under the Act of 1939 on grounds which involve anything which happened before that year. So far as the present case is concerned, the rule of interpretation will be found in Maxwell's Interpretation of Statutes, Edn. 8, at pp. 196 and 197. A similar case arose in England under the Summary Jurisdiction (Married Women) Act, 1895. Section 4 enacted that a married woman might apply to a Court of summary jurisdiction for an order under the Act when she had been forced by the persistent cruelty of her husband to live apart from him. This section was held to be retrospective in its operation and to apply to acts of cruelty before the Act came into force. When an Act is intended to provide a remedy for what is considered to be an existing unsatisfactory state of affairs, the intention is clearly that the remedy should

be applied even though this may involve giving retrospective effect to some of its provisions. In the present instance, the wording of s. 4 shows that it is intended to provide a remedy for wives who have been deprived of maintenance. In these circumstances, there is no reason to differ from the English decision on the same point. The only other arguments which have been advanced relate to questions which have been concluded by findings of fact. The appeal accordingly fails and is dismissed. The parties are left to bear their own costs in this Court.

D.

Appeal dismissed.

ALLAHABAD HIGH COURT

Execution Second Appeals Nos. 1132 and
1133 of 1939

February 12, 1941

MOHAMMAD ISMAIL, J.

RAM KISHORE—DECREE-HOLDER—

APPELLANT

versus

YASHPAL KUNWAR—JUDGMENT-DEBTOR
—RESPONDENT

U. P. Encumbered Estates Act (XXV of 1934), s. 7—Section is mandatory—Controversy as to applicability of s. 7—Court holding s. 7 applies, and ordering stay—Order is appealable.

Section 7, U. P. Encum. Estates Act is mandatory and gives no discretion to the executing Court. Where a controversy arises between the parties as to whether s. 7 applies and the Court holding that it applies, orders stay of execution, the order staying execution is appealable. 189 Ind. Cas. 848 (2), applied.

Ex. S. As. from the decision of the District Judge, Kumaun, dated March 30, 1939.

Mr. S. N. Seth, for the Appellant.

Mr. G. S. Pathak, for the Respondent.

Judgment.—The two connected appeals arise out of two orders of the Court below holding that no appeal lay to the District Judge from the orders of the execution Court staying the execution proceedings. It appears that the appellant obtained a decree on April 16, 1937, against the respondent on the basis of two pro-notes, one dated August 10, 1936, and the other dated January 11, 1937. The decree-holder proceeded with the execution of the decrees. Before the decrees were passed, the judgment-debtor had made an application under s. 4, Encum. Estates Act. An order under s. 6, was passed by the Collector on October 30, forwarding the application to the Special Judge. The judgment-debtor made an application to the execution Court praying for the stay of execu-

tion proceedings under s. 7, sub-cl. (2), Encum. Estates Act. The decree-holder objected and contended that for certain reasons s. 7 (2) was not applicable, and that the judgment-debtor was not entitled to have the execution proceedings stayed. The application was granted. Upon appeal by the decree-holder, the learned District Judge considered himself bound by a ruling of this Court in *Husain Bhai v. Beltu Shah* (1), which held that no appeal lay from an order staying execution. There was some conflict of judicial opinion on this point at one time. The matter has however been set at rest by a Full Bench of this Court in *Har Narain v. Mathura Prasad* (2). In that case an application for stay of execution proceedings was made under s. 3, Temporary Postponement of Execution of Decrees Act, Act X of 1937. The Civil Judge allowed the application and stayed the execution of the decree. The decree-holder appealed against the order of stay and the question for determination was whether an appeal lay. The learned Chief Justice in delivering the judgment of the Bench made the following observation :

"The test to be applied in determining whether an order is appealable or not may be stated thus—does the order conclusively determine the rights and liabilities of parties in a controversy which has arisen between them and which relates to the execution, discharge or satisfaction of a decree? Now, in the present instance, there was a controversy between the parties as to the judgment-debtor's right to have the execution of the decree postponed during the operation of the Temporary Postponement of Execution of Decrees Act..... There therefore was in the present instance a conclusive determination of a question arising between the parties and which related to the execution, discharge or satisfaction of a decree. The order therefore in our judgment was appealable."

Applying this test to the present case, it would appear that the order staying execution proceedings was appealable because a controversy between the parties had arisen which was conclusively determined. The judgment-debtor claimed that he was entitled to have the execution proceedings stayed by virtue of s. 7, of the Act. The contention of the decree-holder was that that section did not apply to the facts of the case and the judgment-debtor's application was not tenable. If s. 7, did apply the Court was bound to stay the proceedings. It had no discretion in the matter and the order of stay would not be in the exercise of a discretion vested in the Court. On the other hand, if s. 7, for any reason was inapplicable, the Court would be at liberty to proceed with

(1) A I R 1924 All. 808; 83 Ind. Cas. 1035; 46 A 733; 22 A L J 706.

(2) (1940) A L J 377; 189 Ind. Cas. 848; I L R (1940) All. 517; A I R 1940 All. 326; 1940 O L R 503; 13 RA 143.

the execution proceedings. That being so, in my opinion, the Full Bench case fully applies to the present case and the order of the execution Court was appealable to the learned District Judge. The case cited by the learned District Judge and several other cases where similar view has been taken, are distinguishable because in all those cases the execution Court had the discretion to stay the execution proceedings temporarily and the order of stay was passed in the exercise of that discretion. Section 7, Encum. Estates Act, is mandatory and gives no discretion to the executing Court. In these circumstances, I hold that the order of the Court below was erroneous. I would therefore allow the appeal, set aside the order of the Court below and remand the case to the learned District Judge with the direction that the appeal be registered under its original number and be decided according to law. Costs here and hitherto will abide the result. The court-fee shall be refunded.

D.

Appeal allowed.

MADRAS HIGH COURT

Appeal Nos. 156, 166, 179 and 191 of 1936

October 16, 1939

PANDRANG ROW AND ABDUL RAHMAN. JJ.
NALLAPAREDDI ANNAPOORNAMMA
—APPELLANT

versus

PELLETI VEERARAGHAVA REDDI

AND OTHERS—RESPONDENTS

Hindu Law — Widow — Maintenance — Suit for, against manager — Manager's duty to prove binding nature of debts sought to be taken into account for reducing family income—Costs in such suit—Nature of widow's right to maintenance — Her separate property, if can be taken into account—Debts—Manager—Necessity—Purchase of new lands and litigation are not prima facie family necessities.

In a suit by a Hindu widow for maintenance, against the manager of the joint family, the manager is under obligation to prove that the debts which according to him have to be taken into account in ascertaining family income are binding on the family; in other words, the manager's *ipse dixit* is not sufficient to show for this purpose that the debts are binding on the family. It may be that the standard of proof, so to say, required for establishing the binding nature of the debts need not be so high as in a suit in which the dispute arises either as between the co-parceners in a suit for partition or as between the creditors and the other members of the family. But nevertheless, there must be some *prima facie* reliable evidence to show that the debts are binding on the family when the manager of the family wants to have those debts to be taken into account for the purpose of reducing the family income available for calculating the rate of maintenance. [p. 571, col. 2.]

So long as the claim to maintenance is genuine and

true and the amount claimed is not out of all proportion to the amount that is found to be due, the widow claiming maintenance ought not to be mulcted in costs, when she has established her right to maintenance, a right to which she is entitled and which was refused unreasonably and unlawfully by the defendants. [p. 575, col. 1.]

There is, it is true, a distinction made in some of the text-books, between the productive and unproductive character of a widow's *stridhanam* property, but this does not seem to be based on any principle, if it is borne in mind that it is a right of the widow to be maintained out of her husband's estate or what was once her husband's estate, and it is the duty of those on whom her husband's estate has devolved to maintain the widow out of that property in the same degree of comfort to which she was used during her husband's lifetime. It is immaterial if she had any private means of her own or could have them by selling some of the jewellery which would not be required by her after her husband's death. Had the husband remained alive, it would have been his duty to maintain his wife out of his own estate irrespective of her *stridhanam* or private means and there appears to be no reason why the latter should be regarded to be any factor in fixing the maintenance after his death. The right of maintenance was conferred on the widow under the Hindu Law in lieu of her husband's share in the joint family property and cannot be taken away by the fact that she has some property of her own either productive or non-productive of income. [p. 578, col. 2; p. 579, col. 1.]

[Case-law reviewed.]

Prima facie, the purchase of new lands for the family is not a family necessity, and certainly every litigation cannot be regarded as *prima facie* a necessity of the family, assuming in both cases that borrowing alone could meet the alleged necessity, and the money required could not be found from the surplus of the family income. [p. 572, col. 1.]

Messrs. P. V. Rajamannar and K. Subba Rao (in No. 156), K. Umamaheswaran (in No. 179), D. R. Krishna Rao (in No. 191) and P. S. Raghavarama Sastry (in Nos. 166 and 179), for the Appellant.

Messrs. P. V. Rajamannar and K. Subba Rao, (in Nos. 166 and 179) and P. S. Raghavarama Sastry, (in No. 156), for the Respondents.

Pandrang Row, J.—These four connected appeals arise out of two suits for maintenance filed by two widows belonging to the same composite family. Appeals Nos. 156 and 191 are by the plaintiffs in the suits and the other two appeals are by defendants Nos. 1 to 7. The suits were for maintenance including arrears of maintenance and also for recovery of jewels or their value and for provision for residence. The claim in both cases was for maintenance and arrears at the rate of Rs. 300 a month and Rs. 5,000 each in lieu of provision for residence. The value of the *stridhanam* jewels that were claimed was Rs. 6,700 odd in one case and in the other Rs. 8,700.

The suits were tried together and disposed of by one and the same judgment dated October 12, 1935, the suits having been

actually instituted in 1929. The Subordinate Judge of Nellore who decided both these suits gave a decree in each case for Rs. 100 a month as maintenance and arrears of maintenance and Rs. 2,500 as provision for residence and dismissed the claim for jewels or their value in both the suits. Both parties have now appealed in both suits and the contentions of the defendants, who are the appellants in two of the appeals, namely 166 and 179, are that the maintenance and arrears of maintenance should not be more than Rs. 40 a month and that the provision for residence is excessive and they raise also two comparatively minor points relating to the alleged payment of Rs. 500 at the rate of Rs. 250 to each of the plaintiffs just before the suits were instituted and to the direction by the Court below regarding costs of the suits. The point raised in the appeals by the plaintiffs, i. e., the claimants for maintenance and arrears, is that they should be given at the lowest Rs. 200 a month and that a decree should have been given for jewels or their value to the extent of Rs. 3,000 in the case of Seethamma, i. e., the plaintiff in O. S. No. 66 of 1931 and Rs. 4,000 in the case of Annapurnamma, the plaintiff in O. S. No. 68 of 1931. A point regarding costs has also been raised in these appeals. This direction regarding costs made by the Court below which is objected to by both the sets of appellants will be dealt with after the other points are disposed of.

The main question, the discussion of which took up most of the time before us is the one relating to the rate of maintenance. The question has been dealt with in very great detail by the Court below, but unfortunately, in dealing with the point in great detail, the Court below lost sight of one or two important points which had to be decided as a preliminary to an examination of the details. In the first place, the Court below relied almost entirely, or at least primarily, on the abstracts of the accounts said to have been kept by the family of the parties for many years. (His Lordship discussed the evidence relating to the abstracts of the account books prepared and then proceeded.) In these circumstances it is impossible to say that anyone who really examined all the numerous accounts in this case and prepared the abstracts as the result of his examination has been examined as a witness in this case to prove that the abstracts are correct, and certainly it is not pretended that defendant No. 1 is himself competent to prepare correct abstracts of so many accounts as are put forward in the

present suits. It is thus apparent that these abstracts have been admitted in evidence in circumstances in which they should not have been admitted; in other words, they have not been properly proved and should not have been relied upon to such an extent at any rate as the Court below has done. Apart from that we find there are obvious discrepancies which even a cursory glance at the accounts and abstracts themselves would show. (After pointing out these, his Lordship proceeded.) Basing its finding mainly on the abstracts, the Court below was of opinion that the total income was not less than Rs. 20,000, from landed property. We need not go into the evidence at very great length regarding this point because after all it does not make a great deal of difference whether the family income is Rs. 20,000 or Rs. 25,000 or even Rs. 30,000. The income in any case is sufficiently large as not to bring into operation of what one may call the rule prescribing the maximum amount that might be awarded as maintenance. Even on the basis of Rs. 20,000 the share of the deceased husbands of the plaintiffs in these suits would be about Rs. 5,000 a year or Rs. 400 a month and what they now demand is Rs. 200 a month. Unless, therefore, the income of the family is something less than Rs. 10,000 a year the claim of the plaintiff's maintenance at Rs. 200 a month could be satisfied without going beyond the maximum fixed by the law as laid down by the highest authorities. Nevertheless, we have to say something on the other aspects of the question on what one may call general evidence, which in a case like this affords a greater security, so to say, against falsity creeping in. (His Lordship then dealt with the general evidence and proceeded.) On the whole, therefore, there can be no doubt that the net income of the family after making all allowances for vicissitudes of season and risk of all kinds cannot be less than Rs. 20,000 a year. Indeed it would not be unreasonable to say that the income would not be less than Rs. 25,000 a year, the family being one which pays about Rs. 10,000 Govt. assessment in respect of *patta* lands and Rs. 4,000 *jodi* in respect of *shrotriam* villages. A net income of double the Govt. revenue and *jodi* is certainly not unreasonable even when prices are lowest.

We do not propose to say much about the details of the question which has been argued at some length, namely, the amount of outstandings and the amount of debts relating to the family. As regards the outstandings, it is obvious that the view taken

by the Court below is right, namely that the belated attempt made by the defendants to prove that some of the outstandings of the family were irrecoverable and that some others did not bear any interest did not succeed. This allegation was subsequently made during the trial, and there is really no independent evidence corroborating this belated allegation; none of the debts due to the family has been written off as irrecoverable or shown as irrecoverable in the accounts of the income submitted to the income-tax authorities. It is too much to suppose that out of a total amount of Rs. 40,000 and odd of outstandings more than Rs. 11,000 should be irrecoverable and more than Rs. 6,000 should carry no interest. It becomes all the more improbable when one considers the wealth of the family and the existence of debts due by the family to others. When the family is borrowing moneys it is most unlikely that they would lend money without interest. In any case, we do not propose to deal with this aspect of the case at greater length as the lower Court has dealt fully and correctly with it. As regards, however, the debts due by the family, one or two observations fall to be made. We do not agree with the Court below that the defendants are under no obligation whatever to prove that the debts which according to them have to be taken into account in ascertaining family income are binding on the family; that, in other words, the manager's *ipse dixit* is sufficient to show for this purpose that the debts are binding on the family. It may be that the standard of proof, so to say, required for establishing the binding nature of the debts need not be so high as in a suit in which the dispute arises either as between the co-parceners in a suit for partition or as between the creditors and the other members of the family. But nevertheless, there must be some *prima facie* reliable evidence to show that the debts are binding on the family when the manager of the family wants to have those debts to be taken into account for the purpose of reducing the family income available for calculating the rate of maintenance.

In this case there is no such reliable *prima facie* evidence. It is admitted by defendant No. 1 himself that more of the debts were contracted after the dispute arose in 1928. It is admitted that the family is well-to-do, and in such a case the evidence required of necessity to borrow much obviously be more satisfactory than in the case of a family more or less impecunious all the time. In

this case the debts were contracted—all of them—by defendant No. 1 and most of them after 1928. The debts were only about Rs. 30,000 to Rs. 35,000 when he took up the management, and they have now swelled to Rs. 71,000. The explanation given is that he had to borrow for the purpose of purchasing properties, making repairs to lands and for litigation and so on; he mentions two big items—Rs. 20,000 for purchase of lands and Rs. 10,000 to Rs. 16,000 for certain litigation. As defendant No. 1 himself was a party to both these items of expenditure, certainly he should have been in a position to give evidence that both these items of expenditure were necessary and that money had to be borrowed for the purpose of meeting this expenditure. But beyond saying that they were borrowed for these purposes, he does not say that there was a necessity to borrow. *Prima facie*, the purchase of new lands for the family is not a family necessity, and certainly every litigation cannot be regarded as *prima facie* a necessity of the family, assuming in both cases that borrowing alone could meet the alleged necessity, and the money required could not be found from the surplus of the family income.

Bearing all these circumstances in mind, the general conclusion emerges that in cases of this kind, where we are not required to determine, so to say, correctly to the last pie, what the family income is, where a rough estimate is as good as any attempt to arrive at strict accuracy and indeed—where strict accuracy is hardly to be hoped for—namely, the outstandings and the debts can be set off one against the other without doing any serious injustice to either party in this litigation and this conclusion which we mentioned during the hearing of the appeal was not controverted or disputed on either side. We, therefore, do not propose to go further into the details of debts and liabilities and we rest content with the general observation which is accepted on both sides that for the purposes of this case it is enough to disregard both of them because one can be regarded as being set off against the other. But we make it clear that this is done only for purposes of these cases, namely, where we have to determine roughly the family income in order to decide, so to say, the status of the family and the amount of maintenance that could be granted.

Before determining the reasonable amount that can be given in these cases as maintenance, one point remains to be dealt with

and that arises in one of these cases only, namely, the claim of Sitamma, the plaintiff in O. S. No. 66. She claimed in a separate suit certain properties as her own and she got a decree in part in her favour in the Court below and that decree is now under appeal. It is argued in these appeals that so far as Sitamma's claim for maintenance is concerned, the income which she derives from the separate property which may be ultimately decreed in her favour should be taken into consideration in determining the maintenance to be allowed to her and that this should be done even in the matter of arrears because mesne profits have been claimed by her and have been decreed. We cannot anticipate the ultimate decision in that suit relating to the separate property of Sitamma, and we shall therefore assume for the purpose of these appeals that Sitamma has separate property of her own which brings her an income of about Rs. 50 a month which is what is alleged by the defendants against her. In other words, we proceed on the basis that Sitamma has separate property from which she gets a monthly income of about Rs. 50. Now, the question is whether the possession of this income from separate property is a factor to be taken into account or consideration in the determination of the maintenance to be given to her. On this point, I have had the advantage of seeing my learned brother's judgment which deals with all the relevant cases declining with this point, and I do not propose to anticipate or repeat any portion of what he is going to say in his judgment. It is enough for me to say that I concur in his views as to the effect of the decided cases and in his final conclusion that this income from separate property is not a factor to be taken into account at all, and that the defendants' contention is not supported by any recognized principle of Hindu Law. It is obvious that the recognition of any such contention will introduce greater uncertainty into a field where already there is too much uncertainty. Because, while it is no doubt very easy to say in a general way that the income from separate property should be taken into consideration, the extent and mode of taking it into consideration are left vague, and vagueness in a point like this means trouble to the parties who will have to get the question determined by one Court after another.

The learned Counsel for the defendants, Mr. Umamaheswaran, felt himself compelled to admit that taking into consideration cannot mean that if the widow, for instance,

be entitled legitimately to a maintenance allowance of Rs. 100 a month in this case, the rate of maintenance allotted to her should be reduced by Rs. 50 a month, *i. e.*, by the amount of the income from her separate property. Obviously he feels that such a position could not possibly be defensible, because, if the income from the widow's separate property had not been only Rs. 50 a month but Rs. 100 a month, the rate of maintenance to which the widow would be entitled would be nil which would be absolutely in the teeth of all principle, for, the right of a Hindu widow to maintenance from out of the property belonging to her deceased husband is absolute and not subject to any condition that she should be in need of any allowance for maintenance.

The co-existence of an absolute right to get maintenance with conditions of this kind is really difficult to postulate, for, what is absolute must be unconditional, and if there are conditions, there cannot be any absolute right. It may be that though in a case of a co-parcener's right to a share, the law itself fixes definitely what his share is to be, the amount of the maintenance due to a widow has to be determined by the Court having regard to the facts and circumstances of each case, but that does not make the right other than absolute. The fact that a Court has to determine the exact money value, so to say, of a right which is not determined by the law itself, cannot convert what is an absolute right into a conditional right, *i. e.* a right that can be claimed or that can be said to exist only if certain conditions are satisfied. The only condition—if one may call it a condition—to be satisfied in a case like this is that the person who claims maintenance must show that she is the widow of a deceased co-parcener and that the family has property on which the claim for maintenance can be fastened. I do not however propose to go further into this point. We therefore come to the conclusion that there is no necessity for taking into consideration the income that Sitamma would derive from her own separate property.

The point is what is the rate of maintenance that can be regarded as reasonable and proper in the circumstances of these cases. The Court below has given Rs. 100 and the defendants want to reduce it to Rs. 40 while the plaintiffs want to enhance it to Rs. 200. Of course, it is impossible to satisfy both the parties in cases like these, however deeply one may go into the details of the case, or to expect both parties to accept any amount as reasonable, unless they

are reasonable enough to compromise and settle the rate between themselves, and not leave it to the Court to decide what the rate should be. In these cases, there is no danger, as we have observed, of exceeding or even approaching near the limit prescribed in cases of this kind, namely the income of the deceased husband's share which in each of these cases is one-fourth of the entire family property and which share on any reasonable estimate would fetch an income of not less than Rs. 400 a month. It is obvious that the rate of Rs. 40 is obviously and clearly unreasonable low. There is no legal authority for the shastric injunction on which extremely low awards of maintenance are sought to be based, namely that the widow ought to "eat or enjoy moderately," that is live as abstemiously as possible. This moral precept cannot be given legal authority in order to cut down the level of comfort which otherwise a widow to whom fortune has been unkind, would be entitled to claim. Whatever might have been the practice in the past, there can be no doubt that the recent tendency has been to be liberal in the grant of maintenance; or to put it perhaps more accurately not to be illiberal in the grant of maintenance to widows. This is obviously in keeping with the changed times and the changed notions of the people including notions as regards comforts reasonably required for persons belonging to certain classes of society.

These changes are reflected in the recent legislation in favour of widows in the shape of the Hindu Women's Rights to Property Act, 1937, which as Mr. Raghavachariar, the learned author of "Hindu Law Principles and Precedents" says can more appropriately be called the Hindu Widows' Rights to Property Act, because the most marked change introduced in the Hindu Law by that Act is the provision in favour of Hindu widows. Though that Act is not applicable to the present cases because the law governing the rights of the parties in these cases is the law as it prevailed before the Act of 1937, nevertheless, the reference to this new legislation is not entirely pointless because that legislation only reflects the change that has unconsciously and slowly crept into Hindu society towards a more liberal treatment of Hindu widows. It is not as if the Legislature suddenly thought it necessary to ameliorate their condition but the Legislature merely gave sanction to a change which had already taken place and that change cannot be ignored by Courts in determining the rates of maintenance. In other words, to put it con-

cretely, the changed notions as to the way in which a widow should live and what pleasures she should be permitted and so on, have to be determined, not in accordance with the old ideals which have more or less ceased to apply or to be applied to actual life, but according to the changed notions that prevail to a greater and greater extent in the present day; as is well known one tendency observed in the country is the gradual steady rise in the standard of living and Hindu widows have been as much subject to this tendency as any other class of people in Hindu society.

We therefore think that while the principle to be observed is to bear in mind all the circumstances of the family, Courts should also bear in mind the changed conditions of society and award maintenance in such a way that the widow concerned is able to live in more or less that standard of comfort in which she would have been able to live if her husband had been alive, so long as the family can stand it and there is no difficulty in the way of the family finding the necessary money to maintain the widow in such comfort. It cannot be said that Rs. 100 a month is sufficient for a widow of a wealthy family who is no longer content to stay in her own native village and live the same village existence as widows in the past. It cannot be said that her desire to live in a place like Nellore is unreasonable nor that life in Nellore is not more expensive than life in a village like Kota.

Considering all the circumstances, we are of opinion that the rate of maintenance should be enhanced from Rs. 100 a month to Rs. 150 a month. This however would apply only to maintenance from the date of the suit and will not apply to the arrears claimed and allowed by the Court below which will remain at the figure Rs. 100 a month. This enhanced rate of maintenance, namely Rs. 150 a month, will, of course, be granted to both the widows; that is to say, the plaintiffs in both the suits will each get maintenance at this rate from the date of her suit.

Before leaving this aspect of the case we might conveniently deal with the contention of the side of the defendants that the charge given by the Court below covers a much larger extent of land than is reasonably necessary in the circumstances. The lower Court has given a charge in respect of all the nine *shrotriem* villages to each plaintiff. The result is that the defendants' family would be unable to deal with the properties contained in the *shrotriems* on account of the

charge. We must however have regard to the higher rate of maintenance which we have considered it necessary to award. In these circumstances, and with the consent of the Advocates on the side of the plaintiffs in the suit, we will confine their charge in respect of their claim to maintenance including arrears to the following villages. As regards the claim of Annapoornamma the charge is limited to Vudathavari Parlapalle and Bhuvanagripalem and as regards the claim of Sittamma the charge is limited to the villages of Polipadu, Muddumudi and Ambapuram. The charge given by the Court below on the remaining four villages is cancelled. (His Lordship then dealt with the controversy regarding the provision for residence and the question of jewels and proceeded.) The only other points that remain to be decided in these appeals are the payment of Rs. 500 in two halves of Rs. 250 to each of the plaintiffs after disputes arose between the parties, and the point relating to costs in the Court below. As regards the payment of Rs. 500 after disputes arose the finding is against defendant No. 1 who pleaded the payment, and after looking into the evidence relating to the point we are not inclined to differ from the finding of the Court below. (After examining the evidence, his Lordship held that the alleged payment could not be believed and proceeded.) The other question of the costs in the lower Court more or less answers itself after the other points have been decided. It is now found that the plaintiffs are entitled to maintenance at least at one half of the rate which was claimed by them in the Court below. In view of the peculiar way in which information was kept back by defendant No. 1 about the status and the property of the family even from the Court itself, it is obvious that the plaintiffs could not be expected to have made a better or nearer estimate of the income of the family than they did. It is impossible to say that a family which, as is now found, pays a Govt. assessment of Rs. 10,000 in respect of *ryotwari* lands and Rs. 4,000 for *jodi* in respect of *shrotriem* villages could not possibly be getting a net income of Rs. 50,000 a year. It was not an unreasonable estimate to make and it cannot be said that in putting forward that estimate the plaintiffs deliberately exaggerated their claim. After all, even according to the correct state of facts as now found by us the family must have an annual net income of not less than Rs. 25,000 and therefore the shares of the deceased husbands of the plaintiffs would have been about Rs. 500

a month. Even assuming that the total income was only about Rs. 20,000 their shares would have come to Rs. 4,500. They were entitled to claim up to this limit.

What exactly is the reasonable amount to be claimed as maintenance is probably more difficult for the claimant-widow to decide than it is for the Court to decide what is the reasonable amount to give, because it is more difficult for the widow to decide against herself than for the Court so to decide. Moreover the Court has to decide only after having all the materials before it. In this case, as in many other similar cases, the plaintiffs are widows with little or no exact knowledge of the extent of the property belonging to the family, and have necessarily to depend upon vague information given by people who may know something about it, and they should not and cannot rightly be penalized for acting upon such information as they pick up in this manner. The determination of the actual amount depends on a number of circumstances, and, as these cases themselves show, two Courts can form different opinions as to what is the reasonable rate of maintenance in a given case. The Court below thought Rs. 100 was reasonable and proper whereas we are of the opinion that Rs. 150 is reasonable and proper. This itself shows that it is not reasonable to expect parties who claim maintenance to be meticulously accurate and observe all possible moderation in making their claim. So long as the claim to maintenance is genuine and true and the amount claimed is not out of all proportion to the amount that is found to be due, the widow claiming maintenance ought not to be mulcted in costs, when she has established her right to maintenance, a right to which she is entitled and which was refused unreasonably and unlawfully by the defendants. In these circumstances we are of opinion that the plaintiffs should be given their entire costs including court-fee due on the plaint in the Court below to be paid by the contesting defendants, and the contesting defendants should bear their entire costs in the Court below.

The result is that the appeals by the plaintiffs in the suits are allowed to the extent indicated above that is to say the rate of maintenance is raised from Rs. 100 to Rs. 150 a month, but not in the case of arrears claimed. The value of the jewels Rs. 2,200 and Rs. 4,000 are decreed in favour of the plaintiffs, Sitamma and Annapurnamma respectively, in addition to what has been decreed in their favour by the Court below. We have already indicated the change to be

made in the decree of the Court below as regards the provision for residence of both the plaintiffs. The question of costs in the Court below has been already dealt with. In the circumstances the appellants in Appeals Nos. 156 and 191 of 1936 are allowed their costs of these appeals to be paid by the contesting respondents who will bear their own costs, the appeals being allowed to the extent indicated above. The other appeals, namely those by defendants Nos. 1 to 7, Appeals Nos. 166 and 179 of 1936, are dismissed with costs.

Abdur Rahman, J.—I agree with my learned brother and should like to examine the legal point which arises here for consideration with reference to decided cases relied upon by learned Counsel for the parties. The question to decide is whether the private income which Seethamma has been getting from her *stridhanam*, (or which has been at times described as peculiar property) should be taken into account in assessing the amount of her maintenance. Learned Counsel for the appellant contends that it should be so. There is some divergence of opinion on the subject both amongst the text-book writers and the decisions of the various High Courts. Strange in his Hindu Law, Vol. 1, at pp. 171 and 172 (1830 edition) observes as follows:

"Whether, in estimating her *stridhana* on the occasion, her clothes, ornaments, and the like, are to be taken into account, or only such articles of her property as are productive of income to her, or conducive to her subsistence, does not distinctly appear; though the restricting the account to the latter would seem to be reasonable, considering the object. An opinion, that her maintenance should be independent of her peculiar property is unsupported."

This was not the correct method, in my opinion, of approach to this question. It should not have been presumed that a widow's income from her *stridhanam* property would have to be taken into consideration in fixing the amount of her maintenance unless some authority was found to support that view. This is particularly so, when Sir Thomas Strange has himself in Vol. 2 of his Hindu Law published the opinion of the Nellore Pundit at p. 307 when the matter was referred to him, i. e. the Pundit, for his opinion by the Court. The answer which the Court proposed to give to the matter issue was suggested in the following words:

"On the death of a Brahmin, leaving a widow and two sons, she and they take possession of his estate, subject to her possession of *stridhana* in which case she is entitled only to a half share."

The Pundit's comment on the answer was as hereunder:

"This opinion is generally correct, but I do not understand either the authority or the reason for restricting

the maintenance to the amount of half a share, in case of the existence of *stridhana*. The division (as it appears to me) should be made without reference to any property she may hold under this title, unless it may have been accepted by her.....The widow's claim to maintenance from her husband's estate is absolute, unlimited by circumstances; but then it is only a claim to maintenance and it is not correct to say that she is entitled to any share or division."

Having regard to this opinion and without referring to any text or authority which would point to a different conclusion, the presumption raised by Sir Thomas Strange in Vol. I against the widow does not seem to be, if I may say so with respect to that author justifiable. Learned Counsel for the appellant has also not been able to point to any original text in support of his contention and in the absence of any such text, I will have to examine the relevant passages from the works to which reference was made and the cases which were cited at the Bar. There are certain passages in Mayne's and Mullah's Hindu Laws at pp. 834 and 595 of their latest editions respectively; but having gone through them I do not find any opinion expressed by the learned authors themselves although relying on certain decisions of the various High Courts, the proposition has been stated that in calculating the amount of maintenance a widow's *stridhanam* property must be taken into consideration unless it was of an unproductive character. Sir Dinshaw Mullah has however referred to the conflict of opinion existing on the point. Sirkar in his treatise on Hindu Law after referring to the various cases on which reliance was placed by the other authors struck a discordant note at p. 621 of Edn. 6 where he observed as follows:

"But all this is open to the objection, that the right to maintenance being a right to property, which the law confers on one person against another, and annexes it to some estate, why should any such extraneous consideration affect it in the manner set forth above, when the law does not say so?"

Since the Hindu Women's Right to Property Act (XVIII of 1937) came into force, subsequent to the dates on which the rights to get their maintenance had become vested in Sitamma and Annapurnamma, the law as it stood before the Act had come into force will govern the present appeals. It cannot be denied that the widows would be entitled to maintenance as members of their deceased husband's families. It is a right which devolved on them on account of their marriage with those who owned certain shares during their lives in the joint family property. Their husbands were during their own lives bound to maintain these ladies and the same right would continue to exist as long as they

(that is the widows) do so and there is property in which their husbands had shares at the time of their deaths. The question is whether this right can be held to have ceased to exist or said to remain in abeyance if these widows happen to possess some private means of their own. There seems to be nothing on principle which would compel us to take the view that this right which came into existence at the time of their marriage and continued to subsist even after the demise of their husbands should disappear permanently or even temporarily, only because they are able to maintain themselves out of their own *stridhanam* property.

A widow's right of maintenance is an absolute right and cannot ordinarily be taken away without a clear provision of Hindu Law. No such provision has been brought to our notice by the learned Counsel for the appellant and in the absence of such a provision or any other cogent reasons it is impossible to ignore that right. Nor are there any decisions of this Court in which the view pressed upon us on behalf of the appellant has been taken. The only Madras case to which our attention was drawn on behalf of the appellant was that in *Lingappa v. Kanakamma* (1). It might be noted here that the head note of this case is rather misleading. The learned Judges do not seem to have decided that a widow's private income was to be taken into account in determining the quantum of maintenance to be paid to her. The facts of the case were that the defendant was found to be in possession of the family property yielding an income of about Rs. 100 per annum. The widow had some private property out of which she could realize something like Rs. 40 to 50 per year. It was contended there that a widow who was able to maintain herself out of other property had no right to claim out of the husband's estate anything for that purpose. This contention was repelled as it was found by the learned Judges to be based on an entirely wrong conception of the right sought to be enforced. In disposing of that contention the learned Judges observed as follows:

"The wives of the male co-parceners in a Hindu family are not entitled to equal shares with the males in the family estate, nor do they take their husband's shares by representation on their death, but in place thereof they are entitled to a portion of their estate for their enjoyment during their lifetime sufficient to maintain them in comfort according to the means of the family. This is an absolute right due to their membership in the family and does not depend on their necessity arising

(1) 38 M 153; 28 Ind. Cas. 200; A I R 1916 Mad. 444; 28 M L J 260.

from their want of other means to support themselves."

Two Single Bench decisions of this Court were cited on behalf of the respondent in which Ananthakrishna Ayyar, J., and Pandalai, J. sitting separately took the view that a widow's private means were not to be considered in fixing the amounts of her maintenance. Those cases are reported in *Kothandarami Reddi v. Chenchamma* (2) and *Sundari Ammal v. Venkatarama Sastrigal* (3). It is true that the question for decision in the latter case was whether the amount of maintenance granted to the widow should not be reduced if her condition had subsequently improved by her own efforts or on account of a gift made to her by one of her relations; but I think that the principle on which that decision was based was that her private income could not be taken into consideration for the purpose of her maintenance. With these decisions I find myself in respectful agreement. Ananthakrishna Ayyar, J. had in *Kothandarami Reddi v. Chenchamma* (2), after considering the various decisions of different High Courts and what was stated in Mayne's Hindu Law, come to the conclusion that a widow's income from her private property should be, in fixing her maintenance, disregarded. It may not be necessary in this case to decide the question, but the observation in that case by the learned Judge to which I am, as at present advised, unable to give my assent, reads as follows :

"The question will be different when the income from the joint family estate is not enough to maintain all the members depending upon it."

It was unnecessary for Ananthakrishna Ayyar, J. to say this in that case. It is unnecessary for us also to decide that question now. I have simply drawn attention to that observation on that ground that our silence may not be construed as tantamount to its approval. In a case where this question arises for decision, it will have to be examined with care. Out of the cases decided by the High Courts it appears to be more convenient at this stage to examine an old Allahabad decision given in *Shib Dayee v. Doorja Pershad* (4), to which reference has been made in one or two Bombay rulings. The facts of that case were that a suit for the recovery of maintenance was instituted by Shib Dayee against her father-in-law in which it was pleaded by the latter that the plaintiff had taken some cash and movable

(2) 59 M L J 531; 126 Ind. Cas. 597; A I R 1930 Mad. 479; Ind. Rul. (1930) Mad. 869; 32 L W 729.

(3) 66 M L J 680; 149 Ind. Cas. 265; A I R 1934 Mad. 384; 6 R M 617; 39 L W 676.

(4) 4 N W P H C R 63.

property belonging to her deceased husband and of the defendant of the value of Rs. 5,000 which sufficed for her maintenance. The trial Court found the proof of the fact that Shib Dayee had taken any jewellery, etc. to the value of Rs. 5,000 wanting, but held that she possessed a sum of Rs. 1,000 awarded to her husband in an arbitration and jewels suitable to the position of the family. Holding that the income of the estate purchased by the defendant for his son, i. e. Shib Dayee's husband, along with the interest on the Rs. 1,000 in her possession would be sufficient for her maintenance, the Subordinate Judge dismissed her claim. It will be noticed that no plea was raised on behalf of the defendant that Shib Dayee had no right to get a maintenance on account of her *stridhanam* property. The sum of Rs. 1,000 which was found to be in her possession was alleged to belong to her husband and if it did, there is no doubt that it had to be taken into consideration in fixing maintenance. But it appears that some argument was advanced in appeal that she was not entitled to get any maintenance inasmuch as she was found to be in possession of some jewels and other property although unproductive of any income. This was repelled by the learned Judges with the observation :

"Nor will the fact that a widow has in her possession jewels and other property unproductive of income, deprive her of or diminish her right to maintenance if they constitute her *stridhanam* although forming part of her husband's estate they are suitable to the position of the family in society."

This does not help the appellant, but the next passage appears to be more directly in point and is liable to be construed so as to be more helpful to him. It reads :

"If, on the other hand, she has property in her possession productive of income, the amount should be taken into consideration in determining the measure of her allowance for maintenance."

In reading this passage, I do not think that the learned Judges were referring to the widow's *stridhanam* property at all. In fact the property in Shib Dayee's possession which was productive of interest was the sum of Rs. 1,000 and this observation must necessarily be taken to have referred to that property. It cannot be detached from its context or from the facts of that case and held to be expressing a principle which the learned Judges were not called upon to consider. If it referred to the Rs. 1,000 belonging to her husband, it would not help the appellant. If on the contrary it referred to some property which was not mentioned in that suit it would be *obiter* and although entitled to respect, yet it

would not be, in the absence of any authority, of any great help to us here.

The first Bombay Case which was brought to our notice was that in *Chandrabhagabai v. Kashinath Vithal* (5) (the page given in some of the references is 323 but the case is the same). It does not help the appellant as it shows that the income accruing from the widow's peculiar property was not taken into account. The next Bombay decision in *Gokibai v. Lakshmidas Khimji* (6) does not help the appellant either. It is true that Farron, J. did observe in this case that the defendant was bound to show that the widow was possessed of property out of which she could maintain herself, but nothing was said in that judgment which would indicate whether the learned Judge was referring to the joint family property or to the widow's *stridhanam* property. It is obvious that if the widow could be shown to be in possession of joint family property out of which she could maintain herself she would not be entitled to maintain an action of this nature at all. The decision in *Dattatraya v. Rukhmabai* (7) does not support the contention raised by the appellant. The widow was in that case found to be in possession of funds belonging to her husband's family estate which fund was sufficient to provide her maintenance for five years after the suit had been brought at the rate allowed by the lower Court. In the circumstances it was held that no cause of action had accrued to the plaintiff in 1904 when the suit was instituted. This case does not decide whether the widow had any private income of her own. The last Bombay case to which reference was made was that in *Gurushiddappa v. Parvatewa* (8). The question in this case was whether the value of the widow's ornaments should be taken into consideration in awarding maintenance to her. The learned Judges who heard the case came to the conclusion that it could not be, but in recording their decision, Broomfield, J. observed :

"I think it must be taken to be good law that as an ordinary rule *stridhan* ornaments are not to be taken into account in assessing maintenance. It need not be laid down as an invariable rule. If the widow were in possession of ornaments of great value which she would not ordinarily wear or use, and which she would be likely to dispose of, that might be a different matter. In the present case I see no reason to differ from the view taken by the trial Judge."

No *stridhanam* property of a productive

character or which could be converted into property of that character was involved in that suit and the observation must be regarded to be in the nature of *obiter*. Wassoodew, J. in writing a concurring judgment observed that a widow's right to claim maintenance out of the husband's estate was absolute and rested upon the possession of her husband's property by the person from whom the maintenance was claimed. But he happened to observe :

"It seems to me difficult upon principle to say that the clothes and jewels or ornaments of the widow, whatever their value, should invariably be excluded in the calculation of her maintenance out of her husband's property."

It was not stated by the learned Judge what principle did he have in mind to which reference was made in this sentence. In view of the position that a widow's right to maintenance was conceded to be absolute, *i. e.*, not conditional on anything else, why should the fact of her not being in possession of her own private or peculiar property be regarded as a condition before maintenance is granted? If the right is an absolute one, her possession of *stridhanam* property must be regarded as irrelevant. In spite of this observation the learned Judge agreed in excluding the ornaments from consideration although on the ground that

"it was not clear upon the record, having regard to the custom of the community to which the widow belonged, that the ornaments in her possession would not all be required to maintain the status of her family."

There is, it is true, a distinction made in some of the text-books, which have already been referred to, between the productive and unproductive character of a widow's *stridhanam* property, but this does not seem to be based on any principle, if we bear in mind that it is a right of the widow to be maintained out of her husband's estate or what was once her husband's estate, and it is the duty of those on whom her husband's estate has devolved to maintain the widow out of that property in the same degree of comfort to which she was used during her husband's lifetime. It is immaterial if she had any private means of her own or could have them by selling some of the jewellery which would not be required by her after her husband's death. Had the husband remained alive, it would have been his duty to maintain his wife out of his own estate irrespective of her *stridhanam* or private means and there appears to be no reason why the latter should be regarded to be any factor in fixing the maintenance after his death. The right of maintenance was conferred on the widow under the Hindu Law in lieu of her husband's share in the joint

(5) 2 B H C R 341.

(6) 14 B 490.

(7) 33 B 50; 1 Ind. Cas. 466; 10 Bom. L R 770.

(8) 1 L R (1937) Bom. 113; 167 Ind. Cas. 973; 38 Bom. L R 1293; A I R 1937 Bom. 135; 9 R B 347.

family property and cannot be taken away by the fact that she has some property of her own either productive or non-productive of income. This exhausts all the Bombay cases cited at the Bar. The next decision to which reference was made at the Bar was that in *Saraswati Kuer v. Sheoratan Kuer* (9), Wort, J., in delivering his judgment at p. 874* observed as follows :

"The point really is somewhat academic, having come to the conclusion, as I have done, that the plaintiff's claim was based under the general Hindu Law, and that being so, the amount to which she is entitled would be a sum in accordance with her position in life, and, as the Privy Council has pointed out, in accordance with the condition of the estate."

No exception could be taken to this statement, but the learned Judge at p. 875 happened to observe :

"There is no doubt that under the general Hindu Law a widow claiming maintenance claims it on the basis, as I have said, of her position in life and the position of the estate *having regard also to her means*."

The last words in the preceding sentence do not occur in any of the decisions by their Lordships of the Privy Council. The statement made by the learned Judge himself on the previous page and which has been quoted above does not contain any such qualification. No authority was cited by the learned Judge for the view that a widow's means had to be taken into consideration and apparently the point was not considered by him in its legal aspect. Moreover, the private income which the widow was getting in that case by way of an allowance from her brother was disregarded as it was held not to be an income which could be taken into consideration by the Court. This case is certainly no authority for the proposition that in calculating the amount of maintenance her *stridhanam* must be taken into account. The last case to which reference was made was an old Calcutta case in *Ramawati Koer v. Manjhari Koer* (10). Relying on *Gokibai v. Lakshmidas Khmiji* (6) the case which has been already considered by me in an earlier portion of this judgment, and on the Privy Council decision in *Narayana Rao Ramachandra Pant v. Ramabhai* (11) the learned Judges came to the conclusion that so long as an applicant for maintenance had private means for her own support she could not claim maintenance from her husband's family. I have already tried to show that *Gokibai v. Lakshmidas Khmiji* (6) does not support that proposition.

As for the second case decided by their Lordships of the Judicial Committee, a reference to that case would show that their Lordships did not hold in that case that the right of a widow to maintenance was, "according to the wants and exigencies of the widow." The last words were certainly used by their Lordships of the Judicial Committee but they were used when they were considering a question of limitation and not a question of Hindu Law. Referring to the Lim. Act they observed as follows :

"The language of the Act is not very clear; and by two subsequent statutes of limitation the events from which the time of limitation is to run in the case of maintenance are wholly different. By common law the right to maintenance is one accruing from time to time according to the wants and exigencies of the widow; and a statute of limitation might do much harm if it should force widows to claim their strict rights, and commence litigation which, but for the purpose of keeping alive their claim, would not be necessary or desirable."

This would show that their Lordships of the Privy Council were trying to express that the cause of action for a widow to maintain her action is of a recurring nature and the period of limitation would only start from time to time according to the wants and exigencies of the widow. They were not considering whether the widow's private means had to be taken into account before a decree for maintenance was passed in her favour. In the absence of any other authority, the decision in *Ramawati Koer v. Manjhari Koer* (10) could not be supported. It was expressly dissented from in *Lingayya v. Kanakamma* (1). A review of these cases would show that but for certain *obiter dicta* in some of the judgments it has not been decided in any case, except in the Calcutta case just referred to, that the widow's private means have to be calculated in fixing the amount of her maintenance. On principle as we have already stated above there seems to be no reason why a widow's *stridhanam* property or private income should be taken into consideration if her right to maintenance is absolute and the duty of persons who are in possession of her husband's estate unqualified and unconditional.

N.-D.

Order accordingly.

(9) 12 Pat. 869; 149 Ind. Cas. 738; A I R 1934 Pat. 99; 15 P L T 372; 6 R P 637.

(10) 4 C L J 74.

(11) 3 B 415; 6 I A 114; 4 Sar. 24 (P O).

*Page of 12 Pat.—[Ed.]

NAGPUR HIGH COURT

Civil Revision No. 226 of 1938

March 28, 1939

BOSE, J.

TULSIRAM—DEFENDANT—**APPELLANT***versus***PAIKAN—PLAINTIFF—OPPOSITE PARTY***Limitation Act (IX of 1908), Arts. 7, 102—Suit by village barber for remuneration for services rendered—Article applicable.*

Article 7, Lim. Act is confined to suits for the wages of a household servant, artisan or labourer. Village barbers are not household servants. They are not labourers in the sense in which the term 'labourer' is used in that Article. It is used there with reference to a man who does work chiefly requiring bodily strength. They are not also artisans, though the modern hairdresser who works on the heads of fashionable ladies, may be considered as artists. Consequently a suit by a village barber for remuneration for services rendered, is governed by Art. 102 and not by Art. 7, Lim. Act. The mere fact that a village barber who may not be as highly skilled a person as a village carpenter or a village blacksmith gets a longer period of limitation would not justify the Court in straining the meaning of the words employed in Art. 7. 46 Ind. Cas. 779 (1) and 104 Ind. Cas. 520 (2), distinguished.

C. R. of the decree of the Court of Judge, Small Causes, Brahmapuri, dated January 19, 1938.

Mr. M. R. Rajkarne, for the Applicant.

Mr. N. B. Chandurker, for the Opposite Party.

Order.—The plaintiff is a village barber and the defendant is a resident of that village and is one of the plaintiff's customers. The plaintiff sues for remuneration for services rendered to the defendant, and the question at issue is one of limitation. If the suit falls within Art. 7 of the Lim. Act then it is beyond time; on the other hand if it falls under the general Art. 102 it is within time.

The lower Court finds that Art. 102 applies and has consequently decreed the claim which is for a small sum of Rs. 9. The learned Counsel for the applicant contends that Art. 7 applies and so asks me to dismiss the plaintiff's claim.

Article 7 is confined to suits for the wages of a household servant, artisan or labourer. It is clear that village barbers are not household servants. It is also, I think, clear that they are not labourers in the sense in which the term 'labourer' is used in that Article. It is used there with reference to a man who does work chiefly requiring bodily strength. That leaves the word 'artisan' to be considered.

Artisan is defined in the Oxford English Dictionary as "one who practises or culti-

vates an art: an artist" and also as "one who is employed in any of the industrial arts; a mechanic, handicraftsman, artificer". I think it is clear that a barber cannot be said to be employed in any industrial art; he is not a mechanic or craftsman or artisan in that sense. The only question is whether he can be said to cultivate an art. The word 'art' is defined in the Oxford English Dictionary and also in Webster's Dictionary and a large number of illustrations are collected under the definition to indicate the sense in which the term is ordinarily used in the English language. Nowhere is cutting of hair or shaving or trimming of beards included as one of the arts. Whether a modern barber who works on the heads of fashionable ladies can be considered an artist may perhaps be open to question. It is possible that the skill required by him placed him in a higher category than was formerly the case, but in any case such persons no longer call themselves barbers. They describe themselves as hair-dressers and use other names of that kind. But however that may be, it is not possible to include barbers of a remote village of the Central Provinces in the class to which a modern barber may perhaps aspire.

I am referred to a passage in *Bala v. Ballabhdas* (1) which places the village barber among village servants such as carpenters and blacksmiths. It is argued that blacksmiths and carpenters are undoubtedly artisans and there is no reason why the village barber should be placed in a higher category and be given a longer period of limitation. It is also pointed out that the learned Judges in the Rangoon High Court in *R. Sewaram v. Lachminarayan* (2) considered this a relevant argument in the matter of a motor driver.

I do not think that either of the rulings is in point here. One may or may not consider the village barber a village servant, but that would not bring the case under the purview of Art. 7, for the servant described there is a household servant and not a village servant. As regards the Rangoon case there can be little doubt that a motor driver is an artisan in the sense that he is employed in an industrial art, namely that of a motor mechanic. Apart from that, I do not think that the mere fact that a village barber who may not be as highly skilled a person as a village carpenter or a village blacksmith

(1) 14 N L R 152 (155); 46 Ind. Cas. 779; A I R 1918 Nag. 156.

(2) 5 R 477; 105 Ind. Cas. 520; A I R 1927 Rang. 279.

gets a longer period of limitation would justify me in straining the meaning of the words employed in Art. 7.

I am of opinion therefore that the lower Court was right in holding that the case did not fall within Art. 7. The application is, therefore dismissed with costs. Counsel's fee Rs. 10.

D.

Application dismissed.

CALCUTTA HIGH COURT

Civil Rule No. 939 of 1940

August 20, 1940

R. C. MITTER, J.

KUMAR PURNENDU NATH TAGORE

AND OTHERS—PLAINTIFFS—PETITIONERS

versus

NARENDRA NATH SAMANTA—

DEFENDANT—OPPOSITE PARTY

Bengal Non-Agricultural Tenancy (Temporary Provisions) Act (IX of 1940), s. 3—Phrase "on account of the non-payment of rent"—Meaning explained.

The words in s. 3, Ben. Non-Agricultural Tenancy (Temporary Provisions) Act "on account of the non-payment of rent" are not used for purposes of indicating that the cause of action for ejectment must be the non-payment of rent. The Legislature meant that if a tenant was in arrears, a suit for ejecting such a tenant would be a suit for ejectment "on account of the non-payment of rent."

C. R. for setting aside the order of the Munsif, 1st Court, Sealdah (24-Parganas), dated June 10, 1940.

Messrs. S. N. Banerjee, Hiralal Chakravarty and Mahendra Kumar Ghose, for the Petitioners.

Order.—It is rather unfortunate that the opposite party is not represented at the hearing, for this rule raises a question of first impression, and I am told that it is a first case falling under Ben. Act IX of 1940, The Ben. Non-Agricultural Tenancy (Temporary Provisions) Act. The facts are as follows:

The opposite party was a monthly tenant under the petitioners holding four cottas of land at a rent of Rs. 3, a month in the suburbs of Calcutta. The plaintiffs' case is that he has not paid any rent since Baisakh 1343 B. S. Before the Ben. Non-Agricultural Tenancy (Temporary Provisions) Act, 1940, was passed the petitioners served a notice to quit on the opposite party requiring him to vacate with the expiry of the month of Ashar 1346. The opposite party not having vacated, this suit was filed on February 10, 1940. The prayers in the suit were (1) for recovery of rent for the three years which had not

been barred by limitation, (2) for ejectment, and (3) mesne profits from Sravan 1346 till restoration of possession.

In the plaint the petitioners recited the fact that the tenant was in arrears for a long period. They did not, however, expressly state that they wanted ejectment on account of non-payment of rent. In fact, as the law now stands non-payment of rent is not even a ground for ejectment of a non-agricultural tenant. The question is whether this case comes within the provisions of s. 3 of the said Act, namely Act IX of 1940. That section provides thus:

"Notwithstanding anything contained in any other law for the time being in force every suit and proceeding in any Court for ejectment of a non-agricultural tenant other than a suit or proceeding for ejectment on account of the non-payment of rent by such tenant, shall be stayed for the period during which this Act continues in force."

The proviso to the section states that a decree for ejectment on account of the non-payment of rent by such tenant shall be stayed if, within thirty days from the date of the decree, such tenant deposits into Court the amount of the decree together with costs of the proceeding. This section, therefore, makes a distinction between suits for ejectment on account of the non-payment of rent and other suits for ejectment. A suit for ejectment falling within the second class has to be stayed for the period during which Act IX of 1940 would be in force. A suit falling within the first class would go on and a decree will have to be passed, but if the decree be for ejectment its execution is to be stayed if the tenant deposits in Court the amount of the rent due under the decree and costs. This seems to me to be the plain intention of the Legislature. But the difficulty is created by reason of the use of the words "ejectment on account of the non-payment of rent." As I have already pointed out, in the case of a non-agricultural tenant non-payment of rent, as the law now stands, cannot be a ground for ejectment. To take an illustration, if a tenant coming within the provisions of Act IX of 1940 holds under a registered lease for a term of years and if he fails to pay rent, or even an habitual defaulter in the payment of rent, he cannot be ejected during the term on the ground of non-payment of rent. The words, "on account of the non-payment of rent" must however be given some meaning. That being the position so far as the substantive law is concerned in the case of non-agricultural tenants, to my mind it seems that the words "on account of the non-payment of rent" are not used for purposes of indicating that the cause of action

for ejectment must be the non-payment of rent. But some meaning must be given to those words "on account of the non-payment of rent." To my mind, it seems that the Legislature meant that if a tenant was in arrears, a suit for ejecting such a tenant would be a suit for ejectment "on account of the non-payment of rent." In this view of the matter, it is not necessary for me to express any opinion on the question as to whether Act IX of 1940 was *ultra vires* of the Bengal Legislature. In fact that point has not been argued as Mr. Banerjee said that he would not argue that point unless I take the view against him on the interpretation of s. 3. As the view that I have taken of the said section is in favour of his contention I did not ask him to enter into the question of *ultra vires*. The plaint in this suit must be regarded as a suit for ejectment on account of the non-payment of rent. I, therefore, direct the learned Munsif to proceed on with the suit, and to try it on its merits. The rule is accordingly made absolute. As there is no appearance on the other side, there would be no order for costs. Let the records be sent down without delay.

D.

*Rule made absolute.***SIND CHIEF COURT**

Execution Darkhast No. 1248 of 1936

October 25, 1940

WESTON, J.

MARUTEERAO KRISHNAJI—

JUDGMENT-CREDITOR

*versus***THAKURDAS ISARDAS—JUDGMENT-**

DEBTOR

Civil Procedure Code (Act V of 1908 as amended by Act IX of 1937), ss. 60, 73—Attachment of salary before June 1, 1937, by judgment-creditor saved by s. 3 of Amending Act, whether available for rateable distribution to other creditor not so saved.

An attachment of salary made before June 1, 1937, under s. 60, Civil P. C., by a judgment-creditor saved by s. 3 of the Amending Act, is available by way of rateable distribution to another judgment-creditor who is not covered by s. 3. Execution Darkhast No. 280 of 1937, affirmed, 176 Ind. Cas. 682 (1), approved, 173 Ind. Cas. 561 (2), distinguished.

Order.—This is a reference by the learned acting Second Registrar not made under the proviso to r. 2 (A), Part II, Chap. V at p. 73 of the Rules of the Court but of his own motion and his reason for the reference is that he does not agree with a decision which I gave, in Execution Darkhast No. 280 of 1937, decided on August 30, 1940, *Mangal-*

das Nanchand v. Ghulam Dastagir which the learned Second Registrar in his reference tells me is in accordance with a decision of Lobo, J. reported in *Kewalmal v. Rodrigues* (1).

The point involved is whether an attachment, made under s. 60, Civil P. C., of salary now exempted by the Amending Act of 1937, but made by a judgment-creditor saved by the proviso to that Amending Act, is available by way of rateable distribution to another judgment-creditor who is not covered by this proviso. In my order in Execution Darkhast No. 280 of 1937 dated August 30, 1940 *Mangaldas Manchand v. Ghulam Dastagir* I held that such a judgment-creditor is entitled to rateable distribution and although the point was slightly different in the matter before Lobo, J. in Execution Darkhast No. 1056 of 1936 my decision receives support from the view taken in that case. The learned Second Registrar refers to a Bombay case *Krishnaji v. Vishnu* (2), but in that case the facts were not the same and the question was one of allowing execution against immovable property of an agriculturist which was not liable in satisfaction of that particular decree. I do not, in the light of this authority, consider, as the learned Second Registrar has considered, that my decision in Judicial Miscellaneous No. 280 of 1937 is wrong and the order in this matter and the companion matters Execution Darkhast Nos. 972/36 *Krishnasahi*, 1173/36 *The Mercantile Co-operative Bank*, 1264/36 *Thakurdas Mangharam*, 16/37 *Lekhraj*, 96/37 *Menghraj*, 912/37 *The Hindu Co-operative Bank*, 914/37 *Krishnasahi*, 572/38 *Sitabai*, 864/38 *Jagatsing* and 1060/38 *Mangaldas v. Thakurdas*, will be that the judgment-creditors seeking rateable distribution are entitled to it.

D.

Order accordingly.

(1) A I R 1938 Sind 144; 176 Ind. Cas. 682; 11 R S 31.

(2) I L R (1938) Bom. 98; 173 Ind. Cas. 561; A I R 1938 Bom. 90; 39 Bom. L R 1212; 13 R B 362.

NAGPUR HIGH COURT.

Civil Revision Application No. 387 of 1940
October 24, 1940.

BOSE, J.

RAMBILAS HARSUKHDAS—PLAINTIFF—
APPLICANT
versus

JAI KISAN—DEFENDANT—NON-APPLICANT
Criminal Procedure Code (Act V of 1898), s. 476—S. 476, scope and interpretation—Section assumes that offence appears to have been committed—Decision of lower Courts under ss. 476 and 476-B, if can be interfered with by High Court under Civil Procedure Code (Act V of 1908), s. 115.

It is not correct to say that only after the Courts have come to a conclusion that an offence of the kind contemplated by s. 476, Criminal P. C., appears to have been committed they can direct their minds to the next question, namely whether it is expedient in the interests of justice that a prosecution should be launched. The section assumes that an offence appears to have been committed.

The sum and substance of s. 476 is that before a prosecution can be launched either the first or the Appellate Court must be of opinion both that an offence appears to have been committed and that it is expedient to prosecute. If in their opinion either of these elements is absent, then no prosecution can be launched. It is consequently not necessary for these two Courts to deal with both questions when in their opinion the answer to either is in the negative; also they can consider the questions in any order they please, but the opinion has to be their opinion and not the opinion of the High Court in revision. Also, if they take up those questions or either of them and deal with them judicially and reach a conclusion, then the High Court has no jurisdiction whatever to interfere in revision under s. 115 of the Civil P. C., however, wrong or erroneous the High Court may consider that conclusion to be.

C. R. App. of the order of the Court of the Additional District Judge, Ellichpur., dated April 29, 1940.

Mr. D. T. Mangalmurti, for the Applicant
Mr. T. L. Sheode, for the Opposite Party.

Order.—This order will govern Civil Revision No. 386/40 and Civil Revision No. 387/40. They are directed against the orders of the lower Courts refusing to prosecute the non-applicants for the offences of perjury, forgery and false personation, said to have been committed either in, or in relation to, a proceeding in the first Court. Both Courts hold that there is no reasonable certainty of conviction and that in their opinion it is not expedient in the interests of justice that the prosecution asked for should be launched. The revision here is a civil revision under s. 115 of the Civil P. C. and I am of opinion that this Court has no jurisdiction to interfere.

The matter is governed by ss. 195, 476 and 476-B of the Criminal P. C. Under s. 195 no prosecution in respect of these offences can be launched except in the manner provided by s. 476. Section 476 confers the power to

prosecute. That power is conferred in the first instance on the Court in which, or in relation to a proceeding in which, the offence or offences appear to have been committed. If that Court refuses to prosecute, then the power is transferred to the Appellate Court under s. 476-B. Except for these two Courts, no other Court, person or body has power to prosecute, not even the High Court unless it happens to be the Appellate Court contemplated by s. 476-B.

If, therefore, the lower Courts consider the matter under ss. 476 and 476-B and come to the conclusion that it is not, in their opinion, expedient in the interests of justice to prosecute, this Court has no power to compel them to do so. The discretion is theirs and theirs alone. The privilege belongs to them and no other person or body or tribunal can usurp it, or substitute its discretion for that of these Courts. They have to be of opinion that it is expedient to prosecute: not anybody else. See as to this a decision of the House of Lords in *Weinberger v. Inglis* (1) and also *Thakurdas v. Secretary of State* (2).

It is possible that this Court can interfere in revision if the lower Courts do not consider the matter under those sections or if they direct their minds to matters which are foreign to those sections, or if they act arbitrarily or capriciously. In that event, the order could be set aside and the lower Courts could be directed to apply their minds to the only matters material under those sections. But in no event could this Court acting under s. 115 substitute its opinion for that of either the first Court or the Appellate Court and direct a prosecution, however, much it may be of opinion that it is desirable that one should be launched. Once the lower Courts consider the questions which arise under s. 476 and deal with the matter on the merits, then, however, wrong or erroneous their opinions may be, this Court cannot interfere. In no circumstances could; or at any rate in my opinion should, this Court send the case back in a matter of this kind for reconsideration on the same evidence and the same materials, because an order of that kind would be nothing more than a direction to the lower Court to act in accordance with the view of the High Court. In other words, it is tantamount to a direction to the lower Courts to substitute the opinion of the High Court for their opinions.

(1) (1919) A C 606; 88 L J Ch. 287 (294); 121 L T 65; 63 S J 461; 35 T L R 399.

(2) 30 N L R 255 (257); 149 Ind. Cas. 103; A I R 1934 Nag. 126; 6 R N 219.

That is something which the Legislature does not allow. It is something which s. 195, read with s. 476 expressly prohibits. The undesirability of remanding cases in such circumstances has been pointed out in *Ma Nyein v. Maung Chit Hpu* (3), and stressed by me in *Kartikram v. Emperor* (4).

Coming now to s. 476, the material portion is as follows:

"When...Court is...of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to etc....which appears to have been committed etc...."

It is strenuously argued that Courts in such circumstances have to consider first whether an offence appears to have been committed or not, and only after they have come to a conclusion that an offence of the kind contemplated by s. 476, appears to have been committed can they direct their minds to the next question, namely, whether it is expedient in the interest of justice that a prosecution should be launched. In my opinion that is wrong. The section assumes that an offence appears to have been committed. Unless such an assumption were made it would be impossible to ask a Court to direct its mind to considering whether a prosecution should be launched. No Court would prosecute for an offence which does not appear to anybody to have been committed, and it would be idle and foolish to ask it to consider whether in such circumstances it is expedient in the interests of justice to prosecute. The answer is self-evident. Of course it is not.

The section is dealing with a situation in which the Court has already had the matter before it in another capacity and ordinarily the Judge who presided at that stage will have had an opportunity of considering whether an offence of the kind we are dealing with appears to have been committed. If he indicates at that stage that in his opinion one does appear to have been committed, then clearly it is not necessary either for him or his successor to cover the same ground and all that is left for consideration is whether it is expedient in the end of justice to prosecute.

If however the Judge in the original proceedings has not expressed an opinion to that effect, then the Court at this stage can either take it for granted that an offence appears to have been committed and state that even assuming that it is not in its opinion expedient to prosecute for reasons given, or it

can look into the matter and state that in its opinion no offence appears to have been committed and if it reaches that conclusion, then clearly the only conclusion it can reach on the question of expediency is that in its opinion a prosecution is not expedient.

The sum and substance of s. 476 is that before a prosecution can be launched either the first or the Appellate Court must be of opinion both that an offence appears to have been committed and that it is expedient to prosecute. If in their opinion either of these elements is absent, then no prosecution can be launched. It is consequently not necessary for these two Courts to deal with both questions when in their opinion the answer to either is in the negative; also they can consider the questions in any order they please. And I repeat again that the opinion has to be their opinion and not the opinion of the High Court in revision. Also, if they take up those questions or either of them and deal with them judicially and reach a conclusion, then the High Court has no jurisdiction whatever to interfere in revision under s. 115 of the Civil P. C., however wrong or erroneous the High Court may consider that conclusion to be.

In the present case the first Court after setting out the facts and the allegations of the applicant about the commission of the various offences applied its mind to the question of expediency and came to the conclusion that a prosecution would not be likely to succeed and that it was not in the interests of justice to file complaints.

The Appellate Court went more fully into the matter. In para. 7 of its order it directed its mind to the question whether there was sufficient material on record to reach a *prima facie* and definite conclusion that the offences complained of had been committed. It examined the evidence carefully its order covers 17 type written pages and it reached the conclusion that there is no sufficient material on record which would justify it in taking action under s. 476. It had power to do this. It entertained the matter and exercised jurisdiction. It has acted judicially. Consequently its conclusions are final and this Court has no jurisdiction to interfere under s. 115 of the Civil P. C., whether the conclusions are right or wrong.

The applications are dismissed with costs Counsel's fee in Jaikisan's case (C. R. No. 387/40) Rs. 40, and in Maroti's Case (C. R. No. 386/40) Rs. 35.

D. Application dismissed.

(3) 7 R 538; 120 Ind. Cas. 912; A I R 1929 Rang. 321; 31 Cr. L J 186; Ind. Rul. (1930) Rang. 80.

(4) 19 N. L. J 158 (160); 167 Ind. Cas. 569; A I R 1937 Nag. 123; 9 R N 202; 38 Cr. L J 433.

LAHORE HIGH COURT

Civil Revision Petition No. 323 of 1940

October 31, 1940

BECKETT, J.

DAULAT RAM—PETITIONER
versus

Mst. MEERO AND OTHERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXII, r. 5—Suit for sale of mortgaged property—Plaintiff dying—Person relying on will executed by deceased claiming to be brought on record—Probate of will, if essential—Decision under r. 5, whether confers any rights to heirship or to property—Decision, if operates as res judicata.

Where a suit is merely for sale of mortgaged property and after the death of the plaintiff, a person relying on the will executed in his favour by the deceased plaintiff claims to be brought on record as his legal representative, he need not take out probate of the will.

A decision under r. 5 of O. XXII, Civil P. C., should be limited to the purpose of carrying on the suit and cannot have the effect of conferring any right to heirship or to property. *Balabai v. Ganesh* (8), relied on.

A decision under O. XXII, r. 5 does not operate as *res judicata*. *Parsotam Rao v. Jankibai* (2), 163 Ind. Cas. 283 (3) and 155 Ind. Cas. 985 (4), relied on.

C. R. P. to revise an order of the Sub-Judge, Second Class, Delhi, dated March 18, 1940.

Mr. Bishen Narain, for the Petitioner.

Mr. Amar Nath Grover, for the Respondents.

Order.—This is a petition for revision of an order under O. XXII, r. 5, Civil P. C., deciding the claims of two rival claimants to be brought on the record as legal representatives of the deceased plaintiff. Mst. Meero, the contesting respondent, propounded a will in her favour with regard to the property in suit. On the strength of this will, her claim to be regarded as the legal representative of the plaintiff, was preferred to that of Daulat Ram, the petitioner, who is a son of the deceased. Two objections were raised to the claim of Mst. Meero. The first was that the will had not been duly executed by the plaintiff and the second was that she could not be brought on the record as a legal representative without taking out probate first. On the second point, the finding was that probate need not be taken out, the suit being one for sale of the mortgaged property. So far as the suit relates merely to bringing the property to sale this finding is undoubtedly right, and this has been admitted in the course of arguments, although the finding was challenged in the grounds of revision. It may, however, be observed that it would be necessary for Mst. Meero either to take out probate or obtain a succession certificate

before proceeding to take out a personal decree, if this became necessary.

The grounds upon which the order is now challenged relate entirely to the execution and the validity of the will; in other words, it is proposed to treat this revision in the same way as if it were a first appeal from the order in question. Before going into the merits, it has to be decided whether this can be done. The reason given by Counsel for the petitioner for presenting the petition is that the interest of his client in the property may be vitally affected and that the order of the trial Court may be treated as conclusive in any further proceedings which may be brought to establish his rights. It is true that if orders passed under O. XXII, r. 5, regarding the choice of a legal representative, were to be treated as finally determining the rights of any claimants to the property in suit, the interest of a disappointed claimant would be seriously affected. On this point, however, the apprehensions of the petitioner appear to be groundless. As held in *Balabai v. Ganesh* (1) a decision under this rule should be limited to the purpose of carrying on the suit and cannot have the effect of conferring any right to heirship or to property.

It is still suggested, however, that if the claimants choose to put directly in issue any such right, then any decision on such an issue may possibly turn up to be final by virtue of the rule of *res judicata*. Here again the authorities do not appear to support the applicant. It is true that there have been decisions in the past to the effect that such a decision might operate as *res judicata*, but the weight of authority is against such a rule. Reference need only be made to *Parsotam Rao v. Jankibai* (2), *Antu Rai v. Ram Kinkar Rai* (3) and *Chiragh Din v. Dilwar Khan* (4). It is finally contended that the bringing of Mst. Meero on the record as the legal representative of the original plaintiff may have a further serious effect, inasmuch as it will be open to her to compromise the suit or otherwise prejudice the course of the proceedings. While this possibility exists, I do not think that this in itself is a sufficient ground for entertaining a petition for revision. If the rival claimants in cases of this kind are prepared to bring their claims before a competent Court, by way of application for a succession certificate or probate,

(1) 27 B 162; 4 Bom. L R 980.

(2) 28 A 109; A W N 1905, 206.

(3) 58 A 734; 163 Ind. Cas. 283; A I R 1936 All. 412; (1936) A L J 622; 9 R A 1; 1936 A L R 556.

(4) A I R 1934 Lah. 465; 154 Ind. Cas. 985; 7 R L 619.

the appointment of a legal representative can await determination of such a suit. If they choose to have the matter determined incidentally by the Court which has to appoint a legal representative for the purposes of that suit only, they do so with the knowledge that their claims will be decided by an order which is not open to appeal. For these reasons, I do not think this is a case in which revision can be entertained, and the petition is dismissed with costs.

D.

*Petition dismissed.***ALLAHABAD HIGH COURT**

Second Appeal No. 1308 of 1939

February 26, 1941

COLLISTER, J.

RADHA KISHEN AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

IKRAM-UDDIN—PLAINTIFF—

RESPONDENT

Civil Procedure Code (Act V of 1908), O. II, r. 2, s. 11—Applicability—Essentials—First suit for recovery of specific sums—Second suit for rendition of accounts, held not barred either by O. II, r. 2 or s. 11.

In order to ascertain whether the suit is barred by the provisions of O. II, r. 2, Civil P. C., it is necessary to consider what facts had to be proved in the first suit and what facts have to be proved in the second suit.

The defendants who were proprietors of a firm of military contractors gave a sub-contract to the plaintiff for the supply of goods and the arrangement between the parties was that the plaintiff should submit his bills to the defendants and the latter should realize the money from the military department and should thereafter pay it to the plaintiff, after deducting a commission of 5 per cent. The plaintiff instituted a suit for recovery of a specific sum of money, which admittedly had reference to specific bills submitted by the plaintiff to the defendants. Subsequently the plaintiff filed another suit against the defendants for rendition of accounts:

Held, that the causes of action and the matters to be proved were different in the two suits and hence the provisions of O. II, r. 2 did not operate as a bar to the second suit. Nor was the suit barred by s. 11. 121 Ind. Cas. 327 (1), relied on.

S. A. from the decision of Temporary Civil Judge, Bareilly, dated September 19, 1939.

Sir Tej Bahadur Sapru Messrs. Panna Lal J. N. Sapru and Ajudhiya Nath, for the Appellants.

Mr. Mukhtar Ahmad, for the Respondent.

Judgment—This is a defendants' second appeal. It appears that the appellants are the proprietors of a firm of military contractors. They gave a sub-contract to the plaintiff-respondent for the supply of leather goods and the arrangement between

the parties was that the plaintiff should submit his bills to the defendants and the latter should realize the money from the military department and should thereafter pay it to the plaintiff, after deducting a commission of 5 per cent. On November 1, 1934 the plaintiff-respondent instituted a suit (Suit No. 725 of 1934) for recovery of a specific sum of money amounting to Rs. 1,066-10-0, which admittedly had reference to specific bills submitted by the plaintiff to the defendants. The suit was originally dismissed, but was decreed in first appeal, and the decree of the Appellate Court was affirmed by this Court in second appeal on March 28, 1938.

Meanwhile on August 30, 1936 the plaintiff filed the suit out of which this second appeal has arisen for rendition of accounts in respect to the period from March 1928 to November 1933. This suit was stayed pending the decision of this Court in connection with the second appeal which had been preferred in respect to Suit No. 725 of 1934. When that appeal was decided and the suit out of which the present appeal arises was taken up again by the trial Court, an application was made to amend the written statement by pleading the bar of O. II, r. 2, Civil P. C. That application was disallowed and a preliminary decree was ultimately passed. There was an appeal, and the learned Judge of the Appellate Court has substantially affirmed the decree of the trial Court. The learned Judge allowed Counsel for the defendants-appellants to plead the bar of O. II, r. 2, Civil P. C. and also the bar of *res judicata* under s. 11, Civil P. C., but both these pleas have been repelled by the lower Appellate Court, and the point taken before me in this appeal is that the learned Judge has erred in holding that the suit was not barred either by the provisions of O. II, r. 2, Civil P. C., or under s. 11, Civil P. C. Rule 2 (4) of O. II, provides:

"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court."

Rule 2 (3) provides:

"A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs he shall not afterwards sue for any relief so omitted."

In considering whether the suit out of which this appeal arises was barred by the provisions of O. II, r. 2, Civil P. C., the criterion is whether or not this claim and the claim which was made in Suit No. 725 of 1934 arose out of the same cause of

action. In *Shib Singh v Jograj Singh* (1), the plaintiff sued the defendant for a specific sum of money as money had and received to the plaintiff's use. The suit was dismissed as legally incompetent and the plaintiff then instituted a suit for account and for payment of whatever money might be found due to him. It was held that O. II, r. 2, Civil P. C. was no bar to the second suit. The learned Judge who decided that case observed:

"The first action was an action for a sum of money which the defendant had received to the use of the plaintiff. In order to prove his claim in that case the plaintiff merely would have to prove that the defendant had received a specific sum of money on the plaintiff's behalf. The present action is for accounts and the plaintiff would have to prove that the defendant was his general agent."

Further on the learned Judge says:

"It is clear from what I have said above that it would be unnecessary to prove the same facts in both these cases and it is equally clear that the evidence which would suffice to enable the plaintiff to obtain a decree in both the suits is not the same."

The learned Judge then went on to find that the causes of action in the two suits were not the same and that O. II, r. 2 (3), Civil P. C. did not apply. In *Mangal Sain v. Labhu Mal* (2) the plaintiff instituted a suit against a person whom he alleged to be his *gumashtha* or agent on the ground that the latter had misappropriated some ornaments, a specific sum of money and the price or value of certain other articles. That suit was dismissed and thereafter he instituted a suit against the same defendant for rendition of accounts. It was held by a Bench of the Lahore High Court that the suit was not barred by O. II, r. 2, Civil P. C. The learned Judge says:

"A careful perusal of the point in the first case indicates that the plaintiff was confining his claim to certain specific items said to have been appropriated by the respondent quite apart from his liability to render accounts as an agent."

In order to ascertain whether the suit is barred by the provisions of O. II, r. 2, Civil P. C. it is necessary to consider what facts had to be proved in the first suit and what facts have to be proved in the second suit. In Suit No. 725 of 1934 what had to be proved was the fact that the defendants had received certain sums of money from the military department on behalf of the plaintiff in respect to bills which had been submitted by the latter. In the suit out of which this appeal arises what had to be proved was (1) the terms of the sub-contract and (2) the liability of the defendants.

(1) A I R 1930 All. 116; 121 Ind. Cas. 827; Ind. Rul. (1930) All. 203.

(2) A I R 1933 Lah. 542; 145 Ind. Cas. 1010; 34 P. L. R 905; 6 R L 154.

appellants to render an account. In my opinion, the cause of action in the two suits was different and therefore the provisions of O. II, r. 2, Civil P. C., do not operate as a bar.

Upon the same reasoning I am of opinion that the suit is not barred by the provisions of s. 11, Civil P. C. inasmuch as the same matter is not directly and substantially in issue in the suit out of which this appeal arises as the matter which was in issue in Suit No. 725 of 1934. For the reasons given in this judgment I dismiss this appeal with costs. Permission to appeal under the Letters Patent is refused.

s.

Appeal dismissed.

MADRAS HIGH COURT Special Bench

Referred Case No. 28 of 1940

November 25, 1940

LEACH, C. J., KRISHNASWAMI AYYANGAR,
AND HAPPELL, JJ.

In the matter of Sri R. KALYANA-
SUNDARAM AYYAR, ADVOCATE,
MADURA

Legal practitioner—Professional misconduct—Addressing of letter to Magistrate's clerk asking him to deal with application filed, urgently, is professional misconduct.

It is improper for an Advocate to address a letter to a clerk in a Magistrate's office asking that an application filed by him should be dealt with urgently and amounts to professional misconduct. The proper course for him if there is any delay, is to bring the matter to the notice of the Magistrate himself.

Refd. Case under s. 12 of the Indian Bar Councils Act in respect of the complaint of the Sub-Magistrate, Manapparai, dated March 16, 1940.

The Advocate-General, in support of the Reference.

Mr. S. Krishnamurthi, for the Respondent.

Leach, C. J.—The respondent is an Advocate practising in the Madura District. He has been charged with professional misconduct in that he wrote a letter to a clerk of the Sub-Magistrate of Manapparai in the Trichinopoly District asking in effect that the return of money, jewels and wrist watch to his clients should be dealt with urgently. They were entitled to the return of the money and the articles. In fact an application had been made to the District Magistrate for an order directing their return and this order had been passed. The letter complained of is dated May 18, 1938, and is in

these terms.

"My dear Brother,

I pray that you will be blessed with welfare, riches and good luck. I have herewith enclosed a memo. Yesterday, I have sent a memo. You should immediately sent the documents referred to in these two memos to the Treasury Office at Kulitalai for reference and return; further, I request you much to send me immediately the order directing the return of money to the petitioner. You must excuse me for the trouble. I feel very grateful for the help rendered by you till now and for the same to be rendered in future. I pray that God will bless you with long life and prosperity."

The Sub-Magistrate opened the cover and it was in this way that the letter came to light. The inquiry into the respondent's conduct was conducted by the District Judge of Trichinopoly and he has submitted a report in which he has expressed the opinion that the respondent has not been guilty of professional misconduct. The District Judge has gone so far as to say that there was nothing improper on the part of the Advocate in requesting the clerk to expediate the despatch of the refund order to enable his clients "to get a refund of the money which they were ultimately entitled to get."

It is manifest that it is improper for an Advocate to address a letter to a clerk in a Magistrate's office asking that an application filed by him should be dealt with urgently. The proper course for the respondent was, if there was any delay, to bring the matter to the notice of the Sub-Magistrate himself. If such letters were allowed there is no knowing to what it might lead. We will assume that the respondent did not intend anything improper, but he must have realized that what he was doing was improper. He has apologised and therefore we consider that the case will be met by censuring him for his conduct. It must be clearly understood that in future a case of this nature will not be so leniently dealt with.

N.-S.

OUDH CHIEF COURT

First Civil Appeal No. 102 of 1937

April 18, 1941

THOMAS, C. J. AND GHULAM HASAN, J.

Haji FAQIR BUX AND OTHERS—

DEFENDANTS—APPELLANTS

versus

Pandit THAKUR PRASAD—PLAINTIFF

AND OTHERS—DEFENDANTS—RESPONDENTS
Muhammadian Law—Dower—Prompt—Lapse of time—Effect—Transfer of Property Act (IV of 1882), s. 53—Preference of one creditor—Effect stated—Question of adequacy of consideration, if relevant, even after amendment of Act by Act XX of 1929—Scope of s. 53 (1), para. 4—Test to know whether suit is a representative one—Suit based on fictitious nature

of transfer for vindication of plaintiff's personal and individual rights—Suit held not one under s. 53 and need not be in representative form—Civil Procedure Code (Act V of 1908), O. VI, r. 5—Pleadings obscure—Court must call for particulars.

Although prompt dower, according to Muhammadan Law, is payable immediately on demand, yet in a large majority of cases it is rarely demanded and is rarely paid; in practice a Muhammadan husband generally gives little thought to the question of paying dower to his wife save when there is domestic disagreement, or when the wife presses for payment upon the husband's embarking upon a course of extravagance and indebtedness without making any provision for her. Lapse of time since marriage raises no presumption in favour of payment of dower. [p. 591, col. 2; p. 592, col. 1.]

A debtor is entitled to prefer a creditor, unless the transaction can be challenged in bankruptcy, and such a preference cannot in itself be impeached as falling within s. 53, T. P. Act. *In re Moroney* (2) and 120 Ind. Cas. 645 (4), relied on. [p. 592, col. 2.]

[Case-law referred to.]

The question of the adequacy of the consideration will be relevant in a suit under s. 53 of the T. P. Act, even after its amendment by Act XX of 1929. But to draw any inference of fraud, the inadequacy should be to a material degree. [p. 593, col. 1.]

The case set up by the plaintiff in the plaint as regards the fictitious character of the deed of gift and the other deeds is entirely different from the scope of a suit under s. 53 of the T. P. Act, where the plaintiff has to accept the genuineness of the deed as an initial fact and has to prove that the transfer, though genuine, was made with a view to defeat or delay the creditors of the transferor. The primary object of an action under s. 53 of the T. P. Act, is to make the assets of the transferor available to the general body of creditors. If it would, then the action would in substance be an action under s. 53 of the T. P. Act and would have to be instituted by, or on behalf of, all the creditors. If it would not, then the action cannot be regarded as an action under s. 53 of the T. P. Act. The proper test to apply when a question of this nature is raised is to see whether if the plaintiffs succeed in the action, the property claimed in the action would be available to the general body of creditors. Where the plaintiff bases his suit upon the fictitious nature of a transfer and wants only to vindicate his individual and personal rights, it is not a suit under s. 53 and need not be in the form of a representative suit on behalf of, or for the benefit of all the creditors. 40 Ind. Cas. 242 (12), 63 Ind. Cas. 788 (13) and 29 Ind. Cas. 497 (14), referred to. [p. 595, col. 2; p. 596, col. 1.]

The rules of pleadings contained in O. VI of the Civil P. C., should be complied with and the practice of introducing obscure pleadings with a view to taking the adversary by surprise is open to grave objection and is not unoften likely to lead to grave miscarriage of justice. Where the parties neglect to perform their duty it is clearly the duty of the Court to call upon them to furnish definite particulars of the plea contained in their pleadings. [p. 595, col. 2.]

F. C. A. against the order of the Sessions and Civil Judge of Lucknow, dated May 22, 1937.

Messrs. Niamatullah and Rameshwar Dayal, for Appellants.

Messrs. K. N. Tandon and R. S. Kapoor, for the Respondant No. 1.

Mr. Suraj Sahai, for Respondent No. 4.

Judgment.—These are the defendants

first appeals arising out of a claim for declaration of right which has been decreed by the Civil Judge of Lucknow by a judgment and decree dated May 22, 1937.

The plaintiff-respondent brought a suit claiming a declaratory decree to the effect that the deed of gift dated October 20, 1930, and subsequent sale deeds dated October 22, 1932, December 16, 1932, and January 23, 1935, are void and ineffective against him and that he is the absolute and sole owner of the auctioned property. The material facts upon which this claim was based were as follows:—

The plaintiff obtained a simple money decree on the basis of a compromise from the Court of the Munsif of Sitapur on July 25, 1930, against Karim Bakhsh, defendant No. 1, for Rs. 750, besides costs and interest.

Under the compromise defendant No. 1 was required to pay the decretal amount with costs and interest to the plaintiff within three months, that is to say by October 25, 1930, failing which the plaintiff was given a right to take out execution. The money was not paid and the decree was transferred for execution to Lucknow. The plaintiff applied for execution by attachment and sale of five annas and three pies share of Karim Bakhsh in *Muhalla Rahimganj*, near Fatehganj, Lucknow, and himself purchased the property in a public auction on June 27, 1932. He also obtained possession through Court on November 2, 1932. It is stated in para. 5 of the plaint that Karim Bakhsh, defendant No. 1, in order to deprive the plaintiff of his money, in bad faith and fraudulently, executed a deed of gift in respect of three annas and eleven pies share situate in Rahimganj in favour of his wife, *Mst. Maryam Begam*, defendant No. 2, on October 20, 1930 (Ex. 25) which is alleged to be fictitious, concocted and showy. The plaintiff alleged that the deed of gift was void against him and he was not bound by it. Defendant No. 2 in turn executed a sale-deed of the same property in favour of defendant No. 3, Sultan Mohammad, her son-in-law, on October 21, 1932, and this deed is likewise fictitious, showy, concocted and is void and ineffective against the plaintiff. It is further alleged that the five annas three pies share in Rahimganj was mortgaged with possession to Faqir Bakhsh, defendant No. 4, by a deed dated December 15, 1923, (Ex. 36) in lieu of Rs. 2,500, and he (Faqir Bakhsh) took possession of the said property under a decree dated October 22, 1926, passed by the Subordinate Judge of Mohanlalganj, Lucknow.

The plaintiff approached Faqir Bakhsh for

redemption of the mortgaged property on April 2, 1936, but he refused to redeem the property. It was then that the plaintiff came to know for the first time that two sale-deeds were collusively executed by defendant No. 3 Sultan Mohammad in favour of defendant No. 5, Abdul Ghafur, on December 16, 1932, (Ex. 40) in respect of two annas share out of the Rahimganj property and in favour of defendant No. 6 Abdullah on January 23, 1935 (Ex. 39) in respect of one anna share out of the same property. Defendants Nos. 5 and 6 are admittedly the sons of defendant No. 4, Faqir Bakhsh. These latter deeds are alleged to have been executed by defendant No. 3 Sultan Mohammad, in collusion with defendant No. 4, Faqir Bakhsh, in favour of the latter's sons and were fictitious *benami* and without consideration. In two redemption suits filed by Faqir Bakhsh and Abdullah against Karim Bakhsh and others in 1932 the plaintiff, who was made a party to the suits, was described as a mortgagee of the Rahimganj property, in reply whereof he filed a written statement dated February 23, 1934, clearly mentioning that he was owner by virtue of the auction-purchase and not a mortgagee. Despite this knowledge defendant No. 4, Faqir Bakhsh, got a fictitious deed executed on January 23, 1935, without consideration in favour of Abdullah. In para. 14, of the plaint all the deeds, namely the deed of gift in favour of *Mst. Maryam*, defendant No. 2, the sale-deeds in favour of Sultan Muhammad, defendant No. 3, Abdul Ghafur, defendant No. 5, and Abdullah, defendant No. 6, are alleged to be absolutely void and ineffective against the plaintiff and the necessity for filing the suit arose against the defendants because they totally denied the ownership of the plaintiff. Paragraph 17 of the plaint may be considered to divide the relief for declaration into two parts, *firstly* a declaration that the gift and the three aforementioned deeds are void and ineffective against the plaintiff, and *secondly* that the plaintiff is the absolute owner of the property in dispute.

Defendants Nos. 1 and 2 made no defence.

The defence of the other defendants was that the deed of gift was executed in lieu of dower debt and was a perfectly genuine transaction. It was also alleged that the defendants had no knowledge of the execution proceedings by the plaintiff and that the plaintiff never got possession of the property purchased by him. It was pleaded that the plaintiff not being in possession of the property in suit, the suit for a mere declaration was not maintainable. Defendants

Nos. 2 to 6 were alleged to be *bona fide* purchasers for valuable consideration and the sale deeds in their favour were binding upon the plaintiff. The pleas of limitation and insufficiency of court-fee were also raised. In para. 25 of the written statement filed by the defendants Nos. 4 and 6 it was vaguely asserted that the plaintiff's suit as it stands is not maintainable and is fit to be dismissed with costs.

The learned Civil Judge framed issues in the case of which only the material ones may be set out below:—

1. Did the defendant No. 1 execute the deed of gift dated October 20, 1930 in favour of defendant No. 2 fraudulently and in bad faith? Is the deed not binding on the plaintiff as alleged in paras. 5 and 6 of the plaint?

2. Did the defendant No. 2 execute the sale-deed in favour of the defendant No. 3 after receiving information of the proceedings for the delivery of possession and is it fictitious and not binding on the plaintiff?

3. Is the plaintiff in possession of the property in suit and is the suit for mere declaration maintainable?

5. Are the defendants Nos. 2 to 6 *bona fide* purchasers for value?

7. Is the plaintiff not entitled to maintain the suit as alleged by the defendants Nos. 4 to 6?

On the first issue the learned Civil Judge held that the deed of gift was a fraudulent and fictitious deed executed in order to defeat and delay the creditors of Karim Bakhsh and was not binding upon the plaintiff.

On the second issue he held that the defendant No. 3 got the sale-deed effected in his name inspite of the knowledge of the execution proceedings by the plaintiff and the circumstances attending it were such as to lead him to infer that it was a fictitious document and therefore not binding upon the plaintiff.

On the 3rd issue he held that the plaintiff being in constructive possession, the suit for a mere declaration was maintainable and no extra relief for possession was necessary.

On the 5th issue he held that none of the defendants Nos. 2 to 6 was a *bona fide* purchaser for value.

On the 7th issue he held that the suit was maintainable inspite of the fact that it was brought by the plaintiff in his individual capacity and not on behalf of all the creditors.

The pleas of court-fee and limitation were not pressed.

The result was that the suit for the declaration was decreed and the deed of gift and the three sale deeds were declared to be fictitious and fraudulent documents and not binding upon the plaintiff.

Two appeals were brought against the aforesaid judgment and decree. Appeal No. 102 of 1937 is by Faqir Bakhsh, defendant No. 4, and his two sons, defendants Nos. 5 and 6, while Appeal No. 103 of 1937 is by Sultan Muhammad, defendant No. 3. Both these appeals will be disposed of by one judgment.

The following questions have been argued before us on behalf of the defendants-appellants.

(1) That the deed of gift was executed in lieu of the dower debt of *Mst. Maryam Begam*, which was due and subsisting at the time of the execution of the gift, namely, October 20, 1930, that the deed was genuine and was not fictitious or fraudulent, and further that the three sale deeds were genuine deeds and were not fictitious or fraudulent.

(2) That the suit as framed is neither in form nor in substance a suit under s. 53 of the T. P. Act and that even if it were assumed to be one under that section, no relief under that section could be granted to the plaintiff.

(3) That the plaintiff not being in actual or constructive possession of the property was not entitled to maintain the suit for a mere declaration under s. 42 of the Specific Relief Act.

(4) That the defendants were in any event *bona fide* purchasers for value.

The first question that arises for determination before us is whether the deed of gift executed by Karim Bakhsh in favour of his wife *Mst. Maryam Begam*, was fictitious or genuine. It is clear that the gift was made in lieu of dower debt of Rs. 1,000. The plaintiff denied the amount of the dower but the learned Civil Judge found that the dower of *Mst. Maryam* was Rs. 1,000. The deed recites that the parties were married thirty years ago and the dower debt was due from the husband. It was ingeniously argued on behalf of the plaintiff-respondent that there was no proof that the whole of the dower was prompt and that in the absence of any evidence that the whole dower was prompt it must be held that the dower was partly prompt and partly deferred. The learned Civil Judge rejected this contention and we agree with him. As we have already stated, the deed of gift itself recites the amount of Rs. 1,000 as dower debt due from

Karim Bakhsh to *Mst. Maryam Begam*. This by itself indicates that unless the whole dower was prompt it could not have been stated in the deed to be due as deferred dower is not due until dissolution of marriage either by death or by divorce. There is also the evidence of *Mst. Maryam Begam*, which shows clearly that she had been demanding the entire dower debt of Rs. 1,000. This demand could not have been made until the whole dower was prompt. The learned Civil Judge found that the dower had really been paid off by Karim Bakhsh to his wife long before the deed had been executed. He, however, conceded that if the dower debt had not been paid then the husband would not have been guilty of any fraud in transferring the property by means of the gift in lieu of dower debt. He says that

"There can be no doubt that if the dower had really remained due nobody could have stopped defendant No. 1 from paying it off by making a gift of the property, and in that case his wife would have been a creditor, and no doubt preference shown by him to one creditor would not have been tantamount to fraud. That would have been merely a piece of family policy."

In support of this finding that the dower debt must really have been paid off before the execution of the deed of gift the learned Civil Judge relied upon the evidence on the plaintiff (as P. W. No. 10) who stated that he had heard from one Nathuni, the husband of the sister of Karim Bakhsh, and one Hafiz Ahmad Husain, the son-in-law of *Mst. Maryam*, that her dower debt had been paid, and some circumstantial evidence to which reference will be made hereafter. Nathuni, according to P. W. No. 10, told him about the payment of the dower during the pendency of the suit. P. W. No. 10 states that he saw him in Court. Hafiz Ahmad Husain told the witness some time in 1934 or 1935. Hafiz Ahmad Husain is also admittedly alive. We are of opinion, that the evidence of P. W. No. 10 based upon the alleged statements of Nathuni and Hafiz Ahmad Husain is manifestly hearsay and is inadmissible in evidence. The plaintiff raised no plea in the case that the deed of gift was not genuine because the dower due to *Mst. Maryam* had been paid long before the execution of the gift. If the plaintiff really wanted to produce evidence in support of the payment of the dower, it was his bounden duty to have produced Nathuni and Hafiz Ahmad Husain, who are alleged to have conveyed to him the information on the point. We must, therefore, eliminate from consideration the hearsay evidence referred to by the plaintiff in his evidence as

P. W. No. 10. It also appears that *Mst. Maryam* who was examined in the case stated that her dower debt had not been paid till her husband transferred the property by means of the gift in lieu of her dower. She was not cross-examined on this point and we cannot, therefore, but hold that the evidence about payment of dower before the execution of the deed of gift is completely lacking. We are not prepared to agree with the learned Civil Judge that as soon as the plaintiff in the witness-box stated that two living witnesses gave him information about the payment of the dower long before the execution of the gift, it became the bounden duty of the defendants to produce those witnesses in rebuttal. The burden of proving the payment of dower clearly lay upon the plaintiff and this burden cannot be held to have shifted on to the defendants by the mere statement of the plaintiff disclosing two living persons as the source of his knowledge.

The circumstantial evidence relied upon by the learned Civil Judge is to the effect that as the parties were married 40 years ago and the dower was demanded on a number of occasions, there is no reason why it should not have been paid long before the execution of the deed of gift. Another circumstance which has been greatly pressed upon our notice is that on different occasions Karim Bakhsh came by large sums of money which he borrowed, and he should have discharged the dower debt of his wife out of those moneys. The third circumstance alleged in this connection is the execution of the deed just a few days before the period of time allowed under the compromise decree expired. We have given due weight to these considerations but we do not think that either of these circumstances constitute a valid and adequate ground for raising a presumption that the dower debt must have been paid long before the execution of the deed of gift. The deed of gift, which was executed in 1930, mentions that the parties had been married thirty years ago. The learned Judge is wrong in stating that they were married 40 years ago. Although prompt dower, according to Muhammadan Law, is payable immediately on demand, yet our experience about Muhammadan families shows that in a large majority of cases it is rarely demanded and is rarely paid; in practice a Muhammadan husband generally gives little thought to the question of paying dower to his wife save when there is domestic disagreement, or when the wife presses for payment upon the husband's embarking

upon a course of extravagance and indebtedness without making any provision for her. Lapse of time since marriage raises no presumption in favour of payment of dower. That Karim Bakhsh may have been in a position to pay the dower debt of his wife, does not necessarily lead to the inference that he actually paid it; nor can the mere circumstance, that Karim Bakhsh paid the dower by means of the execution of the deed of gift only a few days before the time allowed under the compromise decree expired, throw any doubt upon such payment. At best his conduct may amount to an attempt to save the property from the hands of the creditors and to prefer paying the dower debt of his wife against the debts of his other creditors.

Having given our best consideration to the case, we have no hesitation in arriving at the conclusion that the dower debt of *Mst. Maryam* was due and subsisting at the time of the execution of the deed of gift in 1930 and it was paid only by means of the deed of gift in her favour. The finding of the learned Civil Judge on this point cannot, therefore, be upheld.

If the deed be upheld as a genuine gift, it follows that the sale deed executed by *Mst. Maryam* in favour of her son-in-law, *Sultan Muhammad*, was perfectly valid, and similarly sale-deeds by *Sultan Muhammad* in favour of defendants Nos. 5 and 6, *Abdul Ghafur* and *Abdullah* are equally valid. In this view of the matter the auction purchase made by the plaintiff on June 27, 1932, conferred no title upon him.

The next question that arises for consideration in this connection however is, that the transfer under the deed of gift contravenes the provisions of s. 53 of the T. P. Act. Here again, we must express our dissent from the finding arrived at by the learned Civil Judge. The following observations of Lord Wrenbury in *Musahar Sahu v. Hakim Lal* (L. R. 43 I. A. 104) (1) provide in our opinion, a sufficient answer to the argument raised with reference to s. 53 of the T. P. Act:

"As matter of law their Lordships take it to be a clear that in a case in which no consideration of the law of bankruptcy or insolvency applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be the rest of his assets will be insufficient to provide for the payment of the rest of his debts. The law is, in their Lordships' opinion, rightly stated by Palles, C. B. In

(1) 43 I. A. 104; 32 Ind. Cas. 343; 30 M. L. J. 116; 3 L. W. 107; 20 C. W. N. 393; 14 A. L. J. 198; (1916) 1 M. W. N. 198; 19 M. L. T. 203; 23 C. L. J. 406; 18 Bom. L. R. 198; 43 C. 521; A. I. R. 1915 P. C. 115 (P. C.).

re Moroney (1881, L. R. 21 Ir. 27, 62) (2) where he says: "The right of the creditors, taken as a whole, is that all the property of the debtor should be applied in payment of demands of them or some of them, without any portion of it being parted with, without consideration or reserved or retained by the debtor to their prejudice. Now it follows from this, that security given by a debtor to one creditor upon a portion of or upon all his property (although the effect of it, or even the interest of the debtor in making it, may be to defeat an expected execution of another creditor) is not a fraud within the statute: because notwithstanding such an act, the entire property remains available for the creditors or some or one of them and as the statute gives no right to rateable distribution, the right of the creditors by such act is not invaded or affected.

The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid: *Middleton v. Pollock* (1876, 2 Ch. D. 104, 108) (3). So soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor, it follows that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor was a loser by payment being made to this preferred creditor—there being in the case no question of bankruptcy."

This statement of law was approved by their Lordships of the Judicial Committee in *Ma Pwa May v. S. R. M. M. A. Chettyar Firm* (L. R. 56 I. A. 379) (4). Their Lordships added:—

"A debtor is entitled to prefer a creditor, unless the transaction can be challenged in bankruptcy, and such a preference cannot in itself be impeached as falling within s. 53."

In *Bansidhar v. Nawab Jahan Begam* (1937 O. W. N. 1176) (5) a debtor executed a deed of gift in favour of his wife in lieu of her dower debt and it was found that the dower debt had not been paid and remained due at the time of the execution of the deed of gift and also that the amount fixed for dower was Rs. 40,000 but the property forming subject of the gift was worth Rs. 8,000. It was held that the transfer in question was genuine and that it was not possible to say that the debtor had retained any benefit for himself or that the object of the transfer had been to remove the property from the creditors for the benefit of the debtor, but that it was a case merely of one creditor being preferred to another and consequently the transfer in question did not offend against the provisions of s. 53 of the T. P. Act.

(2) (1888) 21 Ir. 27 (62).

(3) (1876) 2 Ch. D. 104 (108); 45 L. J. Ch. 293.

(4) 56 I. A. 379; 120 Ind. Cas. 645; A. I. R. 1929 P. C. 279; 30 L. W. 481; 34 C. W. N. 6; 6 O. W. N. 869; 7 R. 624 (1929) M. W. N. 941; Ind. Rul. (1930) P. C. 5; 51 C. L. J. 6; 32 Bom. L. R. 117; 58 M. L. J. 59; (1930) A. L. J. 533 (P. C.).

(5) 1937 O. W. N. 1176; 171 Ind. Cas. 887; 10 R. O. 142 (2); 1937 O. L. R. 576; A. I. R. 1938 Oudh 44.

A similar view was taken in *Pandit Ram Ratan Lal v. Akhtari Begam* (1939 O. A. 375) (6) which was a case of a sale deed executed by a husband in favour of his wife in lieu of her dower debt. The transferee was also held to be a *bona fide* transferee for consideration.

In *Razina Khatun v. Abida Khatun* (1936 All. L. J. 1328) (7) it was held that where a Muhammadan husband transfers certain property to his wife in satisfaction of the prompt dower debt due to her and the transaction of sale is a genuine one, it is not open to the other creditors of the husband to avoid the transaction merely on the ground that the effect of it was to give preference to one creditor over the others, even though it be shown that this was a fact known to the wife (transferee). In a case of such fraudulent preference the proper remedy of the other creditors, if there is not sufficient property left to meet their claims, is to approach the insolvency Court within two years of the transfer and get the debtor adjudicated an insolvent, in which case they would be placed on the same footing as the preferred creditor and the transfer would be avoided by the insolvency Court.

Another ground urged on behalf of the plaintiff-respondent is that the gift is fraudulent because it was executed in lieu of a grossly inadequate consideration, the value of the property being much greater than the amount of the dower debt. Under the old unamended s. 53 of the T. P. Act it was laid down :—

"Where the effect of any transfer of immovable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously, or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid."

This paragraph does not however, find a place in the new s. 53 introduced by the Amendment Act (XX of 1929). As a matter of fact the question of adequacy of consideration is not material in view of the nature of the issue which was framed in the case, namely whether the transaction was fictitious or genuine. Although the old section does not in terms apply to the case, yet the question of the adequacy of the consideration will be relevant in a suit under s. 53 of the T. P. Act.

Upon the merits, however, we are satisfied that this is not a case in which the property converted by the deed of gift was transferred

(6) 1939 O A 375; 181 Ind. Cas. 181; 1939 O W N 398; 1939 O L R 241; A I R 1939 Oudh 230; 14 Luck. 621; 11 R O 287.

(7) (1936) A L J 1328; 166 Ind. Cas. 619; A I R 1937 All. 39; 1937 A L R 58; 9 R A 427; I L R 1937 All. 153.

red for a grossly inadequate consideration so as to justify an inference of fraud."

In order to determine this matter we shall have to refer in some detail to the history of this property. One Khuda Bakhsh died in 1895 leaving a number of daughters from his two wives and three sons, Rahim Bakhsh, Karim Bakhsh and Nabi Bakhsh. On February 12, 1904, all the heirs of Khuda Bakhsh, including Karim Bakhsh defendant No. 1, mortgaged the shares inherited by them in Rahimganj property to the Maharaja of Balrampur for Rs. 20,000 (*vide* Ex. 34). Each of the three brothers owned four annas 10-13/44 *krant* share of their father in this property. On September 20, 1920, the three sons executed a sale deed of a portion of the Rahimganj property, designated as Block B by the Commissioner's report (Ex. 47) in favour of one Murlidhar and paid off the mortgage debt due to the Maharaja of Balrampur under Ex. 34. The daughters were not parties to this sale deed. They however executed indemnity bond in favour of Murlidhar agreeing to charge their share in the property designated as Block A, if any portion of the property sold to Murlidhar by their three brothers went out of his possession. Murlidhar obtained a decree for Rs. 8,386-3-6 against the three sons on the basis of the security bond which encumbered their share in Block A. Rahim Bakhsh died on December 8, 1923, and the share of Karim Bakhsh was therefore augmented to 5 annas 6 pies 14-55/352 *krants*. This share was, however, reduced to 4 annas, 14 55/352 *krants* as a result of the debts left by Rahim Bakhsh. This latter share stood charged with the following encumbrances :—

(1) Karim Bakhsh was liable to pay his proportionate one-third share in the decretal amount of Rs. 8,386, due from all the three sons. This share came to Rs. 2 795-5-4.

(2) On December 15, 1923, Karim Bakhsh mortgaged his entire share to Faqir Bakhsh, defendant No. 4, for Rs. 2,500 at one per cent. per mensem compoundable monthly (*vide* Ex. 36). The mortgagee was entitled to take possession of the mortgaged property if the principal was not paid within one year. Faqir Bakhsh took possession of the mortgaged property on October 22, 1926, (Ex. 37). The mortgage money due to Faqir Bakhsh up to the date of his possession came to Rs. 3,506-3-3.

(3) On October 2, 1926, Karim Bakhsh made a simple mortgage in favour of Thakur Prasad for Rs. 500 at two per cent. per mensem with six monthly rests of his entire share along with a certain house in Sitapur.

The amount due to Thakur Prasad up to the date of the gift in favour of *Mst. Maryam Begam* namely October 20, 1930, came to Rs. 1,253-13.

(4) On June 26, 1929, Karim Bakhsh mortgaged his share to Abdullah (defendant No. 6), son of Faqir Bakhsh, in lieu of Rs. 1,000, at one per cent. per mensem. Abdullah obtained a decree against Karim Bakhsh for Rs. 1,582-11-6 on March 10, 1932, (Ex. 40). The interest on the principal sum secured by Karim Bakhsh up to the date of gift however, came to Rs. 1,160 approximately.

The total amount of the encumbrances upon the four annas share came to Rs. 8,715-5-7. The property conveyed by the gift was, however, three annas and 11 pies only. The proportionate amount of the encumbrances on one pie share approximately amounts to Rs. 181, and after deducting the sum from the total amount of the encumbrances, the balance of the encumbrances came to Rs. 8,534 approximately upon the share of three annas and 11 pies. To this may be added the sum of Rs. 1,000 which was the consideration of the deed of gift. Thus the total amount of encumbrances came to Rs. 9,534 approximately. As regards the value of the property, we find that Sultan Mohammad sold one anna share to Abdullah for Rs. 2,400 on January 23, 1935, free from encumbrances. The value of the entire four annas share will therefore amount to Rs. 9,600. It will thus appear that although the deed of gift was executed in lieu of the dower debt of Rs. 1,000 only, the encumbrances existing upon the property, which the donee was bound to discharge, came up to very nearly the value of the property computed according to the sale deed executed by Sultan Mohammad in favour of Abdullah. We therefore, hold that the consideration for the deed of gift, far from being grossly inadequate, represented the full value of the property. This circumstance, therefore, affords no justification for the inference that the transfer by way of gift was fraudulent within the meaning of s. 53 of the T. P. Act.

Even if the value of the property on any other computation had been greater than the consideration of the deed of gift, we do not find any satisfactory evidence on behalf of the plaintiff-respondent to show that the inadequacy of the consideration in the present case was to any material degree.

In *Labhu Ram v. Charnu Fauju* (A. I. R. 1929 Lahore, 409) (8), it was held that the trans-

(8) A I R 1929 Lah. 409; 116 Ind. Cas. 317; 30 P L R 306; 11 Lah. L J 251; Ind. Rul. (1929) Lah. 493.

fer which defeats or delays creditors is not an instrument which prefers one to the other but an instrument which removes property from the creditors for the benefit of the debtor. This is true even though the debtor intended to defeat the claims of the other creditor and the transferee had knowledge of this, if his only purpose was to secure payment of his own debt, and the property is not worth materially more than his debts.

The cases relied upon by learned Counsel on behalf of the plaintiff, *Amina Begam v. Sheo Prasad* (8 O. W. N., 794) (9) and *Hashmat Begam v. Mohan Lal* (1937 O. W. N 391) (10) and *Mohammad Haider Kazmi v. Prince Safdar Jah Zahid Ali Mirza* (1938 O. W. N., 922) (11), are clearly distinguishable upon the facts.

Our finding therefore, is that the deed of gift in favour of *Mst. Maryam Begam* was a genuine deed and not a fictitious deed. We also find that the transfer under that deed was not fraudulent and did not offend against the provisions of s. 53 of the T. P. Act. Our conclusion is the same in respect of the three subsequent sale deeds referred to above. As regards the second point, it may be pointed out that the defendants have nowhere specifically raised the question that the suit was not properly framed under s. 53 of the T. P. Act, and that it was not filed by the plaintiff in a representative capacity on behalf of and for the benefit of other creditors. Paragraph 25 of the written statement of defendants Nos. 4 and 6, which we have quoted above, is too vague and too general to indicate what was meant by the defendants and strangely enough no attempt was made on behalf of the plaintiff to seek a clarification of the plea contained in para. 25 of the written statement nor did the Court care to ascertain from the defendants as to the exact scope of the aforesaid plea. Issue No. 7 does not specify what is the allegation of defendants Nos. 4 and 6 upon which the plaintiff is not entitled to maintain the suit.

There were no oral pleadings before the Court on the date of the issues, and as a matter of fact, no facts had been alleged by the defendants in para. 25 of the written statement upon which the plea of non-maintainability of the suit was based. If the parties neglected to perform their duty, it was clearly the duty of the Court to have called upon the defendants to furnish definite

(9) 8 O W N 794; 134 Ind. Cas. 415; A I R 1931 Oudh 344; Ind. Rul. (1931) Oudh 367.

(10) 1937 O W N 391; 168 Ind. Cas. 53; 1937 O L R 199; A I R 1937 Oudh 349; 9 R O 438.

(11) 1938 O W N 922; 177 Ind. Cas. 611; 1938 O L R 433; 11 R O 60; A I R 1938 Oudh 230.

particulars of the plea contained in para. 25 of the written statement. It is to be regretted that the rules of pleadings contained in O. VI of the Civil P. O., have not been complied with in this case and we cannot help observing that the practice of introducing obscure pleadings with a view to taking the adversary by surprise is open to grave objection and is not unoften likely to lead to grave miscarriage of justice. From the finding recorded by the learned Civil Judge on Issue No. 7 it appears that the plea under s. 53 of the T. P. Act was raised in course of the argument. The learned Civil Judge rightly points out that it was not specifically pleaded in the written statement and he was not prepared to allow it at the time of the arguments as it took the plaintiff unawares. The learned Judge does not realise that his failure of duty to clarify pleadings imposed upon him by law itself contributed to the unfortunate result. Apart from the fact that the defendants did not definitely raise the question that the suit was not properly framed as contemplated by s. 53 of the T. P. Act, the plaintiff cannot succeed in avoiding the transfers on the ground that they had been made with intent to defeat or delay the creditors of the transferor unless he succeeds in showing that the transfers, although genuine, were fraudulent within the meaning of the section. Here again we regret to note that we do not find any specific allegations in the plaint that the transfers impugned had been made with a view to defeat or delay the creditors. Reference has been made on behalf of the plaintiff-respondent to paras. 5, 8, 13, 14 and 17 of the plaint. We do not find a single assertion in any of these paragraphs to the effect that the transfers were made with a view to defeat or delay the creditors of Karim Bakhsh. The words "fraudulently" and "in bad faith" have no doubt been used in para. 5 of the plaint but the particulars of the fraud are nowhere mentioned. No fraud against the creditors is pleaded anywhere in the plaint. Throughout the plaint the plaintiff has tried to emphasize that these documents were fictitious and paper transactions and were not genuine; in other words no title passed under these deeds. If the deed of gift is proved to be collusive and fictitious, it is clear that it never took effect and subsequent sale deeds are of no legal effect. Karim Bakhsh retained the ownership of the property, and in that view of the matter the plaintiff's title to the property by virtue of the auction purchase must be held to be unassailable. If, however, the deed of gift is proved to be

genuine and not fictitious, the validity of the subsequent deeds will not be affected and the plaintiff will be at once out of Court. It must also be clearly understood that the case set up by the plaintiff in the plaint as regards the fictitious character of the deed of gift and the other deeds is entirely different from the scope of a suit under s. 53 of the T. P. Act, where the plaintiff has to accept the genuineness of the deed as an initial fact and has to prove that the transfer, though genuine, was made with a view to defeat or delay the creditors of the transferor. This distinction was clearly emphasised by their Lordships of the Judicial Committee in *Mina Kumari Bibi v. Bijoy Singh Dudhoria* (L. R. 44 I. A. 72) (12) where it was observed :—

"First then, as to the alienation in favour of the plaintiff being, as it is termed in the respondent's case, collusive and fictitious. It is there alleged that judgment, Chhatrapat Singh, was, and always remained the real owner of the properties in dispute."

Strictly this means that the transaction was *benami* and not that it was a fraudulent transfer within the meaning of s. 53 of the T. P. Act. The difference is distinct, though it is often slurred. To the suggestion that the transaction was *benami* a complete answer is furnished by the admission that the judgment-debtor owed the plaintiff the amount stated to be the consideration for the sale deeds and more. And even if the case for the decree-holder be treated as raising the further plea of a fraudulent transfer, this same admission operates strongly in the plaintiff's favour. The plaintiff in para. 17 of the plaint does not allege that the transfers are voidable at the instance of the creditors and they should therefore be set aside, and the property should be sold for satisfaction of his decretal debt. On the other hand, he asserts that these transfers are void, and consequently he should be declared to be the owner of the property.

We have no doubt in our mind that the plaintiff's suit as framed is not one under s. 53 of the T. P. Act. There is no indication in the plaint or elsewhere that the suit was filed on behalf of or for the benefit of other creditors. On the other hand, there is every indication in the averments of the plaint, to which we have already referred, that the plaintiff wanted to vindicate his personal and individual rights, and not the rights of other creditors. The plaintiff claimed title to the property on the ground

(12) 44 I A 72; 40 Ind. Cas. 242; 1 P L W 425; 5 L W 711; 32 M L J 425; 21 O W N 585; 21 M L T 344; 15 A L J 382; 25 C L J 508; 19 Bom. L R 424; (1917) M W N 473; 44 O 662 (P O).

of the auction purchase. If the plaintiff succeeds in his action and obtains a declaration of title in his favour, that declaration will not advance the cause of the creditors, as there will be no property available to them for the satisfaction of their claims. Form No. 13 Appendix D, of Sch. I of the Civil P. C. is the form of the decree to be prepared in a case under s. 53 of the T. P. Act to set aside a transfer in fraud of creditors. The form is as follows:—

“No. 13.
Decree to set aside a Transfer in Fraud of Creditors.
(Title.)

It is hereby declared that the _____ dated the _____ day of _____ 19____ and made between _____ and _____ is void as against the plaintiff and all the other creditors, if any, of the defendant.”

Having regard to the reliefs claimed in the suit, it cannot be contended with any show of reason that the suit is one under s. 53 of the T. P. Act and no decree has been sought by the plaintiff to the effect that the transfer is void as against him and all the other creditors, if any, of the defendant.

It has been held that the primary object of an action under s. 53 of the T. P. Act is to make the assets of the transferor available to the general body of creditors. If it would then the action would in substance be an action under s. 53 of the T. P. Act and would have to be instituted by, or on behalf of, all the creditors. If it would not, then the action cannot be regarded as an action under s. 53 of the T. P. Act. The proper test to apply when a question of this nature is raised is to see whether if the plaintiffs succeed in the action, the property claimed in the action would be available to the general body of creditors. (*Vide Sri Thakurji v. Narsingh Narain Singh*, (A. I. R. 1921 Patna 53) (13) and *Vasudeo Raghunath Oka v. Janardhan Sadashiv Apte*, (I. L. R. 39 Bom. 507) (14).

Applying this test to the present case, we are quite clear in our mind that the present suit is not one under s. 53 of the T. P. Act. Before the passing the T. P. (Amendment) Act (XX of 1929) there was a conflict of opinion between the Calcutta and the Bombay High Courts on the one hand and the Madras High Court on the other hand on the question whether a suit to set aside the transfer on the ground that it was made with the intent to defeat or delay the creditors should be brought on behalf of all the creditors or whether it is competent to any one of the creditors

to institute such a suit. The Calcutta and the Bombay High Courts were of opinion that the suit should be a representative suit to be brought on behalf of all the creditors while the Madras High Court was of opinion that the suit could be instituted by a single creditor. The practice of the Calcutta and the Bombay High Courts was also in accordance with Form No. 13 of Appendix D of Sch. I of the Civil P. C. The Legislature gave statutory recognition to the view of the Calcutta and Bombay High Courts by enacting para. 4 of s. 53 (1) of the T. P. Act, which is as follows:

“A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transfer, shall be instituted on behalf, or for the benefit of, all the creditors.”

We have already held that the plaintiff's suit was not a representative suit intended for the general body of the creditors, but we do not desire to press into service this point against the plaintiff as the defendants themselves are to blame for not putting forward their objection to the maintainability of the suit on this ground definitely in their pleadings.

Assuming the suit to be one under that section we are of opinion that it is not possible for us to grant any relief to the plaintiff under that section as it is wholly inconsistent and irreconcilable with the relief claimed by him in the suit.

Coming to the third point we find that the defendants Nos. 4 and 6 asserted in para. 9 of their written statement that the defendant No. 4 did not get actual possession for a portion of the mortgaged property in spite of getting a decree for recovery of mortgagee's possession. We also find from the evidence of Maryam Begam that she got possession over two shops after the gift in her favour. She says that the defendant No. 4 was a mortgagee in possession before the date of the gift and that she obtained possession of a certain shop and a house occupied by the tenants who paid rent to her. We accept this evidence as true. Sultan Mohammad, as D. W. No. 1, has also stated that after the deed of gift *Mst. Maryam Begam* got possession over the shop occupied by Mohan tenant and that she was already in possession of the house. He further says that *Mst. Maryam Begam* could not obtain possession of the entire property gifted, as it had been mortgaged with possession to Faqir Bakhsh. The plaintiff obtained formal delivery of possession on November 4, 1932, after the auction purchase. There is no evidence that

(13) A I R 1921 Pat. 53; 63 Ind. Cas. 788; 6 P L J 48; 2 P L T 217.

(14) 39 B 507; 29 Ind. Cas. 497; 17 Bom. L R 522; A I R 1915 Bom. 89.

he obtained actual possession of the property. In these circumstances it was open to the plaintiff to ask for a further relief either of possession or redemption before he was entitled to a declaration under s. 42 of the Specific Relief Act. The proviso to that section clearly lays down :

"Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

The learned Civil Judge admits that Faqir Bakhsh being the mortgagee of the property was in physical possession, but he holds that the plaintiff was in constructive possession and could, therefore, maintain the suit for declaration. There is absolutely no evidence on the record to show that the plaintiff was in possession through his agents or tenants paying rents to him. It is difficult to see in what way the plaintiff was in constructive possession. We do not agree with the finding of the learned Civil Judge on this point and hold that the plaintiff was not entitled to maintain the suit for a mere declaration.

The decision in *M. Fariduddin Ahmad v. Murtaza Ali Khan* (1935 O. W. N. 1071) (15) referred to on behalf of the plaintiff-respondent has no application to the present case. There it was held that as it was impossible for the plaintiff to sue for possession without having the Privy Council decree set aside, and it was not open to the Court to set aside such a decree, no further relief need have been claimed.

The last point which has been urged before us on behalf of the defendants-appellants, is covered by Issue No. 5 in the case, namely, whether the defendants Nos. 2 to 6 are *bona fide* purchasers for value. It has been contended that the transferees had no reason to consider the gift in favour of *Mst. Maryam Begam* otherwise than as genuine, that they paid value for the transfers as will appear from the recital of the considerations set out in the respective deeds in their names and that the fact that the plaintiff was taking proceedings in execution in pursuance of his decree did not affect the matter. Having regard to the findings at which we have arrived upon the principal points in the case we do not consider it necessary to express any opinion on this point.

For the foregoing reasons we allow the appeals, set aside the judgment and decree of the trial Court and dismiss the suit with costs throughout.

D. (15) 1935 O W N 1071; 158 Ind. Cas. 338; 1935 O L R 574; 8 R O 88; A I R 1936 Oudh 67.

Appeal allowed.

RANGOON HIGH COURT

First Appeals Nos. 49 and 50 of 1940

December 16, 1940

ROBERTS, C. J. AND DUNKLEY, J.

U ZAWTIPALA—APPELLANT

versus

U THATDAMA—RESPONDENT

Burmese Buddhist Law—Ecclesiastical law—Sanghika kyaungdaik—Election of presiding monk—Majority of Sangh expressing desire to elect certain monk—Election, if valid—Death of owner of Poggalika property—Effect—Owner of Poggalika property executing deed, declaring property to be dwithantaka of himself and other person—Registration, necessity of—Res judicata—Suit for possession by monk as representative of Sanghas of Kyaungdaik, dismissed—Subsequent suit as presiding monk, if barred.

Where the majority of the Sangha did desire that a monk should be elected presiding monk of Sanghika Kyaungdaik and so expressed their will at the meeting, then it must be held that he was validly elected. [p. 599, col. 2.]

On the death of owner of Poggalika property the property becomes Sanghika property. 168 Ind. Cas. 967 (3), relied on.

A deed by the owner of Poggalika property declaring the property to be dwithantaka property of himself and some other person is the creation of an interest in immovable property and, therefore, it must be registered under the provisions of s. 17 (1) (b), Regis. Act. 45 Ind. Cas. 926 (4), relied on. [p. 600, col. 1.]

Where a suit for possession by a monk as representative of the Sanghas of Kyaungdaik is dismissed, a subsequent suit by him for possession in the capacity of a presiding monk is not barred by *res judicata*. [p. 598, col. 1.]

F. As. against the decrees of the District Court, Bassein, dated January 16, 1940.

Mr. U Hla Tun Pru, for the Appellant.

Mr. U Ba Sein for Mr. U E Maung (1), for the Respondent.

Roberts, C. J.—One U Pandaisa, who died on October 16, 1933, was the presiding monk of the Nigyawdagon Nyaungbintha kyaungdaik in Bassein town. The kyaungdaik contains eight buildings in all, and U Pandaisa exercised control as presiding monk over all these buildings. In association with this kyaungdaik there were a number of holdings of paddy land, which had been dedicated (by five different registered deeds) by certain pious persons for the use and enjoyment of the monks residing therein. During his lifetime U Pandaisa managed these paddy lands, leased them to tenants and received the rents and profits thereof. After his death, disputes arose between the two parties to these appeals regarding the right of control of the kyaungdaik and the paddy lands, and it appears that the appellant, U Zawtipala, has obtained possession of the paddy lands and that the respondent, U Thatdama, has obtained possession of the

kyaungdaik, with the exception of one building which is occupied by a few followers of U Zawtipala. The suits out of which these two appeals arise, being Nos. 8 and 9 of 1939 of the District Court of Bassein, were cross-suits brought by U Zawtipala and U Thatdama against one another. Suit No. 8 of 1939 was a suit by the respondent, U Thatdama, against the appellant, U Zawtipala, for recovery of possession of the paddy lands already mentioned and the mesne profits thereof. U Thatdama sued in the capacity of presiding monk of the Nigyawdagon Nyaungbintha Kyaungdaik, or, in the alternative, a member of the Sangha "suing on behalf of the whole body of Sanghas in general," and the suit was brought as a representative suit, under the provisions of O. I., r. 8, Civil P. C.

There was a previous suit between them for the possession of these paddy lands, being No. 3 of 1937 of the Assistant District Court of Bassein, out of which First Appeal No. 14 of 1938 *U Zawtipala v. U Thatdama* (1), of this Court arose. That suit was a representative suit in which U Thatdama sued as the representative of the Sanghas of the Nyaungbintha Kyaungdaik. His suit was unsuccessful because it was held by this Court on appeal that neither he nor U Zawtipala was the presiding monk of the kyaungdaik in succession to U Pandaisa and that a suit for possession of the paddy lands brought in a representative character as representative of the residents of the kyaungdaik alone was incompetent. It is now urged on behalf of the appellant that suit No. 8 of 1939 of the District Court of Bassein, out of which First Appeal No. 49 of 1940 arises, was *res judicata* by reason of the decision in suit No. 3 of 1937 of the Assistant District Court of Bassein and First Appeal No. 14 of 1938 *U Zawtipala v. U Thatdama* (1), of this Court. So far as the suit in the District Court was brought as a representative suit and the respondent claimed to be entitled to a decree for possession of the paddy lands "suing on behalf of the whole body of Sanghas in general," clearly the claim is *res judicata* for this is a claim which might and ought to have been made in the prior suit; but, so far as his claim was based on the assertion that he is the presiding monk in succession to U Pandaisa of this kyaungdaik, no question of *res judicata* arises. In First Appeal No. 14 of 1938 *U Zawtipala v. U Thatdama* (1), it was held at that time the respondent was not the presiding monk, and judgment in that appeal was delivered on July 28, 1938. Now, in the present suit, the

respondent claims to have been elected the presiding monk of the kyaungdaik at a public meeting held on October 3, 1938, i. e., he alleges that he has now acquired the status which gives him the right of action, which status he lacked in the former suit.

Suit No. 9 of 1939 of the District Court, out of which First Appeal No. 50 of 1940 arises, was a suit by the appellant against the respondent for a declaration of ownership of the kyaungdaik and the buildings therein and the paddy lands, and for possession of those of these properties of which the appellant was out of possession at the time when the suit was brought. The appellant claims to be the sole owner in his own right of all these properties. The two suits were heard together and the evidence was recorded in suit No. 8 of 1939. The pleadings in that suit were extremely verbose and contained many unnecessary and untenable allegations of fact and much recital of evidence. The plaint consisted of 24 paragraphs and the written statement contained 15 paragraphs. In that suit the learned District Judge framed no less than 16 issues, which really comprised 20 questions for decision. In suit No. 9 of 1939 the pleadings were somewhat shorter, and the issues framed were only eight in number and were all included in the issues framed in suit No. 8 of 1939. Yet the points on which the parties were at issue in both suits were few and defined, and became quite plain when the respondent had been examined. The learned District Judge would have been well advised if at that stage he had re-settled the issues. As it is, his judgment is overburdened with discussions of evidence and arguments which were really unnecessary to the decision of the suits.

The respondent's case is that the Nyaungbintha kyaungdaik is sanghika property and that the paddy lands are aramika sanghika, dedicated by various donors at different times to the kyaungdaik for the use and enjoyment of the monks residing therein. He claims to be entitled to possession of the paddy lands as presiding monk of the kyaungdaik in succession to U Pandaisa. The appellant's case is that the kyaungdaik and the paddy lands were the poggalika property of U Pandaisa, that by a dwithantaka deed, made on May 14, 1932, by U Pandaisa before his death, he became joint owner with U Pandaisa of all this property and, consequently, on the latter's death they all became his sole poggalika property. During the course of the hearing of these appeals, we framed four questions which we consider to be the only questions which it was neces-

(1) 180 Ind. Cas. 210; A I R 1939 Rang. 21; 11 R Rang. 332.

sary to answer for the decision of both suits. They are as follows: 1. Is the respondent entitled to maintain suit No. 8 of 1939 (a) as presiding monk of the kyaungdaik, or (b) as representative of the sangha? 2. Were the properties, sanghika properties, or were they the poggalika properties of U Pandaisa? 3. If the properties were poggalika, did the appellant become the joint owner thereof with U Pandaisa before the latter's death? 4. Did the appellant become the presiding monk of the kyaungdaik by reason of the memorandum executed by U Pandaisa on May 14, 1932, (Ex. 5 in suit No. 3 of 1937 of the Assistant District Court)?

As regards the first question, we have already pointed out that it is not now open to the respondent to sue as a representative of the sangha. His right of action as presiding monk of the kyaungdaik is based on the averment in para. 18 of the amended plaint, to the effect that he was elected as presiding monk of this kyaungdaik at a public meeting convened for the purpose at the kyaungdaik on October 3, 1938. The evidence which he has called concerning this meeting shows that at least 500 pamphlets in Burmese, setting out the object of this meeting, namely the election of the respondent as presiding monk, were distributed in Bassein, inviting members of the sangha and members of the public to attend this meeting, and that at least 30 members of the sangha and 50 members of the public were present at the meeting. The presiding monk of the Tagaung monastery, U Thumana, presided at this meeting, and the respondent was elected as presiding monk of the Nyaungbintha Kyaungdaik without a dissentient voice. The appellant does not seek to say that this testimony is not true, but he sets up that the election was invalid by reason of its informality. It is said that sufficient public notice of the meeting was not given, that the opponents of the respondent were not invited to attend, that no proper chairman of the meeting was elected, that no resolutions were put to the meeting, and no objections were asked for. So far as the objection that the supporters of the appellant were not specially invited is concerned, they were resident in the kyaungdaik at the time and their assertion that they did not know of this meeting until after it had been held cannot be believed. Clearly, they must have known of the meeting and they could have been present if they had desired to do so. They designedly stayed away and, even if they had

been present, they are so few in number that their votes could not have affected the result. The contention of the appellant in regard to this election is concluded against him by our judgments in *U Thuseitta v. U Eindawuntha* (2). As we said in the course of our judgments

"...an impossible position would arise if the will of the majority should not prevail, for a single monk by merely absenting himself from the election could render it impossible for a new presiding monk of a sanghika kyaungdaik to be elected;" and further

"...the only question which it is necessary to ask is this: Has there been a real, valid and true election by the Sangha as such? They may elect, as it seems to us, in any way choose, and the only matter about which we must be satisfied is whether the election was a real election by the whole of the Sangha."

That is, if we are satisfied that the majority of the Sangha did desire that the respondent should be elected presiding monk and so expressed their will at this meeting, then it must be held that the respondent was validly elected. The meeting was no hole and corner business; it was publicly advertised throughout the town of Bassein and every person, either monk or layman, who was really interested in this election, had an opportunity to attend. It is idle for the appellant and his supporters to say that they did not attend because their attendance would not have been welcome to the other side; that is always the position in which an opposition minority finds itself. The desire of the Sanghas that the respondent should succeed U Pandaisa as presiding monk of the kyaungdaik was clearly and unequivocally expressed at this meeting, and therefore it must be held that he was validly elected. This disposes of the first question. As regards the second question, the learned District Judge has found that all the kyaungs within the kyaungdaik except one were aramika sanghika property and that all the paddy lands except one were also aramika sanghika. He has further held that the remaining kyaung and remaining piece of paddy land were the poggalika property of U Pandaisa. He has carefully considered the evidence and no sufficient reason for not accepting his findings has been adduced in argument on behalf of the appellant. It is unnecessary for us to consider this question in detail, because, even if all the properties, were the poggalika property of U Pandaisa it must be held that he made no valid transfer of any of these properties during his lifetime and, consequently, on his death all the properties became sanghika in view of the

(2) (1940) Rang. 97; 185 Ind. Cas. 483; A I R 1939 Rang. 385; 12 R Rang. 196.

decision in *U Zawtika v. U Kalyana* (3).

In regard to the third question, the case of the appellant is based on the memorandum dated May 14, 1932 to which we have already referred. This memorandum sets out that five kyaungdaiks and all the property connected therewith, belonging to U Pandaisa of Nyaungbintha kyaungdaik, are declared to be the dwithantaka properties of U Zawtipala. The memorandum is signed by U Pandaisa and U Zawtipala. The learned District Judge held that it was inadmissible in evidence and did not affect the properties by reason of the fact that it was not registered. It is urged on behalf of the appellant that a dwithantaka deed of this description does not require registration, but no authority for this astonishing proposition has been cited, and the case in *U Zayanta v. U Naga* (4) is directly opposed to this contention. Clearly, it is the creation of an interest in immovable property and therefore since it has been recorded in the form of a document, it must be registered under the provisions of s. 17 (1) (b), Regis. Act. It is said on behalf of the appellant that the transaction was not a gift but the creation of a joint ownership, that by it U Pandaisa made U Zawtipala a joint owner with him of his property and, on the other hand, U Zawtipala made U Pandaisa a joint owner with him of his property; but that is not what the memorandum itself says. The memorandum is plainly a gift of immovable property by U Pandaisa to U Zawtipala and under the provisions of s. 123, T. P. Act, such a gift can only be made by registered instrument. Moreover, even if the contention of the appellant as to the construction of this memorandum could be accepted, the transaction would then amount to an exchange within s. 118, T. P. Act, and therefore as the property is worth more than Rs. 100 it could only be effected by registered instrument. Hence the third question must be answered in the negative.

As regards the fourth question, it was decided by a Bench of this Court in First Appeal No. 14 of 1938 *U Zawtipala v. U Thatdama* (1) that U Zawtipala was not the presiding monk of this kyaungdaik, and with that decision and the reasons given therefor we are, with the greatest respect, in complete agreement. There has been no change in U Zawtipala's position since the delivery of the judgment in that appeal, and con-

sequently, it must be held that U Zawtipala did not become the presiding monk of the kyaungdaik by reason of the memorandum of May 14, 1932 and has at no material time been, and is not now, the presiding monk. The result of the answers to these four questions therefore is that the appellant, U Zawtipala, has no interest whatever in the kyaungdaik or in the aramika sanghika properties connected with the kyaungdaik, but that the respondent, as the presiding monk of the kyaungdaik, is entitled to possession of the kyaungdaik and all the paddy lands connected therewith. These are the decisions at which the learned District Judge has arrived, and, consequently, his decrees in the two suits, granting the respondent a decree for possession and mesne profits of the paddy lands in suit No. 8 and dismissing the appellant's suit in suit No. 9 are correct. These appeals fail and are dismissed with costs.

s.

Appeals dismissed.

ODUH CHIEF COURT

Miscellaneous Appeal No. 40 of 1938

April 16, 1941

BENNETT AND GHULAM HASAN, JJ.

AVADH RAJ SINGH—APPELLANT

versus

MANGREY—RESPONDENT

Provincial Insolvency Act (V of 1920), ss. 4, 53—Question relating to fictitious character of transfer not falling under s. 53—If can be tried under s. 4—Held that gift made by insolvent in favour of his son and nephew was not fictitious and could not be annulled under s. 4—Hindu Law—Debts—Father—Son's liability—Gift by father to son—Son, if absolved from liability to pay father's debts.

It is open to an Insolvency Court to try a question under s. 4 of the Prov. Insol. Act relating to the fictitious character of the transfer even though it does not fall under s. 53 of the Act the petition having been made by the creditor more than four years after the transfer. 157 Ind. Cas. 680 (1), 161 Ind. Cas. 687 (2), 141 Ind. Cas. 667 (3), 131 Ind. Cas. 433 (4) and 113 Ind. Cas. 819 (5), relied on.

A donor who was subsequently adjudicated insolvent had made a gift of his property to his minor son and a nephew. The mutation of names was effected in favour of the donees in respect of the property gifted. No *khwat* stood in the name of donor after the date of the gift and donor no longer retained possession over the gifted property. The amount of indebtedness admitted by the insolvent did not show that the insolvent was under any pressure from his creditors which led him to make the gift in question. It had not been shown that any of the debts was a decretal debt or that there was any execution of decree pending against the insolvent:

Held, that in the circumstances of the case there was no evidence whatsoever to show that the deed of gift was a fictitious or colourable transaction which was not intended to take effect. Therefore, the insolvent had no interest in the property gifted and the gift could not be annulled under s. 4.

(3) 14 R 566; 168 Ind. Cas. 967; A I R 1937 Rang. 76; 9 R Rang. 381.

(4) 9 L B R 258; 45 Ind. Cas. 926; A I R 1918 L B 11.

Under Hindu Law a son is under a pious obligation to pay his father's debts, unless they are tainted by illegality or immorality. A transfer of property to the son by means of a gift would not absolve the son from his liability to pay such debts.

Misc. A. against the order of the District Judge of Gonda, dated February 26, 1938.

Mr. S. B. Bajpai, for the Appellant.

Mr. Mahabir Prasad Srivastava, for the Respondent.

Judgment.—This appeal arises out of an order dated February 26, 1938, passed by the District Judge of Gonda allowing the objection of the creditor respondent that the property in dispute belongs to the insolvent. The insolvent has appealed.

The material facts are that Avadh Raj Singh, the appellant, executed a registered deed of gift on December 15, 1932, in favour of his minor son Raj Bahadur Singh and his cousin Bharat Singh, under which he transferred his under-proprietary tenure measuring 6.20 acres, 35 trees without land, a house and a *phulwari* situate in village Saraiyan and a grove in village Bangaon. The value of the property is stated in the deed to be Rs. 200.

On January 23, 1937, Avadh Raj Singh filed a petition for insolvency. He was declared insolvent on March 13, 1937. On May 18, 1937, Mangrey, one of the creditors—now respondent—filed an application for permission to file a regular suit for cancellation of the deed of gift. This permission was granted on July 13, 1937. Instead of filing a regular suit Mangrey filed an application on October 26, 1937, purporting to be under ss. 4/52 of the Prov. Insol. Act. The Receiver reported upon this application—

“As the petition was presented more than four years after the transfer no action under s. 53 of the Prov. Insol. Act can be taken but the question can be decided by the Insolvency Court under s. 4 of the said Act.”

The learned District Judge framed three issues in the case. The first two issues related to the question whether the deed of gift was a fictitious document which was never given effect to and whether the insolvent remained in possession of the property which the deed of gift purported to transfer. The third issue related to the question whether the deed of gift could be annulled under s. 4 of the Insol. Act.

Issues Nos. 1 and 2 were taken together and the finding on these issues was that the deed of gift was a fictitious document executed by Avadh Raj Singh with the intention of saving his property from the creditors. The learned District Judge also held that the transfer could be set aside where

it is found to be fictitious. The result was that he allowed the objection holding that the property in question belongs to the insolvent.

On behalf of the insolvent it has been contended that the finding upon the fictitious character of the gift is not justified by the materials on the record and that there is no finding in respect of the possession of the property covered by the deed of gift. We are of opinion that this contention must prevail. It is in evidence that the mutation of names was effected in favour of the donees in respect of the property gifted. Lalta Prasad, the *patwari*, states that no *khewat* stands in the name of Avadh Raj Singh after the date of the gift and Avadh Raj Singh no longer retains possession over the gifted property. According to the *patwari*, Avadh Raj Singh does not live in Saraiyan since the date of the gift but lives in another village Bangaon. He also states that Avadh Raj Singh does not stay with his minor son who really lives with Bharat Singh's mother. The evidence of the insolvent is also to the same effect. He repudiates the fact that the deed of gift is fictitious and states that he has been living in village Bangaon since the date of the gift away from his wife and son and that he has not been in possession of the gifted property since the date of the gift.

Mangrey also came into the witness box and produced two witnesses in support of his objection. Mangrey admits that Bharat Singh is employed in Karachi for the last five or six years and that the minor son Raj Bahadur Singh lives with Bharat Singh's mother in village Saraiyan. Mangrey professes ignorance of the entries in the *khewat* and states that he has made no enquiries about it. His two witnesses Bhagwan Das and Mandhata are not reliable witnesses. Bhagwan Das admits that there has been litigation between him and the insolvent. Mandhata belongs to different village.

We have carefully considered the evidence about possession produced by both parties and are satisfied that there is no satisfactory and reliable evidence on behalf of the creditor, which throws any doubt upon the genuineness of the *khewat* entries and the evidence of the *patwari*, who definitely states that Avadh Raj Singh has never had possession since the date of the gift over the gifted property. The existence of the *khewat* entries also shows that the deed of gift has been given effect to. Avadh Raj Singh stated before the Court that excepting a debt of Rs. 50 his debts at the time of the gift in

1932, were the same as given in the schedule attached to his application for insolvency. The total of these debts, minus the debt of Rs. 50, comes to about Rs. 1,130. There is no evidence on the record to show what was the value of the entire property owned by the insolvent at the date of the gift. The learned Judge says that the insolvent was heavily indebted at the time, and he considers the gift of the property by a father in favour of his only minor son as most unusual. The amount of indebtedness admitted by the insolvent does not show that the insolvent was under any pressure from his creditors which led him to make the gift in question. It has not been shown that any of the debts was a decretal debt or that there was any execution of decree pending against the insolvent. The property was transferred in equal moieties between the son and the cousin, and we do not see that there are any circumstances proved in this case to show that the deed of gift was executed merely as a cloak to save the property from the hands of the creditors. It must be borne in mind that a son is under a pious obligation to pay his father's debts unless they are tainted by illegality or immorality. A transfer of property to the son by means of a gift would not absolve the son from his liability to pay such debts.

Having regard to the circumstances of this case, we are satisfied that there is no evidence whatsoever to show that the deed of gift is a fictitious or colourable transaction which was not intended to take effect. We, therefore, hold that the insolvent has got no interest in the property gifted.

As regards the other question whether an Insolvency Court has jurisdiction under s. 4 to go into the question involving the fictitious or genuine character of the transfer executed by the insolvent even though more than two years have elapsed before the date of the insolvency we need only refer to, *Raoji Bapuji Pandarkar v. K. L. Bawachekar*, (A. I. R. 1935 Bom. 316) (1) *Maung Ba E v. Maung Kyi*, (A. I. R. 1936 Rang. 54) (2) and *Mst. Basantbai v. Ramrao Krishna Bao Kolhekar*, (A. I. R. 1934 Nag. 47) (3).

A Bench of this Court in *Abul Hasan Khan v. Rajbir Prasad*, (A. I. R. 1931 Oudh 124) (4), following the view taken by Sen, J.

(1) A I R 1935 Bom. 316; 157 Ind. Cas. 680; 37 Bom. L R 478; 8 R B 83.

(2) A I R 1936 Rang. 54; 161 Ind. Cas. 687; 8 R Rang. 514.

(3) A I R 1934 Nag. 47; 141 Ind. Cas. 667; 15 N L J 85; Ind. Rul. (1933) Nag. 79.

(4) A I R 1931 Oudh 124; 131 Ind. Cas. 433; 8 O W N 147; 6 Luck. 614; Ind. Rul. (1931) Oudh 193.

in *Anwar Khan v. Muhammad Khan*, (I. L. R. 51 All. 550; F. B.) (5), held that where the transfer was intended not to be operative from the beginning and the insolvent had remained in possession of the property, the Receiver may apply for its annulment.

We are of opinion, therefore, that it is open to an Insolvency Court to try a question under s. 4 of the Prov. Insol. Act, relating to the fictitious character of the transfer even though it does not fall under s. 53 of the Prov. Insol. Act.

The result is that we set aside the order of the learned District Judge and allow the appeal with costs.

s.

Appeal allowed.

(5) 51 A 550; 113 Ind. Cas. 819; A I R 1929 All. 105; (1929) A L J 155; Ind. Rul. (1929) All. 211 (F B).

BOMBAY HIGH COURT

Second Appeal No. 647 of 1937

November 15, 1940

WASSOODEW, J.

GANGADHAR KASHINATH SAKHARE

—PLAINTIFF—APPELLANT

versus

DATTATRAYA VISHAVANATH

SULAKHE AND OTHERS—DEFENDANTS—

RESPONDENTS

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 10-A—Suit for redemption—Plaintiff must show that he is agriculturist and not merely that his predecessor was agriculturist at time of transaction—Privilege of agriculturist is personal—Mere initiation into ways of husbandry is not enough.

In a suit for redemption, in order to rely on s. 10-A, Dekkhan Agri. Relief Act, the plaintiff must show that he was an agriculturist and not merely that his predecessor was an agriculturist at the date of the transaction.

The proper time when the jurisdiction to inquire into the real nature of the transaction can be assumed by the Court for the purpose of s. 10-A is when the Court is requested to exercise that jurisdiction. That request is contained in the plaint when disclosing the essential cause of action, upon the averment that the plaintiff is an agriculturist and a party to the suit. Therefore, if the plaintiff invokes the Court's jurisdiction under s. 10-A, he must be an agriculturist within the meaning of s. 2, Dekkhan Agri. Relief Act, at the date when the plaint is instituted. 134 Ind. Cas. 703 (3) and 101 Ind. Cas. 140 (4), relied on.

The privilege of an agriculturist is not hereditary but personal. Nor can that privilege be acquired by birth. 93 Ind. Cas. 924 (5) and 120 Ind. Cas. 839 (6), relied on.

In order to claim the status of an agriculturist a person must prove that he is ordinarily engaged personally in agricultural labour, that is, he is regularly and habitually cultivating his fields. Mere initiation into the ways of husbandry is not enough.

S. A. from the decision of the Assistant Judge, Sholapur, in Appeal No. 173 of 1935.

Mr. A. G. Desai, for the Appellant.
Messrs. D. A. Tulzapurkar, S. G. Patwardhan and P. V. Kane, for Respondents Nos. 5 and 4, and 1-3, 6-8, 10, 13, 14 and 18 respectively.

Judgment.—This is a second appeal from a decision of the Assistant Judge of Sholapur. The only question that arises upon this appeal is whether a plaintiff, who is held not to be an agriculturist at the date of the suit purporting to be one for redemption under the Dekkhan Agri. Relief Act, can invoke the provisions of s. 10-A of that Act to show that the original transaction to which his predecessor, an agriculturist, was a party was in reality intended, contrary to the terms of the document, to be treated as a mortgage. The suit was instituted in August 1930, by the plaintiff as the adopted son of one Kashinath, the adoption having been made by Kashinath's widow in 1924. The plaintiff maintained that his father Kashinath, who died in 1909, had executed a formal conveyance of the property in dispute on February 11, 1899, in favour of the defendants, and that, although it was an out and out sale of the entire interest of the transferor, by a contemporaneous agreement it was intended to be treated as a mortgage. As regards the plaintiff's status, it was described in the plaint to be that of an agriculturist. It was also stated that Kashinath was an agriculturist in 1899.

The alleged nature of the transaction, the status of the plaintiff and that of his adoptive father were denied by the defendants, and that denial was upheld by the trial Court. In appeal the learned Assistant Judge took the view that Kashinath was an agriculturist in 1899, that the alleged contemporaneous agreement could be inferred from circumstances, but that as the plaintiff was not an agriculturist at the date of the suit, the suit was incompetent. He however remarked in para. 7 of his judgment that "it appears that, pending the suit, the plaintiff has started working personally in the fields and has taken lands of others on leases;" but, in his opinion, that circumstance did not enable the plaintiff to claim the benefit of s. 10-A, Dekkhan Agri. Relief Act. Accordingly, the trial Court's decree was confirmed; but the defendants, except the Municipality who had acquired a portion of the land, were deprived of their costs. Against that decree the plaintiff has filed this second appeal and the defendants, the transferees

under the deed of 1899, have filed cross-objections for costs.

Two contentions have been formulated in support of the appeal by Mr. Desai. He argues, first, that it is not necessary, when calling in aid the provisions of s. 10-A, Dekkhan Agri. Relief Act, for the plaintiff to show in a suit for redemption that he is an agriculturist; for, it is sufficient that a person through whom the plaintiff claims was an agriculturist at the date of the transaction, and, secondly, that even if the plaintiff is not an agriculturist at the date of the suit, and if pending the suit and in the course of the hearing the plaintiff acquires the status of an agriculturist by working personally in the fields, he could be deemed to be a party agriculturist to the suit for the purpose of s. 10-A, for, according to Mr. Desai, that section does not, in terms, require that the suit must be instituted by an agriculturist. In my opinion, the first contention is without any substance. Section 10-A provides as follows:

"Whenever it is alleged at any stage of any suit or proceeding to which an agriculturist is a party that any transaction in issue entered into by such agriculturist or the person, if any, through whom he claims was a transaction of such a nature that the rights and liabilities of the parties thereunder are triable wholly or in part under the Chapter, the Court shall, notwithstanding anything contained in s. 92, Evi. Act, 1872, (or in s. 49, Regis. Act, 1908) or in any other law for the time being in force, have power to inquire into and determine the real nature of such transaction..."

Apart from authority, the plain provisions of that section indicate that, unless an agriculturist is a party to the suit, the Court has no jurisdiction to disregard the provisions of s. 92, Evi. Act. The basis of the plaintiff's claim to disregard the provisions of s. 92, Evi. Act, in order to grant him relief was that as an agriculturist party to the suit, he was entitled to rely on s. 10-A, Dekkhan Agri. Relief Act. That claim could only be sustained if he proved that he was an agriculturist at the date of the suit and not merely that his predecessor was an agriculturist at the date of the transaction. The finding of fact is that the plaintiff was not an agriculturist and there was no other agriculturist party to the suit. *Prima facie*, therefore the Court has no jurisdiction to apply s. 10-A, Dekkhan Agri. Relief Act. In the consideration of Mr. Desai's alternative argument it will be interesting to note how the Legislature has expressed itself in the different parts of the Dekkhan Agri. Relief Act as to when the privilege can be asserted or established for the purpose of the several reliefs referred to. The language of

s. 10-A, Dekkhan Agri. Relief Act, does not follow the language used in s. 3 or s. 15-B or s. 20 of that Act. In s. 3 (a) the Legislature has stated that the provisions of Chap. II, shall apply to suits for an account "instituted by an agriculturist." The Legislature there expressly lays down that the plaintiff must be an agriculturist at the date of the suit. Section 20 says that

"the Court may at any time direct that the amount of any decree, whether before or after this Act comes into force against an agriculturist...shall be paid by instalments with or without interest."

Here, it is obviously intended, that the status must be that of an agriculturist at any time when the question of instalments arises. The provisions of s. 15-B leave it to implication as to when the status has to be established. Although that section does not indicate clearly, as s. 20 does, the time when the claimant to the privilege should be an agriculturist, it has been construed as implying the time when the accounts are claimed, that is at the time of passing the decree: see *Devu Jetiram v. Revappa Satappa* (1) and *Rajaram Padval v. Manekial* (2). The language used by the Legislature is not uniform in these two sections, and the proper time for claiming the privilege has to be fixed by reference to the language used and the provisions as to relief. In my opinion, the proper time when the jurisdiction to inquire into the real nature of the transaction could be assumed by the Court for the purpose of s. 10-A is when the Court is requested to exercise that jurisdiction. That request is contained in the plaint when disclosing the essential cause of action, upon the averment that the plaintiff is an agriculturist and a party to the suit. Therefore if the plaintiff invokes the Court's jurisdiction under s. 10 A, he must be an agriculturist within the meaning of s. 2, Dekkhan Agri. Relief Act, at the date when it is instituted. The question is really not of first impression and is covered by the authority of this Court: see *Gadadhar v. Gangaram* (3) and *Sultan Rahim v. Ranchhodji* (4). Although the question in the form in which it is presented was not raised in those cases, this Court has held that the provisions of s. 10-A require that there should be an agriculturist plaintiff to a suit for redemption at the time of its institution.

But even upon the assumption of the correctness of the construction suggested by Mr. Desai that the plaintiff's status has to be considered only at the stage of hearing, for, it is then that the question of abrogating the general rule of evidence arises, the plaintiff in this case cannot succeed. There is no warrant for the view that even at that stage the plaintiff was an agriculturist. In fact no such plea was raised in the plaint. All that the plaint stated was that the plaintiff was an agriculturist when the suit was instituted. It was not said that he had changed his original status at any time and acquired a new one. The suit was filed in August 1930, and the plaintiff was not examined till October 1934. At that time in one statement in his deposition it was elicited that in that year he had taken *kabuliyats* and had started working personally in the fields. Assuming that he had done so, that was insufficient to clothe him with the privileged status. The privilege of an agriculturist is not hereditary but personal; see *Martand v. Amritrao* (5) and *Dharmsey v. Balkrishna* (6). Nor can that privilege be acquired by birth: see *Gadadhar v. Gangaram* (3). If so, it must be assumed that merely upon adoption the plaintiff could not acquire the status which his adoptive father possessed in 1899. He had other landed estate whose income fell in the category of non-agricultural income. If suddenly three years after the suit he began to hold a plough, he could not come within the definition of para. 1 of s. 2, Dekkhan Agri. Relief Act, for he must in order to claim that status prove that he ordinarily engaged personally in agricultural labour, that is, he was regularly and habitually cultivating his fields. Mere initiation into the ways of husbandry is not enough. Consequently, it cannot be said that even pending the suit the plaintiff had acquired the status of an agriculturist. Therefore the plaintiff's appeal must be dismissed with costs (two sets—one set to defendant No. 4). As regards the cross-objections, it seems to me having regard to the view upon the evidence of the lower Appellate Court that the discretion as to costs was properly exercised. The cross-objections are therefore disallowed with costs.

D.

Appeal dismissed.

(1) 46 B 964; 67 Ind. Cas. 840; A I R 1922 Bom. 220; 24 Bom. L R 370.

(2) 34 Bom. L R 55; 137 Ind. Cas. 717; A I R 1932 Bom. 136; 56 B 36; Ind. Rul. (1932) Bom. 323.

(3) 33 Bom. L R 825; 134 Ind. Cas. 703; A I R 1931 Bom. 453; Ind. Rul. (1931) Bom. 511.

(4) 29 Bom. L R 249; 101 Ind. Cas. 140; A I R 1927 Bom. 149; 51 B 224.

(5) 27 Bom. L R 951; 93 Ind. Cas. 924; A I R 1925 Bom. 501; 49 B 662.

(6) 31 Bom. L R 984; 120 Ind. Cas. 839; A I R 1929 Bom. 378; 53 B 787; Ind. Rul. (1930) Bom. 39.

OUDH CHIEF COURT

Execution of Decree Appeal No. 38 of 1940

April 28, 1941

AGARWAL, J.

SURAJ BALI—JUDGMENT-DEBTOR

—APPELLANT

versus

GANGA PERSHAD—DECREE-HOLDER

—RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Sale of property in execution—Before confirmation of sale judgment-debtor adjudicated insolvent and also discharge given—Decree-holder not proving debt in insolvency—Whether ground for setting aside sale—Provincial Insolvency Act (V of 1920), ss. 51, 28—Property sold and purchased by decree-holder—No claim laid by Receiver—Judgment-debtor cannot say that sale should not be confirmed—S. 28, scope of—Execution sale confirmed after insolvency proceedings were over—Judgment-debtor cannot ask Court not to confirm it.

Where after the property of the judgment-debtor is sold in execution of a decree but before the confirmation of sale, the judgment-debtor is adjudicated an insolvent and also obtains an order of discharge and puts in an application that the sale should not be confirmed on the ground that the debt was wiped off as the decree-holder did not prove it in insolvency proceedings the fact that the debt was wiped off on account of the discharge is no reason for setting aside the sale as at the time the sale took place, there was a valid decree. 177 Ind. Cas. 543 (1), distinguished.

Under s. 51, Prov. Insol. Act the decree-holder will not be entitled to the benefit of his execution against the Receiver only, but where the Receiver has laid no claim to the property sold and purchased by the decree-holder the judgment-debtor has no right to say that the sale held in favour of the decree-holder should not be confirmed.

Section 28, Prov. Insol. Act bars the remedy of the creditor only during the pendency of the insolvency proceedings but where the sale was confirmed after they were over the judgment-debtor has no right to ask the Court not to confirm the sale.

Ex. D. A. against the order of the Civil Judge, Melihabad, Lucknow, dated May 11, 1940.

Mr. R. K. Bose, for the Appellant.

Mr. P. N. Asthana, for the Respondent.

Judgment.—This is a second appeal in an execution matter.

The facts of this case are as follows. The respondent Ganga Prasad obtained a simple money decree against the appellant Suraj Bali on May 13, 1937, and the decree-holder applied for the execution of the decree on August 16, 1937, by attaching a house of the judgment-debtor. That house was sold on March 7, 1938, and April 8, 1938, was fixed for confirmation of the sale. On March 21, 1938, Suraj Bali, the present appellant applied for insolvency, and he was adjudicated an insolvent on May 9, 1938. He obtained a discharge on December 16, 1938. The sale was not confirmed till then owing

to a suit brought by one Nannhun claiming that he was the owner of the house and not the judgment-debtor. The present appellant put in an application on January 23, 1939, that as the decree-holder did not prove his debt in the insolvency proceedings, it was wiped off, and so the sale should not be confirmed. That application was refused and the sale was confirmed on July 26, 1939. The learned Civil Judge on appeal has upheld the order of the lower Court.

It is argued before me that as the appellant obtained the order of his discharge before the confirmation of the sale, and the decree-holder did not prove his debt in the insolvency proceedings, his debt was wiped off, and no decree was left in which the sale could take place. It is also argued that the property vested in the Receiver under s. 28 and was no more the property of the judgment-debtor or the decree-holder. In my opinion it is not material whether the debt was wiped off or not owing to the appellant's obtaining an order of discharge. I assume that the debt was wiped off, as is contended on behalf of the applicant, but what would be the effect. At the time the sale took place, there was a valid decree. If the debt was wiped off at all, it was long after the sale. The case is distinguishable from those in which it is found that the decree had been satisfied before the sale or the decree is set aside in appeal. In those cases there is no valid decree at the date of the sale. Such is not the case here. I think the fact that the debt was wiped off on account of the discharge is no reason for setting aside the sale. If the subsequent satisfaction of the decree can be a ground for setting aside a sale, the provisions of O. XXI, r. 89, Civil P. C. would be quite negatory because a judgment-debtor can claim to have the sale set aside on paying the decretal amount and not 5 p. c. of the purchase money. Under O. XXI, r. 89, Civil P. C. when the decree-holder is a purchaser, he is also entitled to 5 p. c. of the purchase money. I, therefore, hold that the effect of the decree-holder not proving his debt in the insolvency proceedings was not to set aside the sale. Reliance is placed on *Sheo Nath v. Madan Mohan Lal* (1938 O. W. N., page 911) (1). In that case the provisions of s. 7 of the U. P. Encum. Estates Act were construed, and it was held that if before the confirmation of the sale an order under s. 7 of the U. P. Encum. Estates Act is made, the

(1) 1938 O W N 911; 177 Ind. Cas. 543; 1938 R D 765; 11 R O 50; 1938 O L R 422; A I R 1938 Oudh 221; 14 Luck. 186.

decree-holder will not be entitled to have the sale confirmed or take delivery of the property purchased by him. The case is distinguishable.

It is argued that provisions of s. 7 of the Encum. Estates Act are similar to those of s. 28 of the Insolvency Act. Section 28 provides that :

"On making of an order of adjudication the whole of the property of the insolvent shall vest in the Court or in a Receiver, and except as provided by this Act, no creditor, to whom the insolvent is indebted in respect of any debt provable under this Act, shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court on such terms as the Court may impose."

There is another s. 51 which provides that :—

"Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the Receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition."

It follows from the latter section that the decree-holder, will not be entitled to the benefit of his execution against the Receiver only, but the Receiver in this case laid no claim to the house sold and purchased by the decree-holder. The judgment-debtor has no right to say that the sale held in favour of the decree-holder should not be confirmed. Section 28 bars the remedy of the creditor only during the pendency of the insolvency proceedings but the sale in this case was confirmed after they were over. I am therefore, of the opinion that the judgment-debtor had no right to ask the Court not to confirm the sale, and his application was rightly disallowed.

The appeal is dismissed with costs.

s.

Appeal dismissed.

ALLAHABAD HIGH COURT

Application for leave to appeal to His Majesty in Council
January 17, 1941

COLLISTER AND BAJPAL, JJ.

Lala RADHEY LAL—APPLICANT

—versus—

NIRANJAN NATH—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), s. 109—Contempt of Court—Refusal of High Court to punish—Jurisdiction exercised is of criminal nature—S. 109 is not applicable—Refusal of High Court to stay criminal complaint—Application for leave to appeal—S. 109 does not apply—Expression "fit one" in Council, meaning of—Refusal to stay criminal complaint—Case cannot be said to be fit for appeal.

The jurisdiction which the High Court exercises in proceedings for contempt of Court is a jurisdiction of a criminal nature and not of a civil nature at all. Where, therefore the High Court has refused to punish a party for contempt the provisions of s. 109, Civil P. C., have no application. 155 Ind. Cas. 188 (1), relied on.

Where the High Court has refused to stay the criminal complaint the jurisdiction it has exercised is of a criminal nature and s. 109, Civil P. C., does not apply to an application for leave to appeal to the Privy Council.

The expression "fit one for appeal to His Majesty in Council" in s. 109 (c) means that the question should be either of great general importance to the public at large or of great private importance to the particular litigant and that the matter was not measurable in money. A refusal to stay a criminal complaint cannot be said to be a matter of great private importance to the particular accused in the case.

Mr. C. B. Agarwala, for the Applicant.

Bajpal, J.—This is an application for leave to appeal to His Majesty in Council and has been filed by one Radhey Lal. He had applied to us praying that one Niranjana Nath should be dealt with and punished according to law for contempt of the Insolvency Court of Agra. On October 2, 1940* we decided the matter and held that Niranjana Nath was not guilty of any contempt and we refused to punish Niranjana Nath. Radhey Lal has filed the present application, and the submission is that the case fulfills the requirements of s. 109 (c), Civil P. C. In *Kapildeva Malaviya v. Chief Justice and Judges of High Court, Allahabad* (1) a Bench of this Court held that proceedings for contempt of the High Court are in the exercise of the inherent jurisdiction of the Court and are of a criminal nature. Several authorities of various Courts were reviewed in that case and the consensus of opinion was that the sentences passed in such matters amounted in effect to a general committal for contempt and were of a punitive character. We also hold the same view, and so far as the contemplated appeal to His Majesty in Council has reference to our refusing to punish the opposite party, Niranjana Nath, for contempt, it is clear that the jurisdiction that we exercised was a jurisdiction of a criminal nature and not of a civil nature at all. The provisions of the Civil P. C., therefore cannot be applicable.

It is then contended that while we refused to punish Niranjana Nath we further passed an order that the criminal case pending against Radhey Lal in the Court of the

(1) (1935) A L J 810; 155 Ind. Cas. 188; A I R 1935 All. 811; 57 A 910; 7 R A 902; (1935) Cr. Cas. 913.

* See 193 Ind. Cas. 260.—[Ed.]

Magistrate should not be stayed. We were of the opinion that in the circumstances of the case it was not desirable that the criminal complaint should be stayed. The submission on behalf of the applicant is that the refusal to stay the criminal complaint is a matter of great importance to Radhey Lal and that so far as that order is concerned, the applicant is entitled to obtain leave from us. Here again we are of the opinion that we exercised jurisdiction of a criminal nature and the provisions of the Civil P. C., do not apply. We might further say that the applicant has to satisfy us, even if the provisions of s. 109 (c), Civil P. C., applied, that the matter is a fit one for appeal to His Majesty in Council. The expression "fit one for appeal to His Majesty in Council" has been interpreted in several cases and the meaning is that the question should be either of great general importance to the public at large or of great private importance to the particular litigant; and that the matter was not measurable in money. We fail to understand how it can be said that a refusal to stay a criminal complaint can be said to be a matter of great private importance to the particular accused in the case.

Our attention was drawn to the case in *Andre Paul Terence Ambard v. Attorney-General of Trinidad and Tobago* (2). In this case their Lordships of the Privy Council on special leave interfered with an order of the Supreme Court of Trinidad and Tobago by which a certain person was directed to pay a fine of £25 for contempt of Court. It was held by their Lordships that there seemed no reason for limiting the general prerogative of the Crown to review all judicial decisions of Courts of Record in the dominions overseas, whether civil or criminal. Their Lordships in that case had not before them the question whether s. 109 (c), Civil P. C., or any analogous provision of any other country was applicable to the facts or not. They held that the general prerogative of the Crown was not in any way limited. If the applicant is in any manner dissatisfied with the order passed by this Court, he can, if he is so advised, apply for special leave. We hold the view that the present application is not maintainable and we accordingly dismiss it.

s.

Application dismissed.

(2) (1936) A L J 671; 162 Ind. Cas. 92; A I R 1936 P C 141; 8 R P C 229; 40 C W N 801; 38 P L R 541; (1936) M W N 619; 44 L W 15; 38 Bom. L R 681; 61 C L J 36; 71 M L J 665; (1936) A O 322; 105 L J P C 72; 154 L T 616; 80 S J 344; 52 T L R 335 (P.C.).

MADRAS HIGH COURT

Appeal Against Order No. 588 of 1938

February 7, 1940

BURN AND LAKSHMANA RAO, JJ.

PAKKIRI MUHAMMAD THARAGANAR

—APPELLANT

versus

U. T. SYED SAHIB—RESPONDENT

Madras Agriculturists' Relief Act (IV of 1938), s. 19—Order passed under, dismissing application of judgment-debtor—Applicability of—Rules issued by Government providing appeal not retrospective—Nature of order under s. 19.

No appeal lies from an order under s. 19, Mad. Agri. Relief Act, dismissing the application of a judgment-debtor even if an execution petition is pending in any Court. The rules issued by Govt. in October 1939, providing for appeal in such cases, have no retrospective effect. Orders under s. 19 of the Act cannot be deemed to be orders under s. 47, Civil P. C. Application under s. 19 is to be made to the Court which passed the decree, not to the Court which is executing the decree. In this view the fact that an execution petition is pending makes no difference; nor does it make any difference that the executing Court happens to be the Court which passed the decree. C. R. P. No. 1129 of 1939, relied on. *Balusu Subbaraidu, In re* (1), explained; observations in 186 Ind. Cas. 862 (2), held obiter.

A. against the order of the Court of the Sub-Judge, Tinnevely, dated September 30, 1938.

Messrs. K. S. Srinivasacharya and K. V. Rajagopalan, for the Appellant.

Mr. S. Ramaswami Iyer, for the Respondent.

Judgment.—Mr. S. Ramasami Iyer for the respondent raises a preliminary objection that no appeal lies in this case. It is true that in the Mad. Agri. Relief Act no appeal has been provided from orders passed under s. 19. Subsequently (in October 1939) the Govt. have issued rules providing for appeal in such cases, but those rules have no retrospective effect. (C. R. P. No. 1129 of 1939) and therefore those rules do not help the appellant. It has been held (*vide Balusu Subbaraidu In re* (1)) that no appeal lies from an order under s. 19 dismissing the application of a judgment-debtor when no execution petition is pending in any Court. We are asked to say that it follows from this decision that if an execution petition is pending an appeal will lie, but the fallacy involved in that contention is obvious. We have been referred to the decision in C. R. Ps. No. 224 etc. of 1939 reported in *Jami Venkatappadu v. Kannepalli Ramamurti* (2) where it has been observed (at p. 855) that

(1) (1939) 2 M L J 609 (1); 50 L W 537; (1939) M W N 1160 (1).

(2) 50 L W 851 (855); 186 Ind. Cas. 862; (1939) 2 M L J 853; (1940) M W N 64; A I R 1940 Mad. 131; 12 R M 677.

all the petitions in that case

"must be deemed to be petitions which raise questions relating to execution, discharge or satisfaction, of the decree and therefore come within the matters covered by s. 47 of the Civil P. C."

That observation is, however, merely an *obiter dictum* since the learned Judges in that case were dealing with revision petitions, which were in the end allowed. If the orders were passed on matters arising under s. 47, Civil P. C., appeals would lie and revision would be inadmissible.

We think Mr. Ramasami Iyer is right in contending that orders under s. 19 of the Act cannot be deemed to be orders under s. 47, Civil P. C. Application under s. 19 of the Act is to be made to the Court which passed the decree, not to the Court which is executing the decree. In this view the fact that an execution petition is pending makes no difference; nor does it make any difference that the executing Court happens to be the Court which passed the decree. The application under s. 19 has to be made to the Court which passed the decree and it is not a matter relating to the execution of the decree in any sense. If the decree is scaled down, an appeal will lie from the new decree, but if the application is dismissed, no appeal can lie. This appeal is accordingly dismissed with costs.

We have been asked to allow this appeal to be converted into a civil revision petition but we think there is no question of jurisdiction here. The learned Sub-Judge has exercised his jurisdiction and has decided that this debt is not one in respect of which relief can be granted. We decline to allow conversion.

N.S.

Order accordingly.

PATNA HIGH COURT

Appeal No. 401 of 1939

November 12, 1940

FAZL ALI AND ROWLAND JJ.

Sheikh MOHAMMAD NAQIR AND OTHERS—
APPELLANTS

versus

Sheikh ALAUDDIN AHMAD AND ANOTHER
—RESPONDENTS

Limitation Act (IX of 1908), Art. 182 (3), (2)—"Review of judgment," meaning explained—Review application rejected—Art. 182 (3), if applies—Plaintiff's suit and first appeal dismissed with costs—Second appeal also dismissed with costs for failure to file talbana—Application for restoration also dismissed—Execution of decree for costs of suit and appeals—Time held ran from date of dismissal of second appeal and not from date of dismissal of restoration application—"Appeal" in Art. 182 (2) is not limited to

competent appeals—It applies whenever there is appeal—Presentation of memo of appeal is preferring appeal.

The words "when there has been a review of judgment" in Art. 182 (3), Lim. Act must mean a review by some one who can review the judgment, that is to say, by the Court which pronounced the judgment to be reviewed. Hence the article will have no application where an application for review has been rejected, because in that case there has not been a review of judgment. The words "review of judgment" cannot be construed to mean proceedings for review of judgment.

The plaintiff's suit as well as the first appeal, were both dismissed with costs. The second appeal was also dismissed with costs for his failure to file *talbana* in time. He filed an application for restoration of the second appeal which was also dismissed. The respondents sought to compute the period of limitation for the execution of the decree for costs of the suit and appeals from the date of the dismissal of the plaintiff's application for restoration of the second appeal.

Held, that the restoration application must be treated as an application for review and since it had been rejected, time for execution of the decree for costs of suit and appeals ran from the date on which the second appeal was dismissed. 169 Ind. Cas. 581 (1), dissented from, *Kurupam Zamindar v. Sadasiva* (2), 44 Ind. Cas. 575 (3), 28 Ind. Cas. 367 (4) and 104 Ind. Cas. 466 (5), relied on.

The reference to an appeal in Art. 182 (2), Lim. Act, is not limited to an appeal which is a competent appeal; the article applies whenever an appeal has been preferred; and the presentation of a memorandum of appeal is preferring an appeal. 44 Ind. Cas. 575 (3), relied on, 134 Ind. Cas. 425 (7), explained, 169 Ind. Cas. 581 (1), not approved.

A. from the appellate order of the District Judge, Purnea, dated August 5, 1939.

Messrs. Naqui Imam and S. M. Siddique, for the Appellants.

Mr. B. C. De, for the Respondents.

Fazl Ali, J.—The only question which arises in this appeal is one of limitation and it arises upon the following facts. In 1932 the appellants brought a title suit against the respondents which was dismissed on August 4, 1933, with costs. Thereupon they appealed to the District Judge but their appeal also was dismissed with costs on December 22, 1934. The appellants then preferred a second appeal to the High Court which was dismissed with costs on September 19, 1935, as *talbana* was not filed within the time prescribed. The appellants thereupon filed a miscellaneous judicial case for the restoration of the second appeal and this case was dismissed with costs on January 16, 1936. Thereafter, on January 11, 1939, the respondents executed their decree for costs which included the costs allowed to them in the trial Court, in the first and the second appeals and in the miscellaneous judicial case. A question then arose as to whether the period of limitation for the execution of the decree

for the costs of the suit and the appeals would run from September 19, 1935, the date when the second appeal was dismissed for default or from January 16, 1936, when the miscellaneous judicial case was dismissed. The first Court came to the conclusion that the appellants' application for execution was barred except in so far as it related to the costs allowed in the miscellaneous judicial case decided on January 16, 1936. The District Judge however held on appeal that the application was not time-barred. In reversing the decision of the Court of first instance the learned District Judge relied on *Firm Dedhraj Lachmi Narayan v. Bhagwandas* (1), in which Courtney-Terrell, C. J., and James, J., have held (1) that the words "where there has been an appeal" in cl. (2) of Art. 182, Lim. Act, do not mean, in their strict grammatical construction that the appeal must be against the decree in the suit; but they include an appeal against an order made on an application for rehearing under O. XLI, r. 21, Civil P. C., (1908) and (2) that all cases in which the Court reconsiders its own judgment are cases of review within the meaning of cl. (3) of Art. 182, and therefore an order made on an application for restoration under O. XLI, r. 21, Civil P. C., is an order passed on review within cl. (3).

Now, if we had been of the view that the present case is fully covered by *Firm Dedhraj Lachmi Narayan v. Bhagwandas* (1) we would have referred this appeal to a larger Bench, because both my learned brother and I are agreed that some of the propositions laid down by the learned Judges in that case require further examination. But as I shall presently show the present appeal can be decided on a point which was neither raised nor decided in that case. As both the parties to this appeal have proceeded on the assumption that the application for restoring the second appeal is to be treated as an application for review, the present case must be held to be governed by Art. 182, cl. (3), Lim. Act. Article 182, cl. (3) provides that where there has been a review of judgment the period of limitation begins to run from the date of the decision passed on the review. This provision has been construed in a number of cases wherein it has been held that it does not apply where the application for review has not been granted but rejected, that is to say, in such cases limitation is not enlarged under this clause: see *Kurapam*

Zamindar v. Sadasiva (2), *Rai Brijraj v. Nauratan Lal* (3), *Venugopal Mudali v. C. Venkatasubiah Chetty* (4) at p. 1202 and *Fakir Chand v. Daiba Charan* (5). With this view I entirely agree. It is contended on behalf of the respondent that the words "where there has been a review of judgment" mean "where there has been an application for review of judgment." In my opinion, however there is no justification whatever for inserting the word "application" into this provision.

The learned Advocate for the respondent contended that as there is similarity in the language of cls. (2) and (3), the word 'review' must be construed to mean an application for review. But the answer to this contention is this: the words "where there has been an appeal" must mean where there has been an appeal by the person who is aggrieved by the judgment appealed from, because only such a person is allowed to prefer an appeal. On the other hand the words "when there has been a review of judgment" must mean a review by some one who can review the judgment, that is to say, by the Court which pronounced the judgment to be reviewed. If that is the meaning to be attached to the words, it is plain that the article will have no application where an application for review has been rejected, because in that case there has not been a review of judgment. The learned Advocate for the respondents also contended that the words "review of judgment" may be construed to mean proceedings for review of judgment. Such a construction however has never been placed upon these words and I do not see any justification for doing so. In my opinion, therefore, the time of limitation in the present case began to run from September 19, 1935 in regard to the costs which were awarded in the trial Court as well as in the first and second appeals and so far as the execution in respect of these costs is concerned, it must be held to be time-barred. As to the costs awarded in the miscellaneous judicial case, it was conceded by the learned Counsel for the appellant that these costs are still recoverable and therefore no decision on that point is necessary. In these circumstances I would allow this appeal, set aside the judgment of the learned District Judge and restore the judgment of the Subordinate

(2) 10 M 66.

(3) 3 P L J 119; 44 Ind. Cas. 575; A I R 1917 Pat. 157.

(4) 39 M 1196 (1202); 28 Ind. Cas. 367; A I R 1916 Mad. 883; 17 M L T 208; (1915) M W N 211.

(5) A I R 1927 Cal. 904; 104 Ind. Cas. 466; 54 C 1052.

(1) 16 Pat. 306; 169 Ind. Cas. 581; A I R 1937 Pat. 337; 18 P L T 231; 3 B R 598; 10 R P 26.

Judge. Having regard to the circumstances of the case, we are of the opinion that the parties should bear their own costs here and in the Court of the District Judge.

Rowland, J.—I agree. With regard to the observations in *Firm Dedhrāj Lachmi Narayan v. Bhagwandas* (1) implying that the Privy Council decision in *Nagendra Nath v. Suresh Chandra* (6) had had the effect of reversing the current of authority in this Court and in particular overruling *Rai Brijraj v. Nauratan Lal* (3), I would like to point out that the law as understood and applied in this Court, even before the date of the Privy Council judgment (which was delivered on April 21, 1932), was in the same sense as that declared by their Lordships. The latest pronouncement of this Court before the date of that Privy Council judgment was made on July 15, 1931 in *Kameshwar Singh Bahadur v. Beni Madho Singh* (7). Kulwant Sahay, J., with whom Khwaja Mohammad Noor, J., agreed, held that the reference to an appeal in Art. 182 (2), Lim. Act, is not limited to an appeal which was a competent appeal; that the article applies whenever an appeal has been preferred; and that presentation of a memorandum of appeal is preferring an appeal. There is therefore no question of the current of authority in this Court being reversed in consequence of what the Judicial Committee decided in *Nagendra Nath v. Suresh Chandra* (6).

D.

Appeal allowed.

(6) 59 I A 283; 137 Ind. Cas. 529; A I R 1932 P C 165; 60 C I; Ind. Rul. (1932) P C 195; 36 C W N 803; (1932) A L J 643; 34 Bom. L R 1065; 55 C L J 528; 33 P L R 621; 36 L W 7; 9 O W N 681; (1932) M W N 817; 63 M L J 329.

(7) A I R 1931 Pat. 422; 134 Ind. Cas. 425; 11 Pat. 430; 12 P L T 701; Ind. Rul. (1931) Pat. 457.

CALCUTTA HIGH COURT

Appeal No. 813 of 1938

June 7, 1940

SEN, J.

TRAILOKHYA NATH BANERJEE—

PLAINTIFF—APPELLANT

versus

SUKUMAR BOSE—DEFENDANT—

RESPONDENT

Civil Procedure Code (Act V of 1908), Sch. II, Paras. 21, 16, s. 104—No explicit order filing award—Decree upon award—Appeal against whole decision must be treated as one against implied order filing award—Appellate order falls under s. 104 (2)—Decree in accordance with award—Appeal; grounds of—Second appeal from order filing or refusing to file award, competency of.

Where there is no separate order passed filing the award, the appeal from the decision of the Court passing a decree upon the award should be treated as an appeal which is in substance an appeal from an implied order filing the award. In such a case the order passed in the appeal is governed by s. 102 (2), Civil P. C. 88 Ind. Cas. 76 (1), relied on. [p. 612, col. 1.]

Although a decree upon an award which is in accordance with the award is normally not appealable nevertheless an appeal will lie from such a decree where the submission or reference to arbitration is challenged as being invalid. From this, however, it does not follow that a second appeal will lie from an order filing or refusing to file an award when the validity of the reference to arbitration is challenged. An order filing or refusing to file an award not being a decree is appealable only to the extent allowed by s. 104, Civil P. C. which prohibits a second appeal. 130 Ind. Cas. 209 (2), relied on, 5 Ind. Cas. 98 (3), explained. [p. 612, col. 2.]

A. from appellate decree of the Sub-Judge, First Court, Jessore, dated March 14, 1938.

Mr. Shambhunath Banerjee, for the Appellant.

Messrs. Rajendra Bhushan Bakshi and Ram Mohan Bhattacharjya, for the Respondent.

Judgment.—The facts giving rise to this appeal are as follows: There was a dispute regarding land between the appellant and the respondent and two others. The dispute was referred by the parties to the arbitration of three gentlemen who are Pleaders of Jessore. They made an award. The appellant applied under para. 20 of Sch. II, Civil P. C., to the Court of a Munsif at Narail in the District of Jessore for an order that the award be filed. The respondent alone objected. His objections broadly were: (1) that there was no valid reference to arbitration, and (2) that the award was liable to be set aside on the ground of misconduct on the part of the arbitrators. The learned Munsif held that the reference was valid and that there was no misconduct. He then passed the following order:

"Ordered that the suit be decreed in terms of the award with costs on contest against defendant No. 1 and *ex parte* against the rest. The award do form part of the decree."

Defendant No. 1, it may be noted, is the respondent. Against this decision an appeal was taken to the District Judge by the respondent and was heard by the Subordinate Judge, first Court, Jessore. The appeal was treated by the learned Subordinate Judge as an appeal from an order directing an award to be filed. Three points were taken by the respondent in challenging the decision of the learned Munsif. They are: (1) That the award determined matters not referred by the submission to arbitration. (2) That the award was indefinite. (3) That the award

was liable to be set aside on the ground of misconduct on the part of the arbitrators. The appellant took the point that the appeal was barred by limitation. The learned Subordinate Judge held against the respondent on the first two points; but he found that the arbitrators were guilty of misconduct and that the appeal was not barred by limitation. On these findings he allowed the appeal in the following terms:

"Ordered that the appeal be allowed with costs. The order of the learned Court below directing the award to be filed is set aside."

Against this order the appellant has filed the present appeal. A preliminary objection is taken by the respondent that no second appeal lies. The argument in support of this objection is as follows: The appeal before the Subordinate Judge was an appeal against an order filing an award passed in an arbitration without the intervention of the Court. An appeal against such an order is permitted by s. 104 (1) (f), Civil P. C., but a second appeal is prohibited by sub-s. (2) which says that no appeal shall lie from any order passed in appeal under this section. The objection is met by the appellant in this way. Learned Advocate for the appellant says, first, that the appeal before the Subordinate Judge was not an appeal against an order filing the award but an appeal against the decree passed upon the award and that therefore a second appeal would lie as the prohibition against second appeals contained in s. 104 (2) is restricted to appeals from orders and can have no application to decrees. Secondly, he says that as the validity of the reference to arbitration was questioned by the respondent a second appeal would lie even though the appeal be held to be one not against the decree upon the award but against the order filing the award.

I shall now take up for consideration the first branch of the argument urged on behalf of the appellant. When an award is made without the intervention of the Court the party who wishes to enforce the award must apply to the Court having jurisdiction over the subject-matter of the award for an order filing the award. The Court must give notice of this application to the other parties and they may come and object to the filing of the award. The Court will decide the question and pass an order filing the award or refusing to file it. Any party dissatisfied with this order has the right to appeal from it but there is no second appeal from such an order. This is quite clear from the provisions of s. 104 (1) (f) and s. 104 (2), Civil P. C. Now if the Court passes an order filing the award, it shall pronounce judgment in

accordance with the award and upon that judgment a decree shall follow. No appeal shall lie from this decree except in so far as the decree is in excess of or not in accordance with the award. If the decree is of this nature an appeal as well as a second appeal will lie.

There is a clear and fundamental distinction between an appeal from an order filing an award and an appeal from a decree passed on an award. The former is directed against the award itself while the latter accepts the award and attacks the decree on the ground that it is in excess of the award or inconsistent therewith. Bearing this distinction in mind I proceed to decide whether the appeal of the respondent was from an order filing an award or from a decree passed thereon. In the present case, the learned Munsif has not followed the procedure laid down in para. 21 of Sch. II of the Code. He passed no distinct order filing the award. He expressed the opinion that the award should be enforced and passed an order "decreeing the suit in terms of the award." The respondent could not frame his appeal as being one from an order filing the award inasmuch as there was no such order passed formally. He did the only thing that he could do; he appealed against the whole decision of the Munsif. He directed his appeal, however, not against the decree but against the award. The objections urged in the appeal were all directed against the award and not against the decree. The learned Judge has described the appeal as being one "against the order directing an award to be filed under para. 21 of Sch. II, Civil P. C." With this description I entirely agree. The appeal was not against the decree but against the implied order filing the award. In circumstances like these where the Court neglects to pass an explicit order filing the award and passes a decree upon the award what is an aggrieved party to do? He can only appeal from the whole decision. Such an appeal must be treated as an appeal from an implied order filing the award even though a decree upon the award has already been passed. If one were to treat such an appeal as an appeal from the decree, it would result in serious prejudice to a party complaining against an award. The result would be that a Court by failing in its duty to record an order filing the award would be able to deprive the complaining party of all opportunity of contesting the validity of the award. The party would be relegated to the very limited right of appealing from the decree on the award, a right which can

be exercised only if the decree is in excess of or not in accordance with the award.

In *Jagat Pande v. Sarwan Pande* (1) the position was exactly similar. It was held that as there was no separate order passed filing the award, the appeal from the decision of the Court passing a decree upon the award should be treated as an appeal which was in substance an appeal from an order filing the award. I entirely agree with this view and hold that the appeal before the Subordinate Judge was not an appeal from the decree but an appeal from the implied order filing the award. That being so, the order passed in the appeal by the Subordinate Judge is governed by s. 104 (2), Civil P. C., which says that no appeal will lie therefrom. The next point urged was that a second appeal will lie because the validity of the reference itself was challenged by the respondent before the Munsif. My attention was drawn to paras. 16 and 21 of Sch. II, Civil P. C., which prohibit any appeal from a decree upon an award except in so far as the decree is in excess of or not in accordance with the award. Learned Advocate for the appellant next referred me to certain cases where it was held that although an appeal from a decree passed on an award was so prohibited nevertheless, if the reference itself was challenged as being invalid, an appeal would lie against the decree even though it be in accordance with the award. Learned Advocate argues that if the prohibition against an appeal from a decree upon an award contained in paras. 16 and 21 of Sch. II, Civil P. C., is removed if the validity of the reference is questioned, then the prohibition against a second appeal from an order filing or refusing to file an award contained in s. 104 (2), Civil P. C., should likewise be held to be removed when any party questions the validity of the reference.

It would serve no useful purpose to deal with all the cases cited before me where it has been held that an appeal will lie against a decree upon an award if the validity of the reference is challenged even though the decree is in accordance with and not in excess of the award. Some of the cases are under the old Code and in view of the important changes made in provisions of the Code dealing with the subject of arbitration they cannot have any direct application. There is also a divergence of opinion on this point both in this Court and in the Courts of other provinces. Most of these cases are

referred to, and dealt with very fully by Mukherjee, J. in *Golenur Bibi v. Abdus Samad* (2). He gives a very elaborate and lucid history of how the view that an appeal lay from a decree upon an award on the ground that the submission was invalid came to be held and although he held a contrary opinion he felt constrained to follow that view in the case under consideration as the weight of decisions in this Court was in support of it. I am bound by this decision and shall for the purposes of this case accept the position that although a decree upon an award which is in accordance with the award is normally not appealable nevertheless an appeal will lie from such a decree where the submission or reference to arbitration is challenged as being invalid. From this, however, it does not follow that a second appeal will lie from an order filing or refusing to file an award when the validity of the reference to arbitration is challenged.

The status of a decree and an order so far as appealability is concerned is fundamentally different. When a decision amounts to a decree it is invariably appealable unless it is expressly provided that no appeal shall lie from it. This is the effect of s. 96, Civil P. C. An order however, if invariably non-appealable unless it is expressly provided that an appeal shall lie from it. This is the effect of s. 104, Civil P. C. If this important difference between a decree and an order is borne in mind the fallacy in the argument of learned Advocate for the appellant will become apparent. The decree passed on an award would ordinarily be appealable were it not for the provisions of paras. 16 and 21 of Sch. II, Civil P. C., which prohibit an appeal if such a decree is in terms of the award. Now this prohibition is based on the fact that the decree is founded upon an award. If the validity of the reference to arbitration is challenged successfully and the decree is shown to be one which was not based on any award, its appealability will be unaffected by the prohibition contained in paras. 16 and 21 which apply only to a decree based on an award. This I consider is the ground on which it has been held that an appeal would lie from a decree on an award even though it is in accordance with the award when the very reference to arbitration was challenged as being invalid.

An order filing an award or refusing to file it is in quite a different category. It is

(1) 47 A 743; 88 Ind. Cas. 76; A I R 1925 All. 404; 23 A L J 440; L R 6 A 350 Civ.

(2) 58 C 628; 130 Ind. Cas. 209; A I R 1931 Cal. 211; 52 C L J 298; 35 C W N 238.

not a decree. Section 2 of the Code where in a decree is defined says that "any adjudication from which an appeal lies as an appeal from an order" is not a decree. Now an order filing or refusing to file an award is an adjudication from which an appeal lies as an appeal from an order. Section 104 (1) (f) makes this quite clear when it treats such an adjudication as an order and makes it appealable as such. Whatever may have been the view held under the old Code where there was no provision corresponding to s. 104 (1) (f) of the present Code, under the law as it stands at present it must be held that an order filing or refusing to file an award is not a decree. Now if it is not a decree but an order it is appealable only to the extent allowable by any express provision in the Code, i. e. to the extent allowed by s. 104 of the Code and as pointed out before that section prohibits a second appeal. Learned Advocate for the appellant referred me to the case in *Rai Charan Purkait v. Amrita Lal Gain* (3) where there was a second appeal entertained by this Court from an order refusing to file an award made in a private reference. The case was under the old Code where there was no provision for an appeal from an order filing or refusing to file an award. Under the old Code such an order was treated as a decree and it was appealable as such. Under the present Code, s. 104 alters the position as I have indicated above. The case in *Rai Charan Purkait v. Amrita Lal Gain* (3), is, therefore, of no assistance to the appellant. In view of what I have said above, the preliminary objection must prevail. The appeal is dismissed with costs. There is an alternative application under s. 115, Civil P. C. that will be dealt with by the Court empowered to deal with such applications.

D.

Appeal dismissed.

(3) 11 C L J 131; 5 Ind. Cas. 98.

LAHORE HIGH COURT

First Appeal, No. 79 of 1939

January 30, 1941

TEK CHAND AND BECKETT, JJ.

ALAM KHAN—PLAINTIFF—APPELLANT

versus

Mst. BHAG BHARI AND ANOTHER

—DEFENDANTS—RESPONDENTS

Court Fees Act (VII of 1870), s. 7 (iv) (c), Sch. II, Art. 17 (iii)—Suit by G's grandson against G's widow for declaration that he was an adopted son of G under his will—A, a collateral of G not made party

—Decree passed—A's suit for declaration that decree in suit by grandson was not binding on him and that suit was collusive and that will set up was not genuine—Suit held fell under Sch. II, Art. 17 (iii).

G's grandson instituted a suit against G's widow for a declaration to the effect that he was the adopted son of G under the will. A who was G's collateral was not made a party to that suit. The suit was decreed. Thereupon, A instituted a suit for a declaration to the effect that the aforesaid decree in the suit instituted by G's grandson against G's widow had been obtained by fraud on wrong facts and against law, without joining the plaintiff (A) as a party, and that it was not binding on him, in other words, that G's grandson was not the adopted son of G and that the will set up by him, on which the decree was obtained, was not genuine.

Held, that the plaintiff (A) not being a party to the decree obtained by G's grandson against widow was in no way bound by it. It could not be said that he was constructively represented in that suit by the widow whose interests were really adverse to his.

Held, also that A's suit was clearly one for a declaration without any consequential relief and fell within Art. 17, cl. (iii) of Sch. II, Court Fees Act. 193 Ind. Cas. 641 (1), distinguished.

F. A. from an order of the Senior Sub-Judge, Sargodha, dated January 6, 1939.

Messrs. Roop Chand and Hem Raj Mahajan, for the Appellant.

Messrs. R. C. Manchanda and S. C. Manchanda, for the Respondents.

Tek Chand, J.—The plaintiff is a collateral of one Ghulam Rasul in the fourth degree. Ghulam Rasul died leaving a widow Mst. Bhag Bhari and a daughter Mst. Bahishtan. Mst. Bahishtan had a son Mohammad Sher. On Ghulam Rasul's death Mohammad Sher, alleging himself to be the adopted son of Ghulam Rasul, under a will dated January 1, 1933, applied to the revenue authorities that mutation be effected in his favour. The plaintiff resisted the claim contending that the will was a forgery and that the defendant had not been adopted by Ghulam Rasul. The revenue authorities accepted this contention and holding that the will was not genuine, rejected Mohammad Sher's claim. Thereupon, Mohammad Sher instituted a suit against Mst. Bhag Bhari, widow of Ghulam Rasul for a declaration to the effect that he was the adopted son of Ghulam Rasul under the will dated January 1, 1933. The present plaintiff was not made a party to that suit. The suit was decreed on June 8, 1936 by Chaudhri Mohammad Ali, Subordinate Judge, Sargodha. On the basis of this decree the land left by Ghulam Rasul was mutated in favour of Mohammad Sher. Thereupon, the plaintiff instituted the present suit for a declaration to the effect that the aforesaid decree passed by Chaudhri Mohammad Ali in the suit instituted by Mohammad Sher (defendant No. 2)

against *Mst. Bhag Bhari* (defendant No. 1) had been obtained by fraud on wrong facts and against law, without joining the plaintiff as a party, and that it was not binding on him. The suit was valued for purposes of jurisdiction at Rs. 5,250, but a court-fee of Rs. 10 was paid, it being stated that the claim was one for obtaining a declaratory decree, pure and simple. The defendants resisted the suit on numerous grounds pleading, *inter alia*, that the court-fee paid was insufficient. They urged that the suit was for a declaration with consequential relief and that it was governed by s. 7 (iv) (c), Court Fees Act, and as the plaintiff had himself fixed the value of the relief at Rs. 5,250, he should pay *ad valorem* court-fee on that amount. The learned Subordinate Judge upheld this plea and directed the plaintiff to make good the deficiency within a certain time. The plaintiff failed to pay the requisite court-fee, and the learned Judge rejected the plaint.

From this decree the plaintiff has come in appeal and it has been contended on his behalf that the suit really fell under Art. 17 (iii) of Sch. II, Court Fees Act, and not under s. 7 (iv) (c) of the said Act, and therefore a court-fee of Rs. 10 had rightly been paid. It may be stated at the outset that the plaintiff not being a party to the decree obtained by defendant No. 2 against defendant No. 1, is in no way bound by it. It cannot be said that he was constructively represented in that suit by *Mst. Bhag Bhari*, whose interests were really adverse to his. Indeed, that suit had really been brought to defeat the present plaintiff's rights by a collusive decree obtained behind his back. Nor is the plaintiff even if his allegations are true, entitled to possession of *Ghulam Rasul's* property, so long as his widow *Mst. Bhag Bhari* is alive. The suit as framed is, therefore, really one for a declaration that the decree obtained collusively by defendant No. 2 against defendant No. 1 in a suit to which he was not a party, does not affect his rights; in other words, that defendant No. 2 is not the adopted son of *Ghulam Rasul* and that the will set up by him, on which the decree was obtained, was not genuine. In our opinion, that is clearly a suit for a declaration without any consequential relief and falls within Art. 17, cl. (iii) of Sch. II, Court Fees Act.

The learned Counsel for the respondents relied on the recent Full Bench decision in Regular First Appeal No. 459 of 1938, decided on November 4, 1940 *Zeb-ul-Nisa v.*

Chaudhuri Din Mohammad (1). That case however, is clearly distinguishable. There a *mutwalli* had alienated *waqf* property and the suit was brought by certain beneficiaries for a declaration that the property was *waqf* and the alienation was void. It was held that in the case of a *waqf* if an alienation is made by the *mutwalli*, it is binding on all concerned, until and unless it is set aside and therefore when a person sues to have it declared null and void, he can only do so by getting the deed invalidated. The relief claimed in such cases therefore includes consequential relief. But the learned Judges clearly pointed out that while it cannot be laid down as a broad proposition of law that in every case where the plaintiff was not a party to the decree or deed sought to be declared as null and void, he is entitled to sue for a bare declaration, the true rule is that it is only in those cases where the plaintiff is a party to the decree or deed and the declaratory relief, if granted, necessarily relieves him of his obligations under the decree or deed, that the declaration involves a consequential relief. The learned Judges went on to say :

"In cases, where the plaintiff is not a party to the decree or the deed, the declaratory relief does not ordinarily include any such consequential relief. But there are exceptional cases in which the plaintiff, though not a party to the deed or the decree is nevertheless bound thereby."

They then gave the instance of a decree obtained against the manager of a joint Hindu family which is binding on all the other co-parceners and also mentioned the case of an alienation by the *mutwalli* of a *waqf* property. It is conceded that the present case does not fall within any of the exceptions mentioned by the learned Judges. The Full Bench decision therefore does not lay down any rule against the appellant. The plaint, read as a whole, shows clearly that the suit is one for pure declaration with no consequential relief. We accordingly accept the appeal, set aside the decree of the lower Court and holding that the court-fee of Rs. 10 paid is sufficient, remand the case to the lower Court for disposal in accordance with law. Court-fee on this appeal shall be refunded. Other costs will be costs in the cause. Both parties have been directed to appear before the Senior Subordinate Judge, Sargodha, on February 10, 1941, when a date for further proceedings will be given.

D.

Appeal accepted.

(1) A I R 1941 Lah. 97; 193 Ind. Cas. 641; 43 P L R 106; 13 R L 465.

ODDH CHIEF COURT

First Civil Appeals Nos. 104, 105 and 106
of 1937

YORKE AND AGARWAL, JJ.

April 16, 1941

Raja Sir MOHD. EJAZ RASUL
KHAN BAHADUR—CLAIMANT—

APPELLANT

versus

Hakim Saiyid ALI MOHAMMAD

AND OTHERS—DEBTORS—OPPOSITE PARTIES—

RESPONDENTS.

U. P. Encumbered Estates Act (XXV of 1934), ss. 14, 18, 35—Transfer of Property Act (IV of 1882), ss. 72, 77, 76 (h)—Civil Procedure Code (Act V of 1908), O. XXXV, rr. 2, 7, O. VI, r. 17, s. 2 (12)—Mortgagee entitled to get possession in default of payment of interest—Default made and possession not given—Mortgagee suing for possession—Amount spent to obtain possession, if can be recovered in proceedings under Encumbered Estates Act—Provision for pendente lite interest, if retrospective—Mortgagee in possession—Deficiency in profits—Mortgagor personally liable for such deficiency—Mortgagee, if can recover deficiency and interest thereon at time of redemption—Mortgagee in possession—Suits by him to recover arrears of rent—Whether act of management—Costs, if can be recovered by him—Amendment of pleadings—Discretion of Court—Interference with, in appeal—Mesne profits, meaning—Costs of collection.

Where a mortgage bond provides that in case of default of payment of interest by the mortgagor, the mortgagee should obtain possession of the mortgaged property and the mortgagor makes a default and does not deliver possession to the mortgagee, the mortgagee is entitled to sue for possession and the amount thus spent in obtaining the decree for possession can be recovered by him in proceedings under the U. P. Encum. Estates Act as he can do in a suit for redemption by reason of O. XXXIV, rr. 2 and 7, because the amount so spent is spent to make good his title against the mortgagor within the meaning of s. 72, T. P. Act. 87 Ind. Cas. 129 (1) and 26 Ind. Cas. 184 (2), relied on.

The provision for *pendente lite* interest in s. 14, U. P. Encum. Estates Act, has retrospective effect.

Where the mortgage deed does not provide that the interest be not a charge on the property and by a covenant the mortgagor has undertaken a personal liability to pay the deficiency in profits, the mortgagee in possession is entitled to recover the deficiency in the profits at the time of redemption but not the interest thereon.

[Case-law referred to.]

The filing of suits to recover arrears of rent by a mortgagee in possession is an act of management within the meaning of s. 76 (h), T. P. Act and any expenses incurred in connection therewith are recoverable by the mortgagee. 23 Ind. Cas. 456 (3), relied on. [p. 619, col. 2.]

It is within the power of the Court to allow the parties to add to their pleadings, and where it is done without any objection by the other side, it is too late to question it in appeal. [ibid.]

Mesne profits mean amount realised minus the costs of collections, and in the absence of any evidence the costs of collections should be considered to be 10 per cent. 154 Ind. Cas. 1 (4), *Hurro Doorga Chowdhurani v. Mahari Surat Soondari Debi* (5) and *Girish Chunder Lahiri v. Shoshi Shikhareswar Roy* (6), relied on. [p. 620, col. 1.]

F. C. As. against the order of the Special

Judge, First Grade, Barabanki, dated July 31, 1937.

Messrs. M. Wasim, Ali Hasan and Nawab Ali, for the Appellant.

Messrs. Hyder Husain and H. H. Zaidi, for Respondents, Nos. 1 to 6 and 8 to 10.

Judgment.—These are three connected appeals Nos. 104, 105 and 106 of 1937. We propose to decide them by one judgment.

Syed Mohammad Askari, Mir Syed Hasan and Syed Agha Ali three brothers divided their *zemindari* property by an agreement, dated June 16, 1902, and Syed Mohammad Askari got 5/9ths shares and the remaining two brothers 2/9ths each. On January 16, 1905, all the three brothers executed a mortgage-deed for Rs. 44,000 in favour of Raja Tasadduq Rasul Khan, *Taluqdar* of Jehangirabad, who is now represented by the appellant Raja Sir Mohammad Ejaz Rasul Khan Bahadur, Kt., C. S. I. Two villages Daulatpur and Balchhat were mortgaged in this deed. The rate of interest mentioned in the deed was 6 p. c. per annum compoundable every six months, and it was provided that in case two instalments of interest were not paid, the mortgagee after waiting for two months more would be entitled to take possession of the mortgaged property. On February 3, 1906, Syed Mohammad Askari executed another mortgage-deed in favour of the same mortgagee in respect of a share in the village Guthia. The amount borrowed was Rs. 20,000 and there was the same condition of the mortgagee taking possession over the mortgaged property in case two instalments of interest were not paid. The rate of interest was 6½ p. c. Syed Mohammad Askari executed another deed on September 12, 1911, in which a further charge of the amount borrowed under the deed of 1906 was created over his share in villages Daulatpur and Balchhat. There was default in payment of two instalments, and the mortgagee brought two suits for possession, one in respect of *Mouzas* Daulatpur and Balchhat and the other in respect of village Guthia. Suit No. 16 in respect of Daulatpur and Balchhat was decreed on April 7, 1924, and the other suit in respect of Guthia on February 28, 1924. The mortgagee obtained possession in execution of these decrees on May 15, 1924 over Daulatpur and Balchhat and on July 23, 1924, over Guthia. A sum of Rs. 1,276 was awarded as costs to the decree-holder in the suit relating to Daulatpur and Balchhat and Rs. 646-2 in the other suit. The mortgagee was in possession of subsequent to May 15, 1924,

till ejected in course of these proceedings. Three applications under s. 4 of the Encumbrances Act were made, one by Syed Agha Ali who died during the pendency of the proceedings and was liable for 2/9ths share of the money due on the mortgage deed, dated January 16, 1905. Another application was made by Hakim Syed Ali Mohammad, one of the heirs of Syed Hasan, and he is liable for 2/99ths of the money due on the mortgage-deed dated January 16, 1905. The third was made by Mst. Sartaj Fatima who is liable to pay 1/12th of the money due on the mortgage deed dated January 16, 1905, and 1/10th of that due on the deed, dated February 3, 1906. Raja Sir Mohammad Ejaz Rasul Khan, the heir of the mortgagee, put forward his claim in all the three cases. He claimed 2/9ths of Rs. 44,000 principal, Rs. 5,161-11-6 interest and compound interest due on the date he obtained possession, Rs. 1,276 costs of the suit for possession and interest on the two latter amounts from the date he obtained possession till the date of the application amounting to Rs. 4,355-10-6 total Rs. 54,793-6 from Agha Ali. He claimed 2/99ths of this amount from Hakim Syed Ali Mohammad. In the case of Sartaj Fatima he claimed 1/12th of this very amount. He also claimed 1/10th of Rs. 20,000 principal of the bond, dated February 3, 1906, Rs. 2,935 interest and compound interest due on the date he obtained possession of Guthia, Rs. 646-2 as in ought costs of the suit for possession and Rs. 2,679-0-9 interest on the two latter amounts from the date of his obtaining possession over Guthia to the date of the application—total Rs. 26,240-2-9.

A reply to the mortgagee's claim was filed on behalf of Hakim Syed Ali Mohammad in which it was stated that the annual income of Daulatpur and Balchhat was more than the annual interest due on the bond of 1905, and so the mortgagee must account for it. It was also stated that the mortgagee had realised a large sum of money by sale of wood, fish, mango produce and the receipt of *nazranas*. Various other allegations were made which we do not think it necessary to state here. Similar replies were given by the other applicants. The parties in all the cases agreed that the three cases should be tried together, and the Special Judge accepted their request. On September 18, 1936, the following issues were framed:—

- (1) Is the claimant under the terms of the deeds of mortgage Ex. A-1, (mortgage of 1905) and Ex. A-4

(mortgage deed of 1906) not liable to render accounts of the profits received by him from the property mortgaged during the period of his possession?

Issues Nos. 2 and 3 need not be mentioned?

- (4) Did the mortgagee fail to let out to fresh tenants lands in the mortgaged villages that were given up by old tenants? If so, is he liable to be debited in respect of the profits of those lands in taking accounts?
- (5) Is the mortgagee entitled to charge interest on sums other than the principal amounts advanced by him which were due payable by the mortgagors when the mortgagee took over possession?
- (6) What sums were due to the claimant from the applicants in respect of his share of the debts under Exs. A-1 and A-4 at the date of the present application?
- (6a) Is the mortgagee's claim in respect of the costs decreed to him in suits for mortgagee possession brought by him barred by the law of limitation?

and it was ordered on April 23, 1937, that a Commissioner be appointed to prepare a statement of accounts showing the profits of various kinds, collected and recovered by the mortgagee from the properties mortgaged during the period of his possession and the charges incurred by him. The parties were ordered to produce a sketch form of statement showing the various heads of income and expenditure which the Commissioner should consider. The Commissioner submitted his report on January 15, 1937. The parties filed objections to that report. The Special Judge then proceeded to determine the issues framed by him, and in determining issue No. 6 he also considered the Commissioner's report and the objections preferred to it by the parties. He held that the claimant, that is the mortgagee, was liable to render accounts of the receipts from the mortgaged property that came into his hands during the period of his possession. He also held that it was not proved that any land remained uncultivated owing to the negligence of the mortgagee, that the mortgagee was entitled to interest which was due under the bonds when the mortgagee took possession, and that the mortgagee was not entitled to the costs incurred by him in bringing suits for possession nor to interest on them. He further held that it was not proved that

the mortgagee had cut any trees, and that the mortgagee was entitled to 10 p. c. on the collections as collection charge and had realised Rs. 75 as *nazar daira*, Rs. 66 as *nazar shagun*, Rs. 144 as *nazar salana*, Rs. 325-8 as *nazar tasfia arazi* and for the houses in the *abadi* and Rs. 117-7 as *bisah* dues, (customary dues levied from tenants to the extent of one quarter of a seer of wheat for every rupee of the rent). He was of opinion that the mortgagee had realised nothing on account of Payal, Bhunam and Jhankar etc. He ordered the Commissioner to submit a fresh report in the light of his findings and each claim be decreed for the amount due with interest at Rs. 4-4, p. c. per annum, from the date the mortgagee gives up possession. The Commissioner submitted his report on May 25, 1937. The Special Judge passed a decree on the basis of this report but set it aside subsequently on the findings that the parties had not been allowed any opportunity to file objections to the second report, and they had been given that right under the order dated April 23, 1937. The Commissioner in his second report had prepared an account of village Guthia, and in doing it he had added every year to the principal amount the shortage of interest that is, the difference between the amount of interest and the amount of profits. The learned Special Judge held that the mortgagee was not entitled to anything more than the profits, even if they were less than the amount of interest. He ordered that the account be amended, and a decree for the amount due be passed.

Appeal No. 104 has been filed by the mortgagee Raja Sir Mohammad Ejaz Rasul Khan Bahadur and is valued at Rs. 41-9-9. Three points have been taken by him. The first point is that he had incurred Rs. 201-8-3 as costs in the rent suit brought by him against the tenants and is entitled to Rs. 4-1-3 from Hakim Syed Ali Mohammad. The other point taken by him is that he is entitled to recover the proportionate liability of the applicant out of Rs. 1,276 incurred by him in the costs of the suit for possession. The third point taken by him is that he has been wrongly made liable for *nazrana*. The respondents have filed cross-objections and they are :

- (1) That the Court below was wrong in holding that the appellant was entitled to 10 p. c. as costs on collections, although the actual costs were much less,
- (2) that the Court was wrong in holding that the objectors were not entitled

to credit of the arrears of rent which the appellant allowed to be time-barred,

- (3) that the mortgagee ought to have been made further liable for Rs. 22-3-9 on account of different kinds of *nazranas*. Rs. 172-14-6 on account of the trees cut by the appellant and Rs. 44-2-3 on account of the *nazrana* of *tasfia arazi*,
- (4) that the Court below erred in holding that they were not entitled to the credit of Rs. 377-12-6 on account of the land which the appellant allowed to remain fallow, and
- (5) that the Court below should have allowed future interest to the appellant from the date of the application of the objectors and not from the date of the dispossession of the appellant.

The same points are involved in the appeal and the cross-objections in appeal No. 105. In appeal No. 106 the appellant has raised a further point that the lower Court was wrong in not allowing him the amount of interest due on the bond of 1906 which was not realised by the profits of the property, and has also contended that he is entitled to the costs of the suit for possession brought in respect of Guthia. The respondents have raised the same cross-objections, in all the cases. The only difference is about the amounts.

The respondents did not press the objections that the lower Court erred in not crediting them with the arrears of rent which the appellant allowed to become time-barred and in not allowing them credit for the land which the appellant allowed to remain fallow. The claim points which about *nazranas* was also not pressed. The points which we have now to determine are—

- (1) whether the mortgagee is entitled to recover the amounts spent by him as costs of the suits for possession brought by him,
- (2) is the mortgagee entitled to Rs. 201-8-3 as costs of the rent suits brought by him,
- (3) whether the mortgagee received any *nazranas*,
- (4) whether the mortgagee is entitled to 10 p. c. costs of collections,
- (5) whether any trees were cut by the mortgagee,
- (6) whether the mortgagee was entitled to interest from the date of the application or from the date of the dispossession of the applicants and

(7) whether the mortgagee is entitled to the portion of the interest of the bond of 1906 not paid by the profits of the property.

The last point arises in appeal No. 106 only.

Point No. 1. The condition in the mortgage-deeds about the mortgagee taking possession is

"that if in any year any two instalments of profits (interest) are not consecutively paid by us, the mortgagors, to the mortgagee, and we fail to pay the amount in a lump sum by the end of the year than the mortgagee after waiting for two months more shall have power to take possession of the property mortgaged though Court and we, the declarants, shall get mutation of names effected in the name of the mortgagees. In case of default the mortgagee may himself get mutation of names effected in his favour, and the amount of interest falling in arrears having been included in the principal, interest at the said rate shall be paid thereon also."

There was admittedly as default in the payment of interest, and the mortgagee brought two suits for possession and stated that the mortgagors had not paid interest towards the instalments of December 1922, and June 1923, and did not deliver possession in spite of repeated requests. It appears that the mortgagors not only did not pay the instalments but did not deliver possession to the mortgagee which they were bound to do under the mortgage deeds. The mortgagee had therefore to bring suits for possession to take possession as mortgagee. Under s. 72 of the T. P. Act a mortgagee can spend such money as is necessary for making his own title to the mortgaged property good against the mortgagor. We think that the amount spent by the mortgagee in getting decrees for possession was spent to make good his title against the mortgagor. It appears that he is entitled to these costs under the law in England. Paragraph 618 of the Halsbury's Laws of England, Vol. 23, p. 413 runs thus—The costs of litigation which are allowed include the following:—

(1).....(2) costs incurred in obtaining possession of the mortgaged property. Thus the mortgagee is allowed expenses of taking possession and the costs of an action to recover possession of the mortgaged property, and these may be included in his accounts as 'just allowances' without special mention in the order. No direct Indian ruling has been brought to our notice, but the principle is laid down in some cases. It was observed in *Nadershaw Sheriarji Rabadi v. Shirinbai Bapuji Musa*, (A. I. R., 1924 Bombay, page 264) (1), that there is no reason to think that the law in India is differ-

ent from the law in England, and a mortgagee is allowed proper costs, charges and expenses incurred by him in relation to the mortgage debt or mortgage security including the costs of litigation property undertaken by him. The suit for possession was undertaken by the mortgagee quite properly, because the mortgagor failed to deliver possession. The mortgagor was himself to be blamed, and he should not complain now. In another case *Varadarajulu Chetty v. Dhanalakshmi Ammal*, (26 Ind. Cas. p. 184) (2), the mortgagee was entitled to add to the mortgage money the costs incurred by him in defending an unsuccessful suit by the mortgagor. We see no reason on principle to differentiate that case from the present one. Dr. Ghosh in his *Law of Mortgage*, Vol. 1, 5th Edition, p. 573, makes the following observation:—

"The mortgagee is also entitled to spend money for supporting the mortgagor's title to the property, as well as for establishing his own security against the mortgagor."

The suit for possession was surely for establishing the mortgagee's security against the mortgagor. We are clearly of opinion that the mortgagee was entitled to spend money in bringing the suits for possession. The next point that arises is whether he is entitled to recover those costs in these proceedings under the Encum. Estates Act. The Encum. Estates Act altered the ordinary procedure for recovery of the mortgage money. Under s. 14 of the Act all the debtors, secured or unsecured, are bound to put in their claims, and the Special Judge shall exercise all the powers of the Court in which a suit for the recovery of the money would lie and shall decide the questions in issue on the same principles as those on which such Court would decide them. The Special Judge shall determine the claims and pass a simple money decree for the amount found due. Section 18 of the Act provides that the effect of a decree of the Special Judge shall be to extinguish the previously existing rights, if any, of the claimant, together with all the rights, if any, of mortgage or lien by which the same are secured. The mortgagor also becomes entitled to the possession of the property under s. 35 of the Act. The effect of the Encum. Estates Act is that the mortgaged property is redeemed by proceedings under it. We think that we should apply the same principles which would have been applicable, had a suit for sale or redemption been brought. The amendment of the Civil P. C.,

(1) A I R 1924 Bom. 264; 87 Ind. Cas. 129; 25 Bom. L R 839.

(2) 26 Ind. Cas. 184; A I R 1915 Mad. 402; 16 M L T 365.

in O. XXXIV, r. 2 and O. XXXIV, r. 7 by Act XXI of 1921 has made it quite clear that before redemption a mortgagee is entitled to costs other than those incurred in the suit itself, costs, charges and expenses properly incurred by him upto the date fixed for redemption together with the interest thereon. It was also held in the Bombay case above referred to "that a mortgagee is entitled at the time of redemption to all the costs incurred by him in making good his title to the property." We are therefore of opinion that the mortgagee is entitled to recover these costs in these proceedings. The costs incurred in the suits relating to Balchhat and Daulatpur were Rs. 1,276. (Their Lordship after mentioning the amounts which the applicants in each of the three appeals were liable to pay proceeded further.)

Point No. 2. There is a list on the file showing that the mortgagee spent Rs. 201-8-3 as costs in suits for arrears of rent brought by him against tenants. These suits were decreed from March 1927, to July 10, 1935. The Commissioner states in his report that the mortgagee at a very late stage in the proceedings when the chart was almost complete and the arguments practically heard wanted to file certain papers showing the amounts spent in litigation, and he could not accept them at that stage and returned them. An objection was taken that the Commissioner had erred in refusing to bring on record the papers filed by the mortgagee, although he got the accounts of legal expenses filed, but he did not award anything on that account. An issue was framed "Were the documents sought to be produced refused by the Commissioner without good grounds." It appears that the learned Special Judge has overlooked this issue, and there is no finding about it. It appears that the Commissioner in determining the income of the property had taken into account the amount of Rs. 97-5, cost of litigation which were realised. It was, therefore, very unfair on his part not to credit the mortgagee with the amount spent by him. The result is that the mortgagor gets credit for the amount which the mortgagee had spent from his own pocket. Section 72 of the T. P. Act before it was amended by Act XX of 1929, provided that when during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he may spend such money as is necessary for the due management of the property and the collection of the rents and profits thereof. By reason of the amendment this clause has been deleted but we find a corresponding

provision in cl. (h) of s. 76 of the T. P. Act. It provides that when during the continuance of the mortgage the mortgagee takes possession of the mortgaged property, the receipts from the mortgaged property after deducting the expenses properly incurred for the management of the property and the collection of rents and profits should be debited against him. It was held in *Basant Singh v. Mata Bakhsh Singh* (17 Oudh Cases, page 47) (3), that

"In the absence of any foundation for a suggestion of bad faith, the filing of suits to recover arrears of rent by a mortgagee in possession is an act of management and any expenses incurred in connection therewith are recoverable by the mortgagee under s. 72 of the T. P. Act."

In this case certain items had been realised by the mortgagee, and it was held that he was entitled to all the money spent by him. We are of opinion that the mortgagee is entitled to this amount from each applicant in proportion to his liability. He is entitled to Rs. 4-1-3 from the applicants-respondents in appeal No. 104, Rs. 44-12-6 from the applicants-respondents in appeal No. 105 and Rs. 16-12-9 from the applicant-respondent in appeal No. 106.

Point No. 3. The learned Special Judge was satisfied oral by the evidence recorded by the Commissioner that the mortgagee received certain *nazranas* amounting to Rs. 727-15 in all the villages. We see no reason to differ from him. It is argued that certain sorts of *nazranas* were not claimed by the mortgagors in their replications to the claims of the mortgagee. The learned Judge has considered this point. He held that after the appointment of the Commissioner the applicants added a number of other heads to those mentioned by them previously under which they alleged the mortgagee had received various sums of money from the tenants, and evidence was given on those points without any objection. It was within the power of the Court to allow the applicants to add to their pleadings, and this appears to have been done without any objection by the other side. We think it is too late for the mortgagee now to argue in appeal that evidence about the *nazranas* not mentioned in the replications should not have been given. It is said that the learned Judge has found that the mortgagee kept proper accounts, but no *nazrana* is mentioned in them. The mortgagee owns considerable other property, and it was found that the amount of *nazrana* is not mentioned in respect of other

property, even though it was admittedly realised by him. It appears that as the realisation of these *nazranas* is not legal they are not mentioned in the account books. We refuse to disturb the finding of the Special Judge on this point.

Point No. 4. It is not denied and cannot be denied in the face of the observations made by their Lordships of the Privy Council in *The Secretary of State for India in Council v. Saroj Kumar Acharya* (1935 O. W. N. page 261), (4), *Hurro Doorga Chowdhurani v. Maharani Surut Soondari Debi* (9 Indian Appeals, page 1) (5) and *Girish Chunder Lahiri v. Shoshi Shikhareswar Roy*, (27 Indian Appeals, page 110) (6) that profits mean amount realised minus the costs of collections, and in the absence of any evidence the costs of collections should be considered to be 10 p. c. It is however argued that there is evidence in this case that the costs of collections are much less, and reliance is placed on the statement of the mortgagee's witness Mohammad Kazim. He did not state anything about these costs in examination-in-chief, but he stated in cross-examination that he was paid Rs. 15 a month and there were two peons under him who were paid Rs. 3 each. It does not follow that the entire costs of collections were the salaries of these three servants. We think that the lower Court was right in allowing 10 p. c. as collection charges.

Point No. 5. The Commissioner and the Court both agreed that there was no reliable evidence to prove that any trees were cut in Purai Ahran, a hamlet of village Balchhat. The Commissioner was of opinion that certain trees were cut in villages Balchhat, Daulatpur and Guthia. The Commissioner relied on his own observation that there were some traces of the trees being cut. It was however, proved that the mortgagor had himself cut some trees before the mortgagee entered into possession. The mortgagee has kept proper accounts, and there is no reason for the price of the trees not being entered in them, had any being really cut. We see no reason to differ from the finding of the Special Judge on this point.

Point No. 6. A provision has been added by the Amending Act of 1939 to s. 14 of the Encum. Estates Act. It is that no pen-

dente lite interest shall be allowed in the case of any debt where the creditor was in possession of any portion of the debtor's property in lieu of interest payable on such debt. It is argued on behalf of the respondents that this provision was added in 1939, and so the lower Court in the absence of it was not entitled in 1937 to award interest from the date of dispossession of the mortgagee. The learned Counsel for the respondents has relied on certain rulings that the amendment should not have a retrospective effect but that very Act which amended s. 14 added s. 20-A cl. (v). Clause (v) of s. 20-A provides that any order passed otherwise than in accordance with the proviso to sub-s. 7 or s. 14 shall be cancelled. It is thus clear that the legislature meant to give this amendment a retrospective effect, and we see no reason to make any alteration in this order. If we were to allow pending interest the order is liable to be cancelled under the Amending Act of 1939.

Point No. 7. The Commissioner in his report dated May 25, 1937, found that Rs. 26,904-8-0 were due to the mortgagee on the bond of 1906. The amount to due on July 24, 1924, when the mortgagee took possession was Rs. 22,935. In the year 1924-1925 the income was Rs. 3,186-7-6 and the interest and expenses amount to Rs. 3182-2-2, and so the mortgagee got Rs. 4-5-4 more than the interest. This amount was deducted from the principal and the amount remaining due on July 24, 1925 was Rs. 22,930-10-8. In most of the subsequent years the income was less than the amount of interest and other expenses. The Commissioner found the amount due to the mortgagee at the end of each year and added it to the principal beginning from the second year. The learned Judge held that the mortgagee was not entitled to get any amount more than that received by him even if the amount of interest and other expenses were more. He has relied on two points—

(1) that the mortgagee never claimed the deficiency in profits in his claim, and

(2) that he was not legally entitled to it. We think that the learned Judge is wrong on both the points. The mortgagee's claim was that there should be no accounting and he was entitled to the possession of the property in lieu of his interest. The applicants themselves pressed for account and the Court accepted their contention in its order dated April 23, 1937. The Commissioner was then appointed to prepare accounts and he did it as claimed on behalf of the mortgagee. The applicants then objected to it and their

(4) 1935 O W N 261; 154 Ind. Cas. 1; 7 R P C 142; A I R 1935 P C 49; 41 L W 284; (1935) M W N 165; 1935 A L J 438; 39 C W N 405; 1935 R D 94; 68 M L J 580; 37 Bom. L R 327; 62 C 499 (P C).

(5) 9 I A 1; 8 C 332; 4 Sar. 304; 6 Ind. Jur. 146 (P C).

(6) 27 I A 110; 27 C 951; 10 M L J 356; 4 C W N 631; 2 Bom. L R 709; 7 Sar. 687 (P C).

objection was allowed by the Court. The mortgagee had never any opportunity to state before the applicants objected that they were entitled to the portion of the interest which was not paid by the profits. The accounting denotes the idea that the mortgagee would be entitled to his interest and would give account of the money received by him after deducting the legal expenses. We are of opinion that the learned Judge was not justified in not awarding the shortage of interest to the mortgagee on the ground that it was not claimed by him in his claim.

The second point taken by the learned Judge is that there is a covenant in the deed that the mortgagor would make up this deficiency out of his other property. The reference is to para. 7 of the mortgage deed of 1906 which runs thus—

"That if at the time of taking possession over the property by the said mortgagee or at any time in future there occurs a deficiency in the profits of the property noted in the deed, I, the declarant shall make up the deficiency out of my other property, and I, the declarant, shall have nothing to do with the enhanced amount of rent."

It is clear that the mortgagor was liable if the entire amount of interest was not realised from the profits of the property. The question is whether by reason of his taking a personal liability to pay the deficiency in profits the mortgagee is not entitled to recover it from the mortgaged property. It was held by the Privy Council in *Ganga Ram v. Natha Singh* (I. L. R. 5 Lahore, page 425), (7), that

"a mortgagee is entitled to treat interest due under a mortgage as a charge upon the mortgaged property in the absence of any contract to the contrary."

There is no provision in the deed that the interest be not a charge on the property. In 10 O. W. N. 299 *Bachulal v. Syed Mohammad Mah* (8) there was a covenant in the deed that if any portion of the mortgaged property was acquired for Govt. purposes and any decrease in the profits payable to the mortgagee occurs for that reason or if the mortgagee has to pay any other kind of new Govt. cess with regard to the mortgaged property and the same cannot be realised from the tenants, then the mortgagor will pay the deficit in the annual profits out of his own pocket. It was held that notwithstanding

(7) 5 L 425; 80 Ind. Cas. 820; 11 O L J 534; 2 Pat. L R 257; 20 L W 101; 26 Bom. L R 750; A I R 1924 P C 183; 22 A L J 688; 47 M L J 64; 10 O & A L R 771; 35 M L T 141; (1924) M W N 559; 6 Lah. L J 551; 51 I A 377; 1 L C 446; L R 5 A (P C) 133; 6 P L T 97; 1 O W N 469; 29 C W N 559 (P C).

(8) 10 O W N 299; 144 Ind. Cas. 1025; 37 L W 537; (1933) M W N 278; 37 C W N 457; (1933) A L J 350; A I R 1933 P C 136; 6 R P C 7 (P C).

this covenant the mortgagee was not prevented from claiming the deficiency in the profits at the time of redemption. The case of *Ganga Ram v. Natha Singh* (I. L. R. 5 Lahore, page 425) (7) has been followed in several cases by the Courts in India. It was held in *Raj Raj Singh v. Sheonarain Lal* (A. I. R. 1928 Patna, page 398), (9) that

"a mortgagee in the absence of any contract to the contrary is entitled to treat the interest due under the mortgage as a charge on the property, and the mere fact that there is an express reference to interest in the personal covenant and no express reference to interest in the hypothecation clause is not evidence to the contrary."

The Lahore High Court in *Manghi v. Dial Chand* (96 Ind. Cas., page 477) (10) held that

"in the absence of any contract to the contrary a mortgagee is entitled to treat interest due under the mortgage as a charge on the property, and the fact that the mortgagor has made himself personally liable makes no difference."

Several cases are cited in Mitra's Transfer of Property Act, 9th Edition, para. 331 in support of this view.

The learned Counsel for the respondents has relied on *Farzand Ali v. Mirza Sadiq Hussain Khan* (22 O. C. page 270) (11). In that case there was a stipulation that if the mortgagee had to pay enhanced revenue, he was entitled to realise it from the mortgagor by bringing a suit against him, and it was held that this stipulation was incompatible with the mortgagee having a right to add the excess to the mortgage money. We cannot follow this case in the face of the subsequent rulings cited above. The other case relied upon by the respondents is *Mirza Abid Hussain v. Kaniz Fatima*, (27 O. C., page 72) (12). In that case the case was of the liability of the mortgagor to pay enhanced revenue, and it was held that he was not liable at all, so there was no question whether the property was liable or not. The third case relied upon by the respondents is *Said Ahmad v. Raja Barkhandi Mahesh Pratap Narain Singh*, (1932 O. W. N., page 253) (13). In that case money was left with a mortgagee to pay off a prior mortgage, and there was a stipulation that

(9) A I R 1928 Pat. 398; 110 Ind. Cas. 594; 9 P L T 785.

(10) 96 Ind. Cas. 477; 8 Lah. L J 432; A I R 1926 Lah. 624; 27 P L R 643; 7 L 559.

(11) 22 O C 270; 54 Ind. Cas. 264; A I R 1919 Oudh 50.

(12) 27 O C 72; 80 Ind. Cas. 1019; A I R 1924 P C 102; 10 O & A L R 281; 22 A L J 284; 34 M L T 78; 19 L W 703; 46 A 269; 11 O L J 427; (1924) M W N 657; 29 C W N 214; 51 I A 157; L R 5 A (P C) 212; 1 O W N 33 (P C).

(13) 1932 O W N 253; 139 Ind. Cas. 64; A I R 1932 Oudh 255; Ind. Rul. (1932) Oudh 339.

if the mortgagee had to pay more than the money left, the mortgagee would be personally liable. That case is quite distinguishable from the present one. We are of opinion that the mortgagee is entitled to recover the deficiency in the profits at the time of redemption.

We have shown above that the mortgagee is entitled to get a decree for all the amounts which he could claim at the time of redemption. It is argued on behalf of the appellant that the mortgagee is also entitled to interest on the deficiency, that is compound interest. Reliance is placed on para. 2 of the mortgage deed, dated February 3, 1906. It provides that the period of mortgage is 20 years but the mortgagor shall have power after the expiry of 5 years from the date of the deed to pay off in a lump sum the entire mortgage money with interest which may be due up to the date with one six monthly instalment of interest more than may be due in future, than the property noted in the deed shall be redeemed. Reliance is also placed on para. 4 which provides that in case any two instalments of interest be not paid the mortgagee will be entitled to possession and the amount of interest falling in arrears having been included in the principal interest at the said rate shall be paid thereon also and on the last portion of para. 7 quoted above. We do not think that the mortgage deed entitles the mortgagee to claim compound interest after taking possession of the property. We are of opinion that he is entitled to claim deficiency in the profits but not interest thereon. According to the report of the Commissioner dated May 25, 1937, the amount due on July 24, 1925, was Rs. 22,930-10-8, and there was a deficiency of Rs. 20-12-11. We do not add this deficiency to the mortgage money then due and thus the amount due on July 24, 1926 was Rs. 22,930-10-8. One year's interest on that amount comes to Rs. 1,547-13-1. The profits were Rs. 31-13-8 more and that amount has to be excluded from Rs. 22,930-10-8. The balance is Rs. 22,898-13-0. This was the mortgage money due on July 24, 1927. The account ought to be as follows : (After stating the account their Lordships proceeded further.)

The mortgagee is entitled to get Rs. 22,898-13-0 plus Rs. 3,261-14-10 total deficiency in profits plus Rs. 122-8-0 interest from July 24, 1935, to August 24, 1935 total Rs. 26,283-3-10. Out of this amount Rs. 147-7-0 will be deducted on account of *nazranas*. The balance is Rs. 26,135-12-10.

Sartaj Fatima is liable to pay 1/10th of it i. e. Rs. 2,611-9-3.

The result is that appeal No. 104 is allowed to the extent of Rs. 4-1-3 costs of rent suits and Rs. 25-12-6 costs of the suit for the recovery of possession—total Rs. 29-13-9. The rest of the appeal and the cross-objections are disallowed. Appeal No. 105 is allowed to the extent of Rs. 44-12-6 costs of rent suits and Rs. 283-9-0 costs of the suit for recovery of possession—total Rs. 328-5-6. The rest of the appeal and the cross-objections are disallowed. Appeal No. 106 is allowed to the extent of Rs. 336-7-0, (difference between Rs. 2,611-9-3 found by us and Rs. 2,275-2-3 allowed by the lower Court), deficiency in profits allowed by us on account of the bond, dated February 3, 1906, Rs. 16-12-9 costs of the suits for arrears of rent, Rs. 106-5-4 costs of the suit for recovery of possession of the mortgaged property on the basis of mortgage-deed, dated January 16, 1905, and Rs. 64-9-0 costs of the suit for recovery of possession of the mortgaged property on the basis of deed, dated February 3, 1906—total Rs. 524-2-0. The rest of the appeal and the cross-objections are disallowed. The parties will get and pay costs of the appeals in proportion to success and failure. The respondents will pay to appellant costs in respect of the cross-objections. The appellant will also get proportionate costs in the lower Court on the amounts decreed in each appeal.

s.

Order accordingly.

PATNA HIGH COURT

Criminal Appeal No. 198 of 1940

December 4, 1940

ROWLAND AND SHEARER, JJ.

MAHADEO NATH KHETRI AND OTHERS

—APPELLANTS

versus

EMPEROR—RESPONDENT

Penal Code (Act XLV of 1860), ss. 34, 302, 201 to 203, 107, 114—Murder—Common intention—Four persons taking part in commission of murder—No evidence to prove which of accused committed crime—All if can be convicted of murder—Abetment, what amounts to—Presence of abettor—He must be deemed to have committed crime—Ss. 201 to 203, applicability of—Offender committing crime and causing evidence of its commission to disappear, if can be convicted under ss. 201 to 203.

Mere presence without proof of any act or omission done to facilitate the offence or at least without proof of the existence of a common intention will not be sufficient under s. 34, I. P. C., to support a conviction. [p. 625, col. 2.]

Where however four persons were inside the house in which a murder was committed and although the victim was crying out loud enough to be heard by the neighbours

as well as those inside the house none of them did anything to prevent the commission of the crime :

Held, that the statutory duty was cast upon the persons who were inside the house, by s. 44, Criminal P. C., to take measures to prevent the completion of the crime and as none of them did any such thing all of them must be held either to have taken an active part or by wilful acquiescence to have furthered the intention of all that the crime should be carried to its completion and that no outsider should have a chance to interfere. [*ibid.*]

Held, further that in the circumstances of the case even if there was no evidence to prove as to which of the persons present in the house committed the murder all the four could be convicted of murder. [p. 624, col. 1.]

Where the intention to cause death has been present it will make little or no difference that the Court cannot determine at what precise point in the course of a series of acts of violence the victims of the crime expired. 186 Ind. Cas. 256 (1), referred to. [p. 626, col. 1.]

Per Rowland, J.—The true principle is that there is no law preventing the main offender being convicted under ss. 201 to 203, but in practice no Court will convict an accused both of the main offence and under these sections. [p. 629, col. 1.]

[Case-law discussed].

Per Shearer, J.—A person who, having committed an offence, subsequently causes evidence of the commission of that offence to disappear, does not in so doing, commit another separate and distinct offence for which the Courts have in strict law jurisdiction to impose a separate punishment. *R. v. Watson* (23), referred to. [p. 630, col. 1.]

Quere.—Whether s. 201, I. P. C., applies to the accused who has committed an offence and caused the evidence of its commission to disappear with the intention of screening himself from legal punishment.

It amounts to abetment within s. 107, I. P. C., if a person intentionally aids by any act or illegal omission the doing of a criminal act and if a person is present, who if absent would be liable to be punished as an abettor, he is deemed under s. 114 to have committed the crime. [p. 625, col. 2.]

Cr. A from a decision of the Judicial Commissioner of Chota Nagpur, dated August 27, 1940.

Sir M. N. Mukherji and Mr. K. K. Banerji, for the Appellants.

The Govt. Pleader, for the Crown.

Rowland, J.—The four appellants, Mahadeo, Sahdeo who are brothers and Chhatu and Anand who are uncles of the former two all live in the same house. Chamni a widowed sister of Mahadeo and Sahdeo was also living in the same house with them. It was the prosecution case that Maheshwar Nath was carrying on an intrigue with this Chamni which the four appellants resented; that on February 14, 1940, at night Maheshwar had entered the house of the accused and was caught in Chamni's room by the appellants who inflicted numerous injuries on him and threw his body into a well in the village. They were charged along with Chamni and another woman of the house, Sucha, with offences of murder s. 302/34 of the I. P. C. and causing disappearance of evidence of an offence-s. 201/34 of the I. P. C.

The two women were acquitted, but the four appellants have been convicted of both offences and sentenced on the former charge to transportation for life and under the latter to rigorous imprisonment for three years each, the sentences being directed to run concurrently.

The facts have been stated with clearness and precision in the judgment of the learned Judicial Commissioner. There is no eye-witness of the murder, and the case rests on circumstantial evidence which it is contended for the appellants does not establish the case against the accused. Moreover, appellant No. 2 Sahdeo has pleaded *alibi*. The evidence is quite clear that the relations between Maheshwar and the men of the accused's household were unfriendly. In June 1938, Maheshwar had occasion to report, at the Police Station an assault on himself by Mahadeo in which Maheshwar's umbrella was broken and Mahadeo threatened Maheshwar. Witness Deopal father of the deceased has spoken as to the intrigue between Maheshwar and Chamni and as to quarrels arising at different times in the last two years between Maheshwar and Mahadeo, Sahdeo and Anand respectively. This evidence is not seriously challenged. On the last occasion referred to by Deopal, Maheshwar had entered the house of Sahdeo at night and was caught by accused Anand who beat him with a *lathi*, but Maheshwar managed to escape. There is no reason to doubt the fact of the motive set up by the prosecution and it is a motive sufficient to account for the crime alleged against the accused, particularly when coupled with the fact that Maheshwar had entered the house of accused on the night in question. As to that there is no witness who saw him enter, but during the night three witnesses Manu Lal, P. W. No. 2, Mohan Lal, P. W. No. 5 and Ramsewak, P. W. No. 10 heard the voice of Maheshwar from within the house of Mahadeo cry out that he was being killed. These three witnesses are very near neighbours whose evidence the Judicial Commissioner has accepted and we have been shown no reason why it should be doubted. In fact Manu and Mohan later on the same night told Deopal what they had heard and Deopal after first looking to see whether Maheshwar was in his own room and finding him missing went to the house of Mahadeo with some neighbours and called out to those inside. There was no answer, although they could see lights and could hear sounds of movement which they have described as resembling the rattling of buckets.

Deopal was so alarmed that he went to Police Station Bero and reported his son's absence and the circumstances at 7 A. M. on the morning of February 15, 1940. On investigation the body of Maheshwar was found in a well in the village. Three of the accused, Mahadeo, Anand and Chhatu were found in the house, but Sahdeo was missing. Blood stains were found in several of the rooms such as satisfied the Sub-Inspector, the Judicial Commissioner and in fact leave no doubt that the rooms inside the house and particularly the room in the occupation of Chamni had been the scene of bloodshed. The body had been disposed of by throwing in a well in the village after drawing up over the head of the victim his vest, shirt and pull-over and then tying a comforter round them and the head. Medical evidence was that death was due apparently to suffocation and the injuries on the person of the deceased, though fairly numerous were not individually sufficient to account for the death and collectively the witness would not have expected them normally to cause death. No witness was found who had seen the body being thrown into well, but there is one witness Jalia Oraon, P. W. No. 21 a near neighbour who says that during the night getting up to ease himself he saw four persons carrying something in a direction from north-west to south-east, but that seeing him they turned back towards north-west. It is the case for the prosecution that this party was the party of the accused carrying the body of the deceased. Jalia has said that he heard Mahadeo say: "Uncle a man is there" which led to the party reversing their direction. The Judicial Commissioner accepted the evidence of Jalia and found that the materials before him established that the murder was committed inside the house of the accused, that all four of the appellants were in the house at the time when the assault on Maheshwar was being committed and that the murder could not have been carried through without the concurrence and connivance of them all and that it may be said with reasonable confidence that Jalia saw the four appellants removing the dead body. On this view he has convicted the appellants as above stated. Sir M. N. Mukherji before us has not attempted to dispute that the deceased died as a sequel to an assault made on him within the house of the appellants and probably by some one or more of the appellants; but it is said that there is no means of proving which of the persons present in the house committed the murder and therefore

none of the appellants can in the absence of better evidence than the Crown has been able to produce be convicted at all. Sir M. N. Mukherji has also argued that there is not sufficient material to support a finding of the presence of Sahdeo in the house on that night. As regards the evidence of Jalia, he has argued that the witness is thoroughly unreliable and that his story should have been discarded as utterly worthless. Sahdeo's statement was that he had left the village on the morning of the 14th, but there are numerous witnesses Deopal, Chabindra, Ramséwak, Ramdeo, Debendra and Gurindra by whom he was seen and who prove his presence in the village up to the evening of the 14th; but he on the other hand has adduced no evidence of his absence. Taking the evidence along with the medical evidence of marks of injury still present on his person when he was examined on March 12, after his arrest, it may fairly be said that the probabilities are strongly in favour of his having been in the house and participating in some violent action.

As regards Jalia, the learned Judicial Commissioner accepted his evidence without much criticism; but it is pointed out that this witness may have some hostility against the accused. In a litigation between Padam Kuer and Kausilla, Jalia was a witness for the defendants, but Mahadeo was on Padam Kuer's side. Jalia also gave evidence against Mahadeo in a case in which a decree-holder had applied to prosecute him and others for cutting attached paddy. It is further pointed out that the witness himself is not a person of very high standing, and it is suggested that he has had a chequered career. He was an *amin* in the cadastral settlement. The circumstances under which he left that service are not explained, but he repudiates the suggestion that he was dismissed for his misconduct. He had some land on *saika* lease from the Maharaja and it seems he defaulted in paying rent and a decree was obtained against him which he, did not satisfy, but that he says was 25 or 30 years ago. Later he became clerk of a Pleader whose services also he has left; but he denies the suggestion that he was accused of embezzling the clients' money and there is no evidence to support the suggestion. He is working now as clerk of another Pleader Kunja Babu of Ranchi and he admits that before he obtained this post, he was unemployed for three years. He has been in debt to Kirpal Munshi who got a decree against him in satisfaction of

which he executed a handnote. He was also in debt to Khwaja Moinuddin for cycle hire and executed a handnote in his favour. These matters transpired in his own evidence and there is nothing to show that he has not been candid. It is further suggested that his statements do not agree with those of other witnesses in respect of the time of occurrence. He told the Sub-Inspector that when he went to ease himself the moon was about setting. That would put the time as near midnight, it being about 7 or 8 days after the full moon. He however, in Court says that it was dark and does not mention the moon at all, no question being asked in cross-examination as to whether the moon had set. According to the other witnesses it was between 2 and 3 a.m. when Deopal was informed by Mohan and Manu; and Manu has described it as being after midnight when he heard the cries of Maheshwar. Some difference in estimates of time can be reasonably expected in dealing with incidents which occur in the night and time for those who have not a watch can only be estimated by guess. I do not think that the discrepancies in the matter of time are fatal to the evidence. The significance of the story that Jalia told can best be understood by reference to the sketch map Ex. 15. In this the house of accused is at A. that of Jalia is at S and there is a well between the house of Jolia Christian at N and S into which it might well have been convenient for the murderers to throw the body of Maheshwar. To do so they would proceed a short distance southward from A and then in a south-easterly direction to the well marked in pencil O. Jalia coming out to ease himself would be likely to do so quite near this well and his story is that seeing him they turned back on their tracks. The well at B in the sketch map in which eventually the body was found is considerably further from the place of occurrence than the other well of which I have been speaking, and the fact that the body was taken to this well a longer distance and passing more than one house on the way is well accounted for if Jalia's story is accepted. After considering Jalia's evidence carefully, I am of opinion in agreement with the Judicial Commissioner that the fact deposed to by him is true. If that is so, and if it was the body which was being carried, it proves that the persons who were disposing of it were four in number and this goes to corroborate the prosecution case that not only the other three accused but Sahdeo also was in the house of the appellants on the night, in

question. I conclude that Sahdeo was there. The question then remains whether the evidence suffices to bring the crime home to individual accused or merely as contended by the defence to support a finding that the murder must have been done by one or more of their number, but that the evidence will not show which is the guilty one and therefore they ought to be acquitted. I am prepared to accept the proposition advanced by Sir M. N. Mukherji with reference to s. 34 of the I. P. C. and mere presence without proof of any act or omission done to facilitate the offence or at least without proof of the existence of a common intention will not be sufficient to support a conviction. Certainly if common intention is proved it will be no answer to say that the prosecution have not established which of the acts done in the commission of a crime was done by each individual accused. We may also refer to the sections dealing with abetment. It amounts to abetment within s. 107, I. P. C., if a person intentionally aids by any act or illegal omission the doing of a criminal act, and if a person is present, who if absent would be liable to be punished as an abettor, he is deemed under s. 114 to have committed the crime. Now in the present case it has been found by the Judicial Commissioner, and I would accept the finding, that all the persons within the house must have known what was going on. Maheshwar was crying out loud enough, to be heard by the neighbours as well as those inside the house. If murder was about to be done or was being done by one or two of the appellants, the others hearing Maheshwar's cries and knowing what was happening or about to happen had the statutory duty cast upon them by s. 44 of the Criminal P. C. forthwith to inform the Magistrate or Police Officer. If that could not be done in time to prevent the completion of the offence any of them could by opening the door and calling in the neighbours have saved the life of Maheshwar. Not one of the four accused did any such thing and all of them must be held either to have taken an active part or by wilful acquiescence to have furthered the intention of all that the crime should be carried to its completion and that no outsider should have a chance to interfere. With this we have also to consider that injuries were found on the person of every one of the appellants which though not conclusive indicate a probability that they had all taken part in a violent struggle. I think, therefore that we ought to uphold the finding of the Judicial Commissioner that all four appellants had

taken part in the crime and in the disposal of the body. It is possible that the murder was not completed inside the house. The medical evidence as already observed suggests that the direct cause of death was suffocation which may have supervened when it was thrown into the well. If they threw him in the well believing that he was dead and did not know that by so throwing him they were causing his death, would they be guilty of murder? That is a position similar to the one considered in *King-Emperor v. Nehal Mahto* (1) in which it was held that the test is whether the intention to cause death has been present and if it is, it will make little or no difference that the Court cannot determine at what precise point in the course of a series of acts of violence the unfortunate man expired. The appellants are, therefore, guilty of murder.

As they must for the offence suffer the sentence of transportation for life, and as no separate sentence has been imposed under s. 201, the accused in this case are not personally affected by whatever we may decide on the question whether they are liable at the same time to be convicted for the offence under s. 201 of concealing evidence; but the Judicial Commissioner has convicted them and it is for consideration whether that order should stand. It has been found that the offence of murder had been committed, that the accused caused the evidence of its commission to disappear and that their intention was to screen themselves and each other from legal punishment. *Prima facie*, no ingredient mentioned in s. 201 of the I. P. C. would appear to be absent; but in Ratanlal's Law of Crimes the section is paraphrased thus: Whenever an offence has actually been committed, any person *other than the offender* knowing or having reason to believe that it has been committed and intending to screen the offender from legal punishment causes any evidence of the commission to disappear shall be punished. The words "other than the offender" do not appear in the section itself. The paraphrase however represents a view of the law which has been often taken by Courts in India. This line of Judicial opinion can be traced back to *Reg v. Kashinath* (2). This was a trial arising out of some frauds and the accused it seems had caused the disappearance of evidence which would have proved the fraud against them. The submission in the memorandum of appeal of the petitioners

had been

"That according to the I. P. C., s. 201, it is necessary for the commission of the offence that the evidence against a third person should be made to disappear, which has not been done in this case."

The argument adduced was that the law (s. 201) applies to the causing the disappearance of evidence of an offence committed by another and not by the person who is charged with causing the disappearance. This argument was rested on something to be found in Mayne's Commentaries and to Bengal rulings to the effect that "the section applies to the causing the disappearance of evidence of an offence committed by another, not by oneself", and that "the person who commits an offence, and afterwards conceals the evidence of it, cannot be punished on both heads of charge." The case of *Queen v. Ramsunder* (3) appears to be one of those rulings: Ramsunder had been convicted of causing hurt and also of concealing evidence of the commission of that offence under s. 201, I. P. C.; for the two offences he had been awarded separate and consecutive sentences. I quote the whole of the reasoning in the judgment:

"The conviction under s. 201 we hold to be illegal. That section refers to prisoners other than the actual criminals who by their causing evidence to disappear, assist the principals to escape the consequences of their offences. But the person who commits an offence and afterwards conceals the evidence of it, cannot be punished on both heads of the charge according to the terms of the I. P. C."

The other pronouncement is not in a judgment of the Court, but in a letter from the Registrar commenting apparently on a sessions statement. It is reproduced in 5 W. R. Cr. Letters p. 5 and runs as follows:

"With reference to the case of Jangeea Tantee and others (Case No. 2 of Statement No. 4), the Court observe that the prisoner Jangeea Tantee has been convicted of grievous hurt under s. 325 of the I. P. C., and causing the evidence to disappear to screen himself from legal punishment (s. 201 of the I. P. C.), and has received separate sentences for each offence. This does not seem to the Court proper, as s. 201 applies to the causing the disappearance of evidence of an offence committed by another, not by oneself. At any rate, in the present case, the commission of grievous hurt and the offence under s. 201 were not distinct acts, but were part of one continuous transaction and, as such, should not have received separate punishments though the acts of the prisoner, subsequent to the causing of grievous hurt (*vide illustration*), may be matters which may properly be taken into consideration in awarding punishment. As the sentence is not excessive, the Court will not interfere, unless on appeal it may be found necessary to do."

There is nothing to show that arguments were heard for the party or for the Crown before issuing this letter.

Returning to Dinkar's case, the Bombay Judges reasoned thus:

"as there is no law which obliges a criminal to
(3) 7 W R 52 Cr.

(1) 18 Pat. 485; 186 Ind. Cas. 256; A I R 1939 Pat. 625; 6 B R 316; 41 Cr. L J 276; 12 R P 505.
(2) 8 B H C R 126.

give information which would convict himself, it is evident that ss. 202 and 203 (intentionally omitting to give information; giving information known to be false) could not apply to the person who committed that offence i. e., the offence which he knew had been committed; and s. 201 should, we think, be construed in a similar manner; and looking at the only illustration which follows s. 201, it would appear that the law was intended to apply exclusively to 'another' and we are, therefore, of opinion that the conviction of the accused, as accessories to an offence known or believed to have been committed by themselves is illegal".

Following this decision a similar view has been taken in *Empress of India v. Kishna* (4) in the *Empress v. Behala Bibi* (5) in *Queen-Empress v. Lalli* (6) in *Queen-Empress v. Dungar* (7) in *Torap Ali v. Queen-Empress* (8) in *Samata Dhupi v. King-Emperor* (9) and in *Teprinessa v. Emperor* (10). All these are either based on Dinkar's case or simply follow one another. The decision in *Torap Ali v. Queen-Empress* (8) is the limit; this has been described as "an example of how justice is defeated" in one of the cases I shall be quoting later, and in the two succeeding Calcutta decisions the Judges show uneasiness and try to find an intermediate position. But logically there is no intermediate position. If Dinkar's case was rightly decided so was Torap's; if Torap's is wrong, so is Dinkar's.—Dinkar's case is direct authority for the proposition that a man could not lawfully be charged with any substantive offence and in the alternative with the offence under s. 201; it follows that he could not lawfully, on a charge of murder, be convicted of the other offence s. 201 because the section is not meant to apply to criminals, but only to the innocent. But ought the Courts to engraft on a section in this manner words of qualification or exception which the Legislature has not seen fit to put there? When the section forbids any man to do away with evidence of any crime, is it open to a Court by a stroke of the pen and without hearing argument to say it does not forbid a man to do away with the evidence of his own crime?

I cannot find that this method of construing a Statute has ever been approved by the Privy Council. They say in *Ramnandi Koer*

v. Kalawati Koer (11).

"It has often been pointed out by this Board that where there is a positive enactment of the Indian Legislature the proper course is to examine the language of that Statute and to ascertain its proper meaning, uninfluenced by any considerations derived from the previous state of the law or of the English Law upon which it may be founded".

The word "often" in the passage cited shows that pronouncements to the same effect are numerous and I do not propose to multiply references to them. I may refer to a decision of the House of Lords in *Vacher & Sons v. London Society of Compositors* (12), in which Lord Atkinson said:

"a Court of Law has nothing to do with the reasonableness or unreasonableness of a provision of a statute, except so far as it may help it in interpreting what the Legislature has said. If the language of a statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results".

Other noble and learned Lords expressed themselves in similar terms. I may cite also one more decision of the Privy Council in *Pakala Narayana Swami v. Emperor* (13), where it is said:

"in truth when the meaning of words is plain it is not the duty of the Courts to busy themselves with supposed intentions".

The principles have been consistently asserted; and with great respect to the learned Judges I would hardly expect the interpretation placed on s. 201, by the above line of authority to receive the approval of the Privy Council in any case which came before their Lordships. Such a case arose in *Begu v. King-Emperor* (14), with the result that was expected by those most conversant with the fundamental principles of construction consistently and repeatedly laid down by their Lordships.

Some of the High Courts had already realized the inconvenience, the absurdities to which the decision in Dinkar's case logically must lead; some of these were denounced

(11) 7 Pat. 221; 107 Ind. Cas. 14; A I R 1928 P C 2; 5 O W N 96; I L T 40 Pat. 19; 30 Bom. L R 227; 47 C L J 171; 54 M L J 281; 9 P L T 97; 32 C W N 402; 26 A L J 385; (1928) M W N 282; 27 L W 782 (P C).

(12) (1913) A C 107; 82 L J K B 232; 107 L T 722; 57 S J 75; 29 T L R 73.

(13) 18 Pat. 234; 180 Ind. Cas. 1; A I R 1939 P C 47; 1939 O L R 134; (1939) M W N 185; 40 Cr. L J 364; 11 R P C 166; 1939 O W N 282; 20 P L T 265; 49 L W 349; 43 C W N 473; (1939) A L J 298; 41 Bom. L R 428; 41 P L R 272; 69 C L J 273; 5 B R 440; (1939) M L J 756; 66 I A 66; (1939) Kar. (P C) 123 Sup; 6 C L T 25 (P C).

(14) 52 I A 191; 88 Ind. Cas. 3; 2 O W N 447; 48 M L J 643; 41 O L J 437; 27 Bom. L R 707; 3 Pat. L R 95 Cr.; A I R 1925 P C 130; 6 L 226; 23 A L J 636; (1925) M W N 418; 26 Cr. L J 1059; 7 Lah. L J 324; 30 C W N 584 (P C).

(4) 2 A 713.

(5) 6 C 789.

(6) 7 A 749.

(7) 8 A 252.

(8) 22 C 638.

(9) 20 C W N 166; 32 Ind. Cas. 132; 17 Cr. L J 4; 23 C L J 333; A I R 1916 Cal. 919.

(10) 46 C 427; 47 Ind. Cas. 275; 19 Cr. L J 903; A I R 1919 Cal. 679.

by the High Courts which had not fallen into them and renounced by those which had in Calcutta for instance, in *Umed Sheikh v. King-Emperor* (15), approved and followed in *Durlav Namasudra v. Emperor* (16), in Lahore in *Bulagi v. Crown* (17), and *Ditta v. Crown* (18), in Oudh in *Mata Din v. King-Emperor* (19). A Bench of the Allahabad High Court in *Emperor v. Har Piar* (20), addressed themselves to the construction of the actual words s. 201 and said:

"we are unable to agree with the view that a person who has actually committed a crime himself whether murder or any other crime—is any of the less guilty of removing traces thereof, if it is proved against him that he has done so, because he was the person who actually committed the offence. If the Legislature intended to provide such an exception, they would undoubtedly have said so in express language".

In that case, however, the Bench though dissenting from two of the earlier decisions based on Dinkar's case did not examine that case itself. That was done by a Bench of the Madras High Court in *re Chinna Gangappa* (21), where the Judges point out that the *ratio decidendi* of *Reg v. Kashinath* (2), has nowhere been examined in the succeeding cases; and they say: "It seems to us to rest on a *petitio principii*." The reason given is that as there is no law now which obliges a criminal to give information which would convict himself, it is evident that ss. 202 and 203 could not apply to a person who committed that offence, that is, the offence which he knew had been committed. Obviously, if there is no law to that effect, then ss. 202 and 203 will not apply. The question rather is whether ss. 201 to 203 do not embody such a law. On the face of them there is nothing to show that they do not apply to the main offender himself. Section 44 of the Criminal P. C. which is the generic section relating to the duty of persons to give information about grave offences including murder, and s. 45 (d) of that Code which lays on any owner or

occupier of land the duty of giving information regarding the occurrence in his village of any sudden or unnatural death, do not in terms exclude the offender himself. These sections of the Criminal P. C. would be relevant in a case under s. 202, I. P. C. where it is necessary that the accused should be legally bound to give information regarding the offence; but even this qualification does not appear under s. 201 or s. 203. What is required there is merely that there should have been an offence and that the accused has given false information about it, with the added intention in the case of s. 201, I. P. C. of screening the offender. We can not, therefore, see wherefrom comes the proposition which is the foundation of *Reg. v. Kashinath* (2), that there is no law which obliges a criminal to give information which would convict himself. There is such a law in the case of grave offences and sudden deaths, and in theory the offender himself could be convicted for breach of that law under ss. 201 to 203, I. P. C. In practice, no doubt, if he has been convicted of the offence itself, no Court will think it worthwhile to convict him also under ss. 201 to 203, I. P. C. If the proposition laid down in *Reg. v. Kashinath* (2), is carried to its logical conclusion, it would appear that it is improper to try an accused person as the present accused has been tried, in the same trial under both ss. 302 and 201, I. P. C., because a perfect defence to s. 201, would be a plea and proof that he himself was the murderer, and an accused would be entitled to say that the plea he proposes to make to the charge under s. 201 will depend on whether he is acquitted or convicted of the principal offence; and that to call upon him to plead to the charge under s. 201, before and until he knows what the verdict on the murder charge is, would be to deprive him of his legitimate defence. It would also in a case where the Court regards proof of his complicity in the actual offence as insufficient to establish his guilt compel the Court to let him go free, even though it is satisfied that he gained his acquittal on the main offence by his own concealment of the traces of the crime. This was exactly what happened in *Reg. v. Kashinath* (2), and it is hardly compatible with justice that the actual offender should escape conviction under ss. 201 to 203 because he is the actual offender in the main crime, while those who merely witnessed it but gave false information about it are punishable under ss. 201 and 203. This means that the more successful a criminal is in con-

(15) 30 C. W. N. 616; 96 Ind. Cas. 967; 27 Cr. L. J. 711.

(16) 59 C. W. N. 1040; 138 Ind. Cas. 116; A. I. R. 1932 Cal. 297; 36 C. W. N. 733; (1932) Cr. Cas. 266; Ind. Rul. (1932) Cal. 417; 33 Cr. L. J. 546.

(17) 9 L. 671; 112 Ind. Cas. 347; A. I. R. 1928 Lah. 476; 29 Cr. L. J. 1019.

(18) 10 L. 213; 110 Ind. Cas. 682; 29 Cr. L. J. 746; A. I. R. 1928 Lah. 906; 10 A. I. Cr. R. 562.

(19) 5 Luck. 255; 123 Ind. Cas. 886; 6 O. W. N. 1017; A. I. R. 1930 Oudh 118; Ind. Rul. (1930) Oudh 182; 31 Cr. L. J. 575.

(20) 49 A. 57; 97 Ind. Cas. 44; L. R. 7 A. 156 Cr.; 27 Cr. L. J. 1068; 24 A. L. J. 958; A. I. R. 1926 All. 737.

(21) 54 M. 68; 129 Ind. Cas. 230; 32 L. W. 389; (1930) M. W. N. 489; A. I. R. 1930 Mad. 870; 59 M. L. J. 677; 32 Cr. L. J. 263; Ind. Rul. (1931) Mad. 230; (1930) Cr. Cas. 1126.

cealing his own offence, the more the law will assist him in escaping justice altogether, and, unless the Court holds without reasonable doubt that the accused did not take part in the murder, the Court is bound to give him the benefit of the doubt and acquit him of offences under ss. 201 to 203. The case reported in *Torap Ali v. Queen-Empress* (8), is another practical example of how justice is defeated by such a theory of the law. The true principle seems to be that there is no law preventing the main offender being convicted under ss. 201 to 203, but in practice no Court will convict an accused both of the main offence and under these sections.

The matter came before a Division Bench of this High Court in *Rup Narain Kurmi v. King-Emperor* (22), when the Judges Fazl Ali and Scroope, JJ., were agreed that there was no bar to the conviction under s. 201 of persons charged with a murder, but not convicted of it, but whereas Fazl Ali, J. would not go further than this, Scroope, J. accepted in its entirety the reasoning of the Allahabad High Court in *Emperor v. Har Piari* (20). The headnote to the report is misleading. It includes the statement: Held that the section does not relate to the principal offender but to persons other than the actual criminal who, by causing the evidence of the offence to disappear, assist the principal to escape the consequence of his crime, thus representing wrongly that this was the view of two Judges; whereas it was only the view of one and the contrary opinion of Scroope, J. is absolutely and entirely ignored in the headnote. It is not a fact as represented in the headnote that there is an agreed decision of two Judges on the point before us. The matter is open for our independent opinion.

The learned Judges who decided the Patna case on June 11, 1930, had not before them the decision *In re Chinna Gangappa* (21), which was decided on April 8, of the same year and arrives from another point of view at the same conclusion as the Allahabad decision relied on by Scroope, J., and we are entitled, I think, to read s. 201 and express our own opinion on its meaning read in accordance with the principles laid down by the Privy Council. As to the application of these principles to the particular section we have to consider, I have not been able to find any more recent authority directly bearing on it; but some light on the general method of construction can be had by

examining a case already referred to, namely, *Pakala Narayana Swami v. Emperor* (13). Their Lordships had occasion to construe s. 162 of the Criminal P. O. which provided in sub-s. 1:

"No statement made by any person to a Police Officer in the course of an investigation under this Chapter shall if reduced into writing be signed by the person making it, nor shall any such statement or any record thereof whether in a Police diary or otherwise or any part of such statement or record be used for any purpose (save as hereinafter provided at any inquiry or trial in respect of any offence under investigation at the time when such trial was made)".

The majority of the High Courts had held that this sub-section did not apply to a statement made by a person who, at the time it is tendered in evidence, is an accused person; and their Lordships say: "that the words in their ordinary meaning would include any person though he may thereafter be accused" and they say:

"that if the statement is to be admitted at all it can be by limiting the words 'used for any purpose' by the addition of such words, as 'except as evidence for or against the person making it when accused of an offence'. If such an exception were intended one would expect to find it expressed; and their Lordships cannot find sufficient grounds for so departing from the plain words used".

and their Lordships make the pronouncement already cited that "in truth when the meaning of words is plain, it is not the duty of the Courts to busy themselves with supposed intentions," and they say

"in this case the words themselves declare the intention of the Legislature. It therefore appears inadmissible to consider the advantages or disadvantages of applying the plain meaning whether in the interest of the prosecution or the accused".

I am impressed by the reasoning in *Emperor v. Hari Piari* (20) and *In re Chinna Gangappa* (21) and I think it is not improbable that if Fazl Ali, J. had had before him this latter decision and that of the Privy Council in *Pakala Narayana Swami v. Emperor* (13), he would have found himself in agreement with the opinion of Scroope, J. and would have followed the Allahabad decision. Apart from the reasoning in the Madras case, so acute and experienced a lawyer, so eminent a Judge as Fazl Ali, J. whose opinion I regard, as I ought, with the greatest respect, would not fail to take notice that the *ratio decidendi* in *Har Piari's* case is the same as in the later decision of the Privy Council. Their Lordships say "if such an exception were intended one would expect to find it expressed"; and I find it difficult to suppose that the learned Judge would question the correctness of that line of reasoning.

It is possible however to support the decision of the Judicial Commissioner in the case

(22) 10 Pat. 140; 132 Ind. Cas. 876; A I R 1931 Pat. 172; Ind. Rul. (1931) Pat. 300; 32 Cr. L. J. 75; (1931) Or. Cas. 460; 12 P. L. T. 746.

before us on another ground. The intention of each of the appellants was to screen his companions as well as himself from legal punishments; and on this view the convictions under s. 201 seem not to be objectionable, even if the words of the section require that a man should screen an offender other than himself.

I would dismiss the appeal.

Shearer, J.—I regret that I am unable to concur in the view which my learned brother takes of the meaning and scope of s. 201 of the I. P. C. In my judgment, a person who, having committed an offence, subsequently causes evidence of the commission of that offence to disappear, does not in so doing, commit another separate and distinct offence for which the Courts have in strict law jurisdiction to impose a separate punishment. The words in the section over which the difficulty arises are : Whoever.....causes any evidence.....to disappear with the intention of screening the offender from legal punishment.....". The word "whoever" may be taken as equivalent to "any person who". Now, in the sentence "any person who causes any evidence to disappear with the intention of screening the offender" the words "any person" appear to me to exclude by necessary implication the offender himself. The words immediately after "whoever" or "any person who" are "knowing or having reason to believe that an offence has been committed". These words quite certainly pre-suppose a person other than the offender himself. The marginal note to the section and the illustration appended to it also suggest that it was the intention of the Legislature to exclude the offender from the scope of the section. Any one reading the section would, I think, at first sight at least assume that it was intended to cover the case of a person who had not taken part in the commission of a crime himself but had, subsequent to the commission of it, endeavoured to prevent justice being done by removing evidence of it. In order to make it cover also the case of the offender himself it is necessary, in the first place, to substract from the section the words "knowing or having reason to believe that an offence has been committed" which become wholly unnecessary and to add after the word "offender" some such words as "even if the offender be himself". On the ordinary principles of construction it is not, in my judgment, permissible to do this.

The most recent decision which can be cited in support of the view taken by my learned brother is *In re Chinna Gangappa*

(21). That was a case in which a man reported to the Police that his wife had been stung by a scorpion or bitten by a snake when in point of fact, she had been killed, in all probability by himself. Possibly for that reason the somewhat novel argument which was put forward and eventually commenced itself to the Court was based on s. 44 of the Criminal P. C. The argument proceeds on the assumption which in my opinion is unwarranted, that the word "whoever" in s. 201 of the I. P. C., and the words "every person" in s. 44 of the Criminal P. C. can, without doing any extreme violence to the language used in the remainder of the sections, be made to include the offender himself. Immediately after the words "every person" in s. 44 come the words "aware of the commission of" which impliedly exclude the offender or at least are, so far as he is concerned, wholly unnecessary. Then come the words "intention of any other person to commit" which make it I submit with great respect, clear that the words "every person" do not include a person intending to commit an offence and therefore make it extremely unlikely, to say the least of it, that they were intended to include a person who had committed one. Finally there occur the words "without reasonable excuse". What weight or meaning can be given to these words in the case of the offender himself? Wallace and Jackson, JJ. in *In re Chinna Gangappa* (21) criticised an observation in *Reg. v. Kashinath* (2), that "there is no law now which obliges a criminal give information which would convict himself". "*Nemo tenetur accusare seipsum*". In 17th century in England this maxim was thought to embody the law of God and Nature; such was the odium which had been excited by the practice of the Court of Star Chamber in administering the *ex officio* oath to prisoners and compelling them to answer incriminating questions. The revulsion of feeling persisted and eventually in 1848 Parliament enacted a statute which absolutely prohibited any judicial questioning of the prisoner either before or during the trial. When, thirteen years later the law of criminal procedure in India was for the first time systematised and codified, this characteristic feature which gives to the English system a dignity and an apparent humanity which other systems lack, was, it is true, not exactly reproduced. But if the power of the Criminal Courts to question accused persons was not taken away altogether it was at least provided that they were not to be bound to answer questions and were to be exempt from punishment if

they answered questions falsely. In my opinion, the substantial truth of the observation made in *Reg v. Kashinath* (2), is not open to doubt and the *ratio decidendi* in *In re Chinna Gangappa* (21) is, on the other hand, radically unsound.

The other decisions relied on are those of Walsh and Pullan, JJ. in *Emperor v. Har Piari* (20), and that of Scroope, J. in *Rup Narain Kurmi v. King-Emperor* (22). In the former it is remarked:

"We are unable to agree with the view that a person who has actually committed a crime himself—whether murder or any other crime is any the less guilty of removing traces thereof, if it is proved against him that he did so, because he was the person who actually committed the offence. If the Legislature intended to provide such an exception they would undoubtedly have said so in express language".

In order to make s. 201 apply to the case of the offender himself, it is necessary as I have already shown, to substract from it words that are there and to add to it words that are not. That being so, is it not more reasonable to assume that if the Legislature had intended to make the act of causing evidence of the commission of a crime to disappear punishable in every case, there would have been two sections and not one in the I. P. C., one the section now there to cover the case of the accessory after the fact and the other a section to cover the case of the principal offender in some such terms as:—

"Whoever, having committed an offence intentionally causes any evidence of the commission of that offence to disappear or gives any information respecting the offence which is false"

The authors of the I. P. C., in dealing with the offence of resistance or obstruction to lawful apprehension found it necessary to insert two sections, viz:—Sections 224 and 225, the former covering the case of the person sought to be apprehended and the latter the case of other persons who assisted him to resist. Moreover, they added an explanation to s. 224 to make it clear that resistance or obstruction to lawful apprehension was an act for which a punishment might be imposed in addition to any punishment to which the offender might be liable in respect of the offence on account of which he was sought to be apprehended. Why did they not take the same simple and obvious course in dealing with the offence of causing evidence of the commission of a crime to disappear, if they wished to make such an act, when done by the offender himself, punishable? The principal author of the I. P. C., was one of the great masters of the art of lucid expression and his object in adopting a style which, it has been well said, is as unlike that of an Act of Parliament as it is

unlike that of an Indian Regulation was to prevent the law being misunderstood by Courts which were often presided over by laymen. Would he and his co-adjusters have left s. 201, as it now stands, if they had intended it to apply to the case of the principal offender? On the other hand, if they had intended it not to apply to the case of the principal offenders, could they reasonably be expected to have foreseen that the Courts might so apply it and to have realised the necessity or desirability of adding an explanation to the section and making their meaning still more abundantly clear? It is obvious that in framing s. 201 and certain other sections which occur in the same chapter, the authors of the I. P. C., were endeavouring to reproduce the English Law relating to accessories after the fact. If they had anything else before them, it, was probably the sections in the French Penal Code which deal with the same matter. In other words, they were not considering then, whether cases might not arise in which a person should be punished for removing traces of an offence he had himself committed. But Legislature has since considered and provided for this in at least one specific instance. In or about 1895 one Shama Charn Sen was tried on a charge of defrauding a bank of three lakhs of rupees and had to be acquitted apparently, if the Commentary in Ratanlal is correct, on the ground that it could not be shown on what particular occasions or in what particular sums the amount had been abstracted. This acquittal was followed by the enactment of s. 477-A of the I. P. C. It is interesting to note that in *Reg v. Kashinath* (2), the accused persons had entered into a conspiracy to defraud, and had defrauded, the Public Works Department of large sums of money. The facts of the case do not appear very clearly from the report and it is scarcely possible to say that if s. 477-A had then been in existence the accused persons could and would have been prosecuted under it rather than under s. 201. A clerk or servant who misappropriates money and in order to conceal this destroys papers and books of account, in effect causes evidence of the commission of his crime to disappear. It is reasonable that such an act should itself be made an offence as it may conceivably be the means of his successfully avoiding punishment for the misappropriation. But there does not seem to be any very good ground on which every attempt on the part of any offender to remove traces of his crime should be made punishable. It is as natural for an offender to try and con-

ceal his crime as it is for him to try and avoid apprehension. Human nature being what it is, it would plainly be futile to endeavour to prevent a criminal trying to conceal his crime by the threat of further punishment while to make such an act punishable would put it in the power of the Courts to be vindictive.

My learned brother has referred to *Begu v. King-Emperor* (14). That was a case in which two men were convicted under s. 302 and three other men, who had been tried along with them on the same charge, were ultimately convicted under s. 201. The question, or rather one of the questions, that arose, was whether in the absence of a charge under s. 201 the conviction could be maintained. It has to be remembered that at one time in England an accessory after the fact could not be tried until after the conviction of the principal felon and even now a person indicted as a principal cannot be convicted and sentenced as an accessory after the fact: *R. v. Watson* (23). Their Lordships of the Judicial Committee came to the conclusion that in India the law was otherwise and that ss. 236 and 237 of the Criminal P. C., rendered the conviction valid. These sections were set out in the judgment and were critically examined. Section 201 of the I. P. C., was not set out or discussed and after reading and re-reading the judgment I am bound, with the greatest respect, to say that I am unable to find anything in it to support the view that s. 201 punishes the principal offender as well as the accessory after the fact. On the contrary, the point was one which did not at all arise and which it was quite unnecessary for their Lordships to consider. If it had been, the observations of so distinguished a lawyer and philosopher as Viscount Haldane would, no doubt, have been illuminating.

It has been satisfactorily proved that the appellants were jointly concerned in the commission of this murder and in the removal of the dead body of the victim. It may be said that the intention of each of the appellants in removing the dead body was to screen his companions as well as himself from punishment and on that ground perhaps the convictions under s. 201 as well as under s. 302 can in this particular case be supported. But if they can, that is a purely accidental result of the language used in the section. In my judgment, the law in India does not, any more than does the Common Law of England, ordinarily visit the act of an offender in

endeavouring to remove traces of his crime with a punishment separate and distinct from any punishment to which he may have rendered himself liable by committing the offence. With these observations I would concur in the order of my learned brother dismissing the appeal.

s.

Appeal dismissed.

BOMBAY HIGH COURT

Second Appeal No. 323 of 1938
November 5, 1940

BROOMFIELD AND MACKLIN, JJ.
VITHALDAS BHAGWANDAS DARBAR
—PLAINTIFF—APPELLANT—

versus

TUKARAM VITHOBA KSHATRI
AND OTHERS—DEFENDANTS—

RESPONDENTS

Transfer of Property Act (IV of 1882), s. 92—A getting tagai loan of Rs. 1,000 from Government under Land Improvement Loans Act and making it charge on land No. 1 and offering lands Nos. 2, 3 and 4 as collateral security—A subsequently mortgaging lands Nos. 2 and 3 to B and selling lands Nos. 1 and 4 to P and leaving Rs. 1,000 with him for paying off Government loan—Few days before aforesaid sale C attaching land No. 1 in execution of his decree and purchasing it at execution sale—Suit by P claiming charge over lands Nos. 1, 2 and 3 and recovery of amount paid by him to Government from A, B and C—Neither s. 92, Transfer of Property Act nor s. 69, Contract Act (IX of 1872), held applied—P held not entitled to reliefs claimed—Proper remedy was by suit for damages against A.

One A obtained from Govt. under Land Improvement Loans Act in 1927 a sum of Rs. 1,000 as tagai loan. It was made a charge on his land No. 1 for the improvement of which the loan was taken. His other lands Nos. 2, 3 and 4 were offered as collateral security. In 1929 A mortgaged lands Nos. 2 and 3 to B and on January 25, 1932, sold lands Nos. 1 and 4 for Rs. 5,000 to P and kept Rs. 1,000 with P out of the purchase-money for paying off the Govt. loan. On January 21, 1932, that is four days before the sale, C attached land No. 1 in execution of his money decree and purchased it himself at the execution sale. In 1935 P filed a suit claiming that he was entitled to a charge on lands Nos. 1, 2 and 3 and to recover the amount paid by him to Govt. from A, B and C.

Held, (1) that if P came within the terms of s. 92 he would have the same rights as Govt. not only against A who borrowed the money from Govt. but also against B and C who derived their rights from A. But P did not fall under s. 92 as there was in fact no mortgage to Govt. but only a statutory charge under Land Improvement Loans Act, on the lands;

(2) that part of the consideration for sale of land No. 1 retained by P for the discharge of Govt. loan must be regarded as the money of A and therefore P was not entitled to subrogation under para. 1 of s. 92. Nor could P come under para. 3, because there was no registered agreement giving him the right of subrogation. 171 Ind. Cas. 153 (1) and 160 Ind. Cas. 137 (2), relied on.

(3) that the same reasoning which ruled out s. 92,

(23) (1916) 2 KB 385; 85 L J KB 1142; 115 L T 159; 80 J P 391; 32 T L R 580.

T. P. Act, rendered s. 69; Contract Act, also inapplicable. If the repayment of the *tagai* loan to Govt. was to be regarded as the act of the vendor, A and not the act of P, the purchaser P, obviously did not come within the terms of s. 69. Moreover, even if it were possible to say that there was a payment by P within the meaning of s. 69, it was a payment which he was bound to make under the terms of his agreement with A and it would not therefore be open to him to say that it was a payment which some other person was bound to make. *Dakshina Mohun Roy v. Saroda Mohun Roy* (3) and *Muhammad Siddiq Khan v. Muhammad Nasir-ul-lah Khan* (4), distinguish-
ed.

(4) that P's suit was misconceived and that his only legal remedy was to sue A his vendor, for damages.

S. A. from the decision of the District Judge, Bijapur, in Appeal No. 145 of 1936.

Messrs. H. C. Coyajee and G. R. Madbhavi, for the Appellant.

Mr. S. R. Parulekar, for Respondents Nos. 2 and 3.

Broomfield, J.—This is an appeal by the plaintiff from a decree of the District Judge of Bijapur confirming a decree of the joint Subordinate Judge of Bijapur, who dismissed a suit brought by the plaintiff for reimbursement or contribution. The plaintiff's claim was put forward in the following circumstances. One Ramappa who was the father of defendant No. 1 was the owner of four fields, survey Nos. 5/2, 381, 382 and 124. In October-November 1927, Ramappa borrowed Rs. 1,000 from Govt. under the Land Improvement Loans Act for the improvement of survey No. 5/2. By virtue of s. 7 of the Act, Govt. therefore has the right to recover the money with interest from the borrower personally, or out of the land for the benefit of which the loan was granted, or out of properties given as collateral security that is in the present case survey Nos. 381, 382 and 124. It is provided in the same section that it is in the discretion of the Collector to determine the order in which he will resort to the various modes of recovering the moneys which are recoverable as if they were arrears of land revenue. On November 26, 1929, Ramappa mortgaged survey Nos. 381 and 382 to defendant No. 3. On January 25, 1932, he sold survey No. 5/2 and 124 to the plaintiff. The consideration for the sale was Rs. 5,000, and the sale deed (Ex. 28) provided that out of this sum Rs. 1,000 was to be kept with the purchaser (plaintiff) for discharging the *tagai* debt. Prior to this in 1930 defendant No. 2 had obtained a money decree against Ramappa and he attached survey No. 5/2 four days before the plaintiff's purchase. Subsequently on February 4, 1933, defendant No. 2 purchased that survey number in execution proceedings.

The *tagai* debt due to Govt. was paid off by the plaintiff in three instalments—one of Rs. 150 paid on May 27, 1932, one of Rs. 150 paid on March 18, 1933, and the final instalment of Rs. 600 paid on November 13, 1934. On March 23, 1933, the plaintiff brought a suit against defendant No. 2 to recover possession of survey No. 5/2, but the suit failed because it was held that defendant No. 2 had a prior claim in view of the fact that he had attached the land before the sale of it to the plaintiff. The suit in which the present appeal arises was filed by the plaintiff in June 1935. He claimed to have a charge on survey Nos. 5/2, 381 and 382 and to be entitled to recover the amount paid by him to Govt. from defendants Nos. 1, 2 and 3. As I have mentioned, the plaintiff failed in both the lower Courts. He there relied partly on s. 92, T. P. Act, and partly on s. 69, Contract Act. Section 92 deals with the rule about what is called subrogation. In s. 91 certain persons other than the mortgagor are stated to be entitled to redeem a mortgage; and s. 92 provides that if any of these persons does in fact redeem a mortgage, he has the same rights as regards redemption, foreclosure or sale as the mortgagee whose mortgage he has redeemed has against the mortgagor or any other mortgagee. That is provided in para. 1 of s. 92, and para. 3 provides this:

"A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated."

By virtue of s. 59-A of the Act the word "mortgagor" includes "persons deriving title from a mortgagor," so that if the plaintiff comes within the terms of s. 92 he would have the same rights as Govt. not only against defendant No. 1 who borrowed the money from Govt. but also against defendants Nos. 2 and 3 who derived their rights from defendant No. 1. There are however obvious difficulties in the way of the application of s. 92 to this case. In the first place there was in fact no mortgage to Govt. There was a statutory charge in favour of Govt. in respect of survey No. 5/2 and also the three fields given as collateral security. But it was not a mortgage. Assuming however that that difficulty could be got over, it has been held by a Full Bench of the Allahabad High Court in *Hira Singh v. Jai Singh* (1) that where part of the consider-

(1) I L R (1937) All. 880; 171 Ind. Cas. 153; A I R 1937 All. 588; (1937) A L J 659; 10 R A 228; 1937 A L R 800 (F B).

ation for sale of land is retained by the purchaser for the discharge of incumbrances on the land that money is to be regarded as the money of the vendor, and, therefore, the purchaser is not entitled to subrogation under para. 1 of s. 92. He may or may not come under para. 3, but in the present case it is clear that the plaintiff cannot come under para. 3 because there is no registered agreement giving him the right of subrogation. The same view of the construction of s. 92 has been taken by a Full Bench of the Madras High Court in *Lakshmi Amma v. Sankara Narayana Menon* (2). In view of these authorities the learned Counsel for the appellant has conceded that he cannot rely on the doctrine of subrogation. He does not now claim that his client has any charge over the lands in suit and argues merely that he is entitled to a personal decree against the defendants by reason of the equitable principle enunciated in s. 69, Contract Act. According to that section "a person who is interested in the payment of money which another is bound by law to pay, and who therefore, pays it, is entitled to be reimbursed by the other".

But the same reasoning which rules out s. 92, T. P. Act appears to render s. 69, Contract Act, also inapplicable. If the repayment of the *tagai* loan to Govt. is to be regarded as the act of the vendor Ramappa, and not the act of the plaintiff, the purchaser, the plaintiff, obviously does not come within the terms of s. 69. Moreover, even if it were possible to say that there was a payment by the plaintiff within the meaning of s. 69, it was a payment which he was bound to make under the terms of his agreement with Ramappa, and it would not, therefore, be open to him to say that it was a payment which some other person was bound to make. Mr. Coyajee relied on *Dakshina Mohun Roy v. Saroda Mohun Roy* (3), where Lord Macnaghten said in the course of his judgment (p. 163):*

".....it seems to their Lordships to be common justice that when a proprietor in good faith pending litigation makes the necessary payments for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment.....".

Section 69, Contract Act, was not mentioned in the judgment, but the principle relied upon seems to be the same, and that principle does not apply if the legal effect of the transaction

(2) 59 M 359; 160 Ind. Cas. 137; A I R 1936 Mad. 171; 70 M L J 1; 8 R M 607; (1936) MW N 30; 43 L W 23 (F B).

(3) 21 C 142; 20 I A 160; 6 Sar. 366; 17 Ind. Jur. 576 (P C).

*Page of 20 I A.—[Ed.]

tion between the plaintiff and Ramappa was that Ramappa paid the money and not the plaintiff. Incidentally I may say that the plaintiff's good faith is by no means clear, since all the payments which he made to Govt. were made after the attachment of the survey No. 5/2 and the final payment was made after defendant No. 2 had actually got possession of the land. We were also referred to *Muhammad Siddiq Khan v. Muhammad Nasir-ullah Khan* (4). In that case part of the consideration for a sale of land was retained by the vendees for the purpose of partially discharging the encumbrances on the land, the vendor being bound to supply the rest of the money necessary for the purpose. Their Lordships held that the money retained by the vendees was not to be regarded as a deposit of the vendor's money on which the vendor was entitled to get interest. They did not say that the money was not the vendor's money, and I think that there is nothing in this case inconsistent with the view taken by the Full Benches of the Allahabad and Madras High Courts. The Privy Council case, therefore, appears to be of no material assistance to the plaintiff. It may be a case of some hardship as the plaintiff has not got the full benefit of his repayment of the *tagai* loan to Govt., whereas the other defendants have benefited by it in proportion to the land in which they are interested. But in our opinion the lower Courts were clearly right in holding that the plaintiff's suit was misconceived and that his only legal remedy was to sue defendant No. 1, his vendor, for damages. The appeal, therefore, must be dismissed with costs.

D.

Appeal dismissed.

(4) 21 A 223; 26 I A 45; 7 Sar. 472; 3 C W N 201 (P C).

LAHORE HIGH COURT

Civil Revision No. 833 of 1939

February 14, 1941

TEK CHAND AND BECKETT, JJ.

LAKHMI CHAND—DECREE-HOLDER—
PETITIONER

versus

Jamadar AULIA KHAN AND ANOTHER—
JUDGMENT-DEBTORS AND OTHERS—DECREE
HOLDERS—RESPONDENTS

*Punjab Debtors' Protection Act (II of 1936), s. 9—
Objections under—To be decided by executing Court
—Collector's jurisdiction in this respect—Land
actually alienated by Collector in full satisfaction of
decree—Executing Court cannot deal with objections
under s. 9.*

The validity of objections under s. 9, Punjab Debtors' Protection Act can be decided by the Court which passed the decree or order that is, the executing Court. The Collector has no jurisdiction to decide such objections. The executing Court, however, has no jurisdiction to deal with objections under s. 9 regarding the attachability of the land after it has actually been alienated by the Collector in full satisfaction of the decree. 184 Ind. Cas. 393 (1), referred to.

When a special jurisdiction is conferred it must be taken as strictly limited to the terms in which it is created and cannot be extended to cover matters to which no express reference has been made or which do not have to be decided in order to carry out the purpose for which the special jurisdiction has been created.

C. R. referred by Din Mohammad, J., dated January 15, 1940.

Mr. Yashpal Gandhi, for the Petitioner.

Mr. Ghulam Mohy-ud-Din, for the Respondent (Aulia Khan).

Beckett, J.—The facts of this case are as follows. On January 31, 1934, a decree was passed in favour of the petitioner against the property of Amir Khan in the hands of the respondents, his brothers. The decree was in respect of a sum of Rs. 285 due on a *bahi* account. On January 5, 1937 the petitioner asked for execution by way of attachment and sale or farm of a certain land. This application was consigned to the record room for non-prosecution on February 19, 1937. A second application was put in on the same day but was dismissed on May 21, 1937 by request. On June 11, 1937 there was a third application to the same effect. An order of attachment was at once passed. It appears that there was some difficulty in serving the respondents with a copy of the order but a copy was pasted on their house on August 9, 1937. On October 15, 1937, the proceedings were transferred to the Collector of that district for the purpose of arranging for a farm of the land. The Collector then transferred the proceedings to the Sub-Divisional Officer of the Pindigheb Sub-Division, where the property was situated. The parties appeared on July 3, 1938, before the Tahsildar who took down their statements. The Tahsildar submitted his report and the parties were directed to appear before the Collector on July 22. Issues were struck with regard to the number of the dependants who had to be maintained from the land and with regard to other sources of income besides the produce of the land. After taking evidence, the Collector came to the conclusion that there would still be sufficient land to support the respondents and their dependants if the whole of the land under attachment

was farmed out, and decided that this land should accordingly be farmed out to the decree-holder for a period of 12 years in full satisfaction of the decree.

At the time of arguments before the Collector, Counsel for one of the respondents took the objection that the land was not liable to attachment on the ground that it was ancestral. The Collector, however, took the view that this question should have been settled by the Civil Court before the proceedings came to him. Further, on the assumption that he had jurisdiction, he held that he would have no option but to dismiss the objections since there was nothing on the record to show the nature of the property. The proceedings were then returned to the Civil Court.

On August 13, 1938, the judgment-debtors presented an application to the Civil Court, raising the same objection. The executing Court held that, though the land was ancestral, it was not protected by s. 9, Punjab Protection of Debtors' Act, 1936, and further that since the decree had been wholly satisfied under the order of the Collector, it had no further jurisdiction to deal with the matter. On appeal to the Senior Subordinate Judge, this order was set aside and the land was released under s. 47, Civil P. C. The decree-holder has presented a petition for revision of this order. As the question of jurisdiction is one of some general importance, the case has been sent to a Division Bench.

The principal argument advanced by the learned Counsel on behalf of the decree-holder is that an executing Court is *functus officio* when once a decree is fully satisfied and has no power to deal with the objections which may be raised subsequently. In this connexion reliance is placed on a judgment of this Court reported in *Ram Chandar v. Sarupa* (1) in which it was held that an executing Court can take notice of any objection under s. 47 of the Code relating to property until the sale has been confirmed. The learned Senior Subordinate Judge has met this argument by holding that the Collector had no power to deal with any objections under s. 47, so that the objections could only be decided after the proceedings had been returned by the Collector. As against this view, and in support of the view that the executing Court has no further power to entertain the objections after the Collector has passed final orders it was urged that s. 4, Punjab Debtors' Protection Act,

(1) A I R 1939 Lah. 113; 184 Ind. Cas. 393; I L R. (1939) Lah. 103; 41 P L R 436; 12 R L 218.

contemplates a complete transference of the execution proceedings as a whole to the Collector, who is then competent to deal with all questions which may arise, and has not merely to submit proposals for the satisfaction of the decree which must be confirmed by a Civil Court. The first question to be decided, therefore, is whether the executing Court and the Collector continue to exercise some sort of concurrent jurisdiction or whether the jurisdiction of the Collector ousts that of the Civil Court and enables him to deal with any questions that may arise, more particularly objections, as to the attachability of the land under s. 9 of the Act.

Section 4 of the Act provides that whenever a Civil Court orders that land be attached and alienated temporarily in the execution of a decree for the payment of money the proceedings of such attachment and alienation shall be transferred to the Collector. On proceedings being transferred to him, the Collector has then to decide the period of alienation. Section 5 provides for the exemption from temporary alienation of such land as is, in the opinion of the Collector, sufficient to provide for the maintenance of the judgment-debtor and his dependants. In s. 6 it is provided that the Collector when acting under ss. 4 and 5 shall be deemed to be acting judicially, and shall act in accordance with the provisions of law applicable to the Court from which the proceedings have been transferred. There is a provision for appeal to the Commissioner, who is also to be deemed to be acting judicially when hearing appeals under this section.

Section 9 deals with the exemption of ancestral property where custom is the rule of decision. The section provides that such property in the hands of a subsequent holder shall not be liable in the execution of a decree or order of a Court relating to a debt incurred by any of his predecessors-in-interest. This provision is made subject to certain provisos. When the debt has been expressly charged by way of mortgage by a predecessor-in-interest, the Court is to determine the liability as if this section had not been passed. In respect of old debts ancestral property may still be liable if the decree-holder is able to establish certain conditions to the satisfaction of the Court and if the judgment-debtor is unable to establish certain other conditions.

In our opinion, the intention of the Act with regard to jurisdiction is sufficiently clear from the wording of these sections. It is the executing Court which has to pass an

order for the alienation of the land and must therefore have power to determine, if necessary, whether the land is liable to attachment or not. The proceedings are then to be transferred to the Collector, but the proceedings to be transferred are only those which relate to the attachment and temporary alienation. The Collector has then to decide the period of limitation for the purpose of carrying out the order of the executing Court; and for this purpose, he may have to decide in a judicial capacity certain other questions which may arise under s. 5, such as whether the judgment-debtor possesses an independent source of income. When a special jurisdiction of this kind is conferred however it must be taken as strictly limited to the terms in which it is created and cannot be extended to cover matters to which no express reference has been made or which do not have to be decided in order to carry out the purpose for which the special jurisdiction has been created.

The immediate question is whether s. 9 can be interpreted as in itself conferring any jurisdiction on the Collector to deal with objections arising under that section. We think that this question must be answered in the negative. The wording of the section shows that such objections are to be taken before some authority described as the "Court." The word "Court" is not defined in the Act. The sections begin by referring to a decree or order of a Court relating to a debt, and then goes on to provide certain conditions relating to attachment afterwards to be determined by the Court in accordance with the provisions of that section. Ordinarily, this would mean the Court by which the decree or order was passed, that is, the executing Court. The mere fact that the Collector is to be deemed acting judicially when determining the period of alienation is not in itself sufficient to lead to the supposition that he is to be regarded as the Court which has to decide the validity of objections under s. 9. In the second place, the question whether the land is altogether exempt from attachment is not one which is necessarily connected with the questions which the Collector is called upon to decide under ss. 4 and 5. As already remarked, this is a question which has to be decided by the Civil Court before an order of attachment can be passed and before the proceedings can be transferred to the Collector. If it is raised before the transfer, it has to be decided by the Civil Court; there is no reason to suppose that the Act intended that the same question should be decided by the Civil Court if raised

before the transfer but by the Collector if raised subsequently. For these reasons we consider that the Collector was correct in holding that the objection as regards the ancestral nature of the property could not be raised before him in the course of proceeding which related only to the amount of the property which should be alienated and the period of alienation.

The next question is whether the objection could be raised before the executing Court after the Collector had decided on the period of the alienation. Even if the objections were to be raised before the executing Court after the transfer of the proceedings to the Collector, this would give rise to a certain amount of difficulty, inasmuch as the section lays down that the whole of the proceedings relating to the attachment are to be transferred to the Collector, who is then to act independently; and it would hardly be possible for the Civil Court to decide contested objections relating to proceedings which have been transferred elsewhere. These difficulties may not be insuperable. It is possible that there might be circumstances in which the executing Court might have to hold that the order of attachment should never have been passed and that the order ought to be cancelled, in which case the Collector would presumably cease to have jurisdiction and the proceedings would return to the Civil Court. It seems evident, however, that the Act contemplated that in normal circumstances the liability of the land to attachment would be decided before the proceedings were transferred to the Collector, who would then have nothing to do but decide how much of the land should be alienated and for how long.

For the purposes of the present petition, it is unnecessary to consider in what circumstances the executing Court would have power to reverse an order of attachment after the proceedings have been transferred to the Collector. If such a power exists at all, it seems clear that it could only be exercised before the alienation has been effected, and an objection as to the attachability of the land cannot be raised after that has taken place. When the proceedings have been transferred, the alienation of the land becomes a matter entirely within the province of the Collector, and he is required to carry it out, provided sufficient land is left for the maintenance of the judgment-debtor and his family. In the present instance, the judgment-debtors appear to have been avoiding the jurisdiction of the Civil Court at the time when objections should normally have

been put in. They became aware of the attachment soon afterwards, however, when they appeared before the Tahsildar and they could in any case have raised the objections long before the date of the Collector's final order. Whatever the position may be as regards the result of such objections before the executing Court between the date of the transfer and the date of the alienation, we consider that the executing Court is correct in holding that it had no power to deal with an objection regarding the attachability of the land after it had actually been alienated in full satisfaction of the decree. The petition for revision is accordingly accepted and the order of the executing Court is restored with costs throughout.

Tek Chand, J.—I agree.

s. *Petition accepted.*

MADRAS HIGH COURT

Special Bench

Original Petition No. 114 of 1940

September 25, 1940

LEACH, C. J., KING AND PATANJALI

SASTRI, JJ.

AL. VR. ST. VEERAPPA CHETTIAR

—PETITIONER—

versus

COMMISSIONER OF INCOME-TAX,

MADRAS—RESPONDENT

Income-tax—Agricultural income—Sum collected by Receiver held not agricultural income—Amount held, constituted profits of mortgage transaction and, therefore, no deduction could be allowed in respect thereof.

In the year 1913, the assessee's father advanced Rs. 2,15,000 under a simple mortgage on the security of the *zamin-dari*. The loan was not repaid and in 1925, the assessee was compelled to file a suit in the Court to enforce payment of the amount then due. A compromise was eventually agreed upon and a decree was passed by embodying the terms of settlement. Under this decree the debtor was to pay to the assessee a sum of Rs. 3,75,000, in full settlement of all claims on or before July 31, 1931. In the meantime this sum was not to carry interest. In the event of the amount not being paid by the due date, the *zamin-dari* was to become the absolute property of the assessee's family. By this decree a Receiver was appointed and it was a term of the compromise that any moneys which the assessee received from the Receiver should be set off against the Rs. 3,75,000, and that the debtor should only be responsible for the balance. It was, however, stipulated that in the event of the balance not being paid, the whole of the *zamin-dari* would still become the property of the assessee's family. From July 28, 1928, the date of the compromise decree, to July 31, 1931, Rs. 42,000 was paid into Court by the Receiver as the net rent collectors for that period. This amount was later on paid to the assessee. The sum due to be paid to the assessee under the terms of the compromise decree on July 31,

1931, was not paid and in consequence his family became the absolute owners of the *zamindari*. The estate was not, however, handed over to the assessee until February 2, 1933. But in that year the assessee's title to the *zamindari* was challenged. The litigation did not end until September 2, 1936, when the title of the assessee's family to the property was finally decided. The assessee, however, had induced the income-tax authorities to agree to the assessment being made when the mortgage transaction was closed. In assessing the assessee as the manager of the family for the year 1937-38, the income-tax authorities included the profit which they calculated had been made out of this mortgage transaction. The assessee contended that as the amounts paid to him in cash were received by him more than three years before the year of account they were not assessable:

Held, (1) that Rs. 42,000 representing rents which the Receiver collected from the tenants of the agricultural lands of the *zamindari* could not be regarded as agricultural income inasmuch as the assessee was neither the owner of the *zamindari* when monies were collected, nor in the position of a usufructuary mortgagee. 157 Ind. Cas. 289 (1), distinguished.

(2) that the assessee was not entitled in law to escape assessment on the profit which was made out of this mortgage transaction. On his own showing this transaction did not close until the High Court had given its decision in 1936, and, therefore, it was not until that year profits could properly be calculated. In these circumstances the income-tax authorities were fully entitled to assess on that basis;

(3) that under the terms of the compromise decree the assessee got the whole of the *zamindari* plus the Rs. 42,000. The Rs. 42,000 was part of the profit which was made out of the transaction, and, therefore, no deduction could be allowed in respect of that amount.

Messrs. P. Kesava Aiyangar and Krishna-machariar, for the Petitioner.

Mr. K. V. Sesha Aiyangar, for the Respondent.

Leach, C. J.—The petitioner is the managing member of an undivided Hindu family and as such he has been assessed to income-tax for the year 1937-38. The family belongs to the Nattukottai Chettiar community and carries on a money-lending business. In the year 1913, the petitioner's father advanced Rs. 2,15,000 to Bangaru Ammal, the *Zamindarini* of Thevaram, on the security of the *zamindari*. The loan was not repaid and in 1925 the petitioner was compelled to file a suit in the Court of the Subordinate Judge of Dindigul to enforce payment of the amount then due. Accumulations of interest, it was said, had brought the figure upto Rs. 5,49,683 but this was denied. A compromise was eventually agreed upon and a decree was passed by the Subordinate Judge embodying the terms of settlement. Under this decree the debtor was to pay to the petitioner a sum of Rs. 3,75,000; in full settlement of all claims on or before July 31, 1931. In the meantime this sum was not to carry interest. In the event of the amount not being paid by

the due date the *zamindari* was to become the absolute property of the petitioner's family. By this decree a Receiver was appointed and it was a term of the compromise that any moneys which the petitioner received from the Receiver should be set off against the Rs. 3,75,000, and that the debtor should only be responsible for the balance. It was however stipulated that in the event of the balance not being paid the whole of the *zamindari* would still become the property of the petitioner's family. From July 28, 1928, the date of the compromise decree, to July 31, 1931, Rs. 42,000 was paid into Court by the Receiver as the net rent collections for that period. This amount was later on paid to the petitioner. The sum due to be paid to the petitioner under the terms of the compromise decree on July 31, 1931, was not paid and in consequence his family became the absolute owners of the *zamindari*. The estate was not however handed over to the petitioner until February 2, 1933.

The *zamindarini* died on December 14, 1930, and her heir was her mother Errammal. Errammal died on February 2, 1933, leaving a will by which she purported to bequeath the *zamindari* to one Thangaswami Naicker, who with two others challenged the right of the petitioner to obtain possession of the estate. The case was carried to this Court and the litigation did not end until September 2, 1936, when the title of the petitioner's family to the property was finally decided. Until this had happened, the account books of the petitioner showed the *zamindarini* as the debtor, but the title of the petitioner's family having been confirmed he closed this account and opened one under his own name transferring to that account the moneys which he had received in connection with the loan. In assessing the petitioner as the manager of the family for the year 1937-38 the income-tax authorities have included the profit which they calculated has been made out of this mortgage transaction. The profit has been calculated at the sum of Rs. 2,57,998, less Rs. 84,700, which had been received towards the loan before 1924. The petitioner objected to an assessment being made on this basis and he requested the Commissioner of Income-tax to refer to this Court, under the provisions of s. 66, Income Tax Act, the questions raised by him. In accordance with this request the Commissioner has referred the following questions:

"(1) Whether the sum of Rs. 42,000 deposited in the Court between July 1928 and July 1931, and withdrawn by the petitioner and adjusted as income in the year of account is agricultural income."

(2) Whether the entire income excluding the sum of Rs. 84,700 interest realized in 1915 to 1923 from this transaction as a whole can be said to have accrued arisen or been received in the year of account."

The petitioner's case with regard to the first question is this. He says that as the Rs. 42,000 represents rents which the Receiver collected from the tenants of the agricultural lands of the *zamindari* this cannot be taxed, income from agriculture being exempt. If the petitioner were the owner of the *zamindari* when these moneys were collected there would be force in the contention, but he was not, nor was his family. These moneys were paid into Court by the Receiver in reduction of the amount due under the mortgage and the total sum was paid over to the petitioner for this purpose. The petitioner was not even in the position of a usufructuary mortgagee. He held a simple mortgage and the title to the estate claimed by him did not vest until after all these moneys had been collected and paid into Court in reduction of the mortgage debt. There is no substance at all in the petitioner's contention here. It has been suggested that the decision of the Privy Council in *Commissioner of Income-tax v. Maharajahdhiraj of Dharbhanga* (1), has application, but this cannot be accepted. That case had reference to a usufructuary mortgage and, as I have already mentioned, the petitioner was never in the position of a usufructuary mortgagee.

The second question also must be answered in favour of the income tax authorities. Year by year from 1926-27 until the year of assessment 1937-38 the petitioner was pressing the income-tax authorities not to take into account any sums received by him on account of this mortgage, but to leave the position open until the matter had been concluded. When the petitioner's agent produced before the Income-tax Officer the accounts in respect of the year 1926-27 it was found that no interest in respect of the loan to the *Zamindarini* had been debited and it was contended by the assessee that as the loan was the subject-matter of litigation no payment of interest should then be taken into account. This contention was accepted. In the year of assessment 1929-30 the Income-tax Officer discovered that the petitioner had obtained a decree against the *Zamindarini*, but the Income-tax Officer was induced to stay action by the statement

(1) 14 Pat. 623; 157 Ind. Cas. 289; A I R 1935 P C 172; 62 I A 215; 8 R P C 25; 1935 O L R 508; 1935 A L R 859; 1 B R 820; (1935) M W N 839; (1935) A L J 978; 1935 O W N 1022; 16 P L T 609; 39 C W N 1255; 42 L W 464; 69 M L J 474; 37 Bom. L R 822 (P O).

that no execution proceedings had been taken and that when the decretal amount was realized the income thereby received would be accounted for in his books. In the assessment year 1930-31 no accounts were produced for the year of account. The petitioner's agent here represented that proceedings for the recovery of the decretal amount had not been taken and that it would be sometime before any money was realized on the loan. The accounts for the assessment year 1931-32 showed that a sum of Rs. 38,865 had been received in the previous year. The contention then raised was that unless the decretal amount was realized in full no part of the realization could be taken as profit. For the assessment years 1932-33 and 1933-34 the accounts again showed receipts on account of this mortgage. Thereupon the petitioner's agent represented that there was an understanding between the department and the petitioner that interest should be taken into account only when the entire amount was repaid. On this representation the Income-tax Officer took no portion of the moneys received in these two years as income assessable in those years.

Notwithstanding that the petitioner induced the income-tax authorities to agree to the assessment being made when the transaction was closed, he now says that as the amounts paid to him in cash were received by him more than three years before the year of account they are not assessable to tax. To say the least, it is not an honest contention to put forward in view of the representations made by him from year to year. But without taking into consideration the honesty or dishonesty of the petitioner or the effect of his representations, it is clear that he is not entitled in law to escape assessment on the profit which was made out of this mortgage transaction. On his own showing this transaction did not close until the High Court had given its decision in 1936 and therefore it was not until that year profits could properly be calculated. In these circumstances the income-tax authorities were fully entitled to assess on that basis. The question whether the profit calculated by the department is excessive does not arise in this reference, but the Court has been given to understand that in other proceedings the petitioner intends to challenge the figure arrived at by the income-tax authorities.

There is one other point which requires to be dealt with. The petitioner says that in any event he should be allowed to deduct the Rs. 42,000 referred to in the first ques-

tion as that sum was paid into Court in reduction of the Rs. 3,75,000. In raising this point the learned Advocate for the petitioner overlooks the fact that under the terms of the compromise decree his client got the whole of the *zamindari* plus the Rs. 42,000. The Rs. 42,000 is part of the profit which was made out of the transaction, and therefore no deduction can be allowed. For the reasons indicated we answer the first question referred in the negative, and the second question in the affirmative. The petitioner must pay the costs of this reference, Rs. 250.

N.-D.

*Answer accordingly.***ALLAHABAD HIGH COURT**

Civil Revision No. 304 of 1940

and Execution Second Appeal No. 610 of 1938

January 21, 1941

BRAUND, J.

RATI RAM—JUDGMENT-DEBTOR—

APPLICANT

versus

NIADER MAL—DECREE-HOLDER—

OPPOSITE PARTY

Agra Tenancy Act (III of 1926), ss. 80, 253—Order of ejectment made before expiry of 15 days' notice under s. 80—Appeal—Conditional order if can be passed—S. 253, scope of—Order of ejectment passed before expiry of 15 days' notice—Appeal and then revision from order—Judgment-debtor not making attempt to pay amount in meanwhile—If can take advantage of technical irregularity—Civil Procedure Code (Act V of 1908), s. 115—Applicability to proceedings Agra Tenancy Act.

In an appeal against an order of ejectment passed before expiry of 15 days required by notice under s. 80, it is not possible for the Appellate Court to pass a conditional order saying that it set aside the trial Court's order on the condition that the whole amount was paid within certain time.

Once the High Court is seized of the revision, then, it becomes its duty to cast its eye not merely on one part of the proceedings but the whole of them. What come under the review of the High Court are the proceedings as a whole from start to finish and the object of the scrutiny of the High Court is that so far as possible justice may be done in the proceedings as a whole.

A landlord obtained a decree for arrears of rent against the tenant. The notice under s. 80 (2) was served on the judgment-debtor on July 23, 1937. On August 7, 1937, the Assistant Collector, treating the matter as if there had been a default in complying with the notice, made an ejectment order, although 15 days required by notice had not expired at the time of such order. There was an appeal and also a revision to the High Court and the tenant although he had ample time to pay the amount made no attempt to pay it.

Held, that though the order of the Assistant Collector was technically irregular there was no injustice to the judgment-debtor and he could not be allowed to take

advantage of the technical irregularity upon an application for revision.

Though s. 115, Civil P. C., is inapplicable to a proceeding under the Agra Ten. Act, s. 253, Agra Ten. Act is applicable.

C. R. and Ex. S. A. against an order of the Additional District Judge, Meerut, dated January 12, 1938.

Mr. S. B. L. Gour, for the Applicant.

Mr. B. Mukerji, for the Opposite Party.

Order.—This is an application in revision arising out of a Second Appeal No. 610 of 1938, in which I made an order on April 10, 1940. The facts are very simple. It seems that a decree was obtained against the applicant by the opposite party for arrears of rent. On July 23, 1937 a notice, purporting to be a notice under s. 80, sub-s. (2), Agra Ten. Act, 1926, was served upon the applicant. The Act requires that notice to be a 15 days' notice. The Assistant Collector, however, on August 7, 1937, treating the matter as if there had been a default in complying with the notice, made an ejectment order against the applicant. It must be admitted that technically that order was irregular. The fifteen days had not expired at 4 p. m. on August 7, when the Assistant Collector made his order. On that ground in January 1938 the applicant went before the Additional District Judge of Meerut in appeal to complain of the ejectment order.

The Additional District Judge appears to have appreciated that the order of August 7, was technically improper and he realized that it had to be set aside on that account. But he also equally appreciated—and I entirely agree with him—that by that time the applicant had had a considerable period in which he could have paid the arrears of rent if he had been minded to do so. It is really no answer to say that there was certain legislation introduced in September 1937 under which he need not have paid. On this revision application what I am considering on the merits, that is to say the real merits of the matter, is whether any injustice has been done. The learned Additional District Judge in the end gave the applicant three months' time in which to pay. He put it in a rather careless form by saying that he set aside the Assistant Collector's order "on the condition that" the whole amount was paid within three months. I do not think it is possible to make a conditional order of that kind. What he really meant was that he set aside the Assistant Collector's order and substituted another order that, in the event of the whole amount

not being paid within three months, the applicant should then be ejected.

There was then a second appeal to this Court which came before me in April last year and in which I passed the order to which I have already referred. It was conceded that no appeal lay and, by what appears to me now to have been a great concession to the applicant, I refrained from dismissing the second appeal then and there and gave him time to launch the present revision application. This revision application was, accordingly, set on foot on May 7. Two preliminary objections were first taken by Mr. Mukerji on behalf of the respondent. He says first that even this revision application is entitled under s. 115, Civil P. C., and, inasmuch as that section is wholly inapplicable to a proceeding under the Agra Ten. Act, this revision is already 'out of Court.' I see the force of that, but I feel that 'so to hold' would be taking a rather technical view, because, even if s. 115, Civil P. C., does not apply, s. 253, Agra Ten. Act, itself clearly does. Mr. Mukerji then says that, if this is to be considered as a revision application under s. 253, Agra Ten. Act, it still is defective, because what is being sought to be revised is not the judgment of the Assistant Collector but the judgment of the Additional District Judge. I do not think that there is any real force in that, because once the High Court is seized of the revision, then, in my view, it becomes its duty to cast its eye not merely on one part of the proceedings but the whole of them. What come under the review of the High Court are the proceedings as a whole from start to finish and the object of the scrutiny of the High Court is that so far as possible justice may be done in the proceedings as a whole. Again, I feel that the point is a technical one.

I should not be prepared to accede to either of these preliminary objections as I take a somewhat broad view upon the revisional function of the Court. But that has two edges to it and, if I take a broad view in the matter of the preliminary objections, I have also to take a broad view of my functions in examining the merits of the matter. What I feel I have to do is primarily to see whether, in the events which have happened, there has been an injustice. In my view, there certainly has not and I think that, if I were now to interfere with the decree, I should be doing a far greater injustice to the respondent or the opposite party than any injustice to the applicant which at present exists. It may be that there were certain technical irregularities but the

substance of the matter seems to me to be this. The applicant was in arrears with his rent and a decree was passed against him for it. He did not pay, but on the contrary he continued to accumulate arrears of rent in respect even of a subsequent year. Then the applicant sought to enforce his right under s. 80, Agra Ten. Act, by getting possession of the property. This he undoubtedly would have succeeded in doing but for a technical slip on the part of the Judge in relation to the length of the notice.

Then a further substantial period until January 1938 elapsed while the appeal proceedings were pending and during the whole of that time no effort was made by the applicant to pay what was due from him. In considering the merits of the matter, it seems to be immaterial to say that there was in force a certain statute which prevented him from being sued for it. But that is not the end of the matter. Two years later, it comes here, and still the applicant has made no effort to pay. Meanwhile the decree-holder has gone into possession. There has been a long period of time during which the applicant, had he been an honest man, could have paid this money and the matter is made no better by the offer, which when pressed he seems willing now to give, that if allowed a short further period he will pay. He had a very long time in which he could have paid this money and, for one reason or another, has failed to do so. Looking at it broadly, as I think I must, it seems to me that I shall be working an injustice on the opposite party by allowing the applicant to take advantage of some technical irregularity upon a revision application of this kind. In the result therefore the Second Appeal No. 610 of 1938 and the Civil Revision No. 304 of 1940 will both be dismissed with costs.

s.

Order accordingly.

NAGPUR HIGH COURT

Miscellaneous Appeal No. 140 of 1937

September 20, 1938

BOSE, J.

NATHMAL—APPELLANT

versus

BALKRISHNA—RESPONDENT

Res judicata — Applicability — Order on execution application, when can be res judicata on point whether it is "in accordance with law" — Ambiguous order, construction of—Order held not res judicata — Civil Procedure Code (Act V of 1908), O. XXI, r. 11 (2) (b), (h), (e) (j) and rr. 12, 13, s. 100—Order under O. XXI, r. 2 (b), not specifying addresses of judgment-debtors, is in accordance with law — Execution

application showing costs slightly less than awarded, if in accordance with law—Application under O. XXI, r. (2)(e) not specifying date of payment, if in accordance with law—Particulars of movables to be attached not shown—Validity of application—Objection that execution application is fraudulent cannot be raised in second appeal for first time—Similarly, objection that execution application was defective as not mentioning previous application, cannot be raised for first time in second appeal.

*If there is a previous order of the Court operating as *res judicata* which holds that the application under consideration was not made in accordance with law, then clearly that matter cannot be reargued at a subsequent stage of the execution. But before an order can operate as *res judicata* it must clearly decide that the application in question was not in accordance with law. If it merely rejects or dismisses the application on some other ground as, for instance, the non-appearance of the decree-holder, then there is no decision on the merits and when there is no decision on the merits, there is of course no *res judicata*. Where it is ambiguous whether an order is on merits, then the ambiguity must be construed in favour of a person against whom the order is made. Where the order is: "Decree-holder absent. Application incorrect. He is awaited for November 2, 1933", or "decree-holder absent. He has not yet turned up as yet though he was awaited till to-day. Application is therefore rejected with costs" the order will not operate as *res judicata*. [p. 642, col. 2; p. 643, col. 1.]

All that O. XXI, r. 11 (2) (b), Civil P. C., requires is that the names of the parties should be specified in the application. It says nothing about the addresses. Consequently even where the application does not specify addresses of judgment-debtors, the application is in accordance with law. [p. 643, col. 2.]

If the decree-holder asks for more costs than are actually due to him, that might be another matter, but where, when he asks for something less, and the difference is of a trivial character, it is impossible to hold that the application is so vitiated as to be incapable of execution at all. [p. 644, col. 1.]

All that sub-cl. (e) of r. 11, O. XXI, requires is that the payments made should be specified in the application. It says nothing about the dates of these payments. Therefore application not specifying such dates is in accordance with law. [*ibid.*]

Order XXI, r. 11 (2) (j), Civil P. C., states nothing about the specification of the property. All that the decree-holder is required to set forth is the mode in which he seeks the assistance of the Court. This mode is sufficiently indicated when he states that he seeks attachment of the movables of the judgment-debtor. From the perusal of rr. 12 and 13 of O. XXI, it is clear that the Code has drawn a distinction between movables in the possession of the judgment-debtor and movables belonging to him but not in his possession and immovable property in his possession. When the Code itself draws such a distinction and does not ask for a list of movables when they are in the possession of the judgment-debtor, it is impossible to state that an application which does just what the Code requires is not in accordance with law. Consequently an application not specifying particulars of movables to be attached is in accordance with law. [p. 644, cols. 1 & 2.]

An objection raised in the High Court which was not raised in either of the Courts below to the effect that the present application is fraudulent in that the decree-holder has suppressed certain particulars with the intention of misleading the Court must be disallowed. [*ibid.*]

Similarly an objection which was not taken in the Courts below, namely that the present application for execution is defective in that it does not refer to the previous application and also does not mention the

results of the previous applications to which it refers must be disallowed. [*ibid.*]

Misc. A. from an order of the Court of the Additional District Judge, Wardha, dated January 13, 1937.

Mr. M. R. Indurkar, for the Appellant.
Messrs. A. V. Khare, W. B. Pendharkar, S. P. Gole and K. P. Vaidya, for the Respondent.

Order.—The main question here is whether the execution application, dated March 14, 1936, out of which this appeal arises, is within time. That depends upon the construction to be placed upon a previous application, dated October 25, 1933, and upon the two orders, dated October 28, 1933, and November 2, 1933, passed on it.

The first Court held that the application of October 25, 1933, was an application for execution made in accordance with law and that consequently the present application was within time. The lower Appellate Court reversed this finding and came to the conclusion that the previous application was not in accordance with law because it did not mention either the place of residence of the judgment-debtor or the correct amount of costs due in execution. Consequently it has thrown out the present application and the decree-holder appeals.

Now I do not think there can be much doubt about the law. Under Art. 182 of the Indian Lim. Act an execution application is within time if it is filed within three years from the date of a previous application "made in accordance with law" to the proper Court or within three years of the date of the final order passed on such an application. The question then is whether the application of October 25, 1933 was "made in accordance with law."

It has been decided in *Pilivasao v. Khairunnissa* (1) that a liberal construction must be placed upon Art. 182 (5) of the Lim. Act. The objection of limitation is at all times a technical one and there is no reason why a Court of justice should endeavour to throw out a just claim unless the judgment-debtor can bring himself strictly within the four corners of the technicality upon which he relies. If he is technical, then there is no reason why he should not be met with technicality.

Of course if there is a previous order of the Court operating as *res judicata* which holds that the application under consideration was not made in accordance with law,

(1) 31 N. L. R. 126; 153 Ind. Cas. 955; A. I. R. 1935 Nag. 1; 7 R. N. 152.

then clearly that matter cannot be reagitated at a subsequent stage of the execution. But before an order can operate as *res judicata* in the present circumstances it must clearly decide that the application in question was not in accordance with law. If it merely rejects or dismisses the application on some other ground as, for instance, the non-appearance of the decree-holder, then there is no decision on the merits and when there is no decision on the merits, there is of course no *res judicata*. This has been decided by a Full Bench of the Judicial Commissioner's Court in *Gulamali v. Rai Kumar Chatterji* (2) and also by a single Judge in *Hanumanlala v. Sheonarayan* (3). Therefore what I have to see is whether there was a decision on the merits in respect of the application of October 25, 1933.

The first order passed in connection with that application is dated October 28, 1933, and is to this effect :

"Decree-holder absent. Application incorrect. He be awaited for November 2, 1933."

There is clearly no decision in this order. All it states is that the application is incorrect and therefore the decree-holder be awaited, that is to say, the Judge did not decide the question but made up his mind to await the explanation of the decree-holder and to withhold his decision until he had heard what he had to say. That order therefore clearly does not operate as *res judicata* in respect of this matter.

The next order is dated November 2, 1933, and is in these terms :

"Decree-holder absent. He has not yet turned up as yet though he was awaited till to-day. Application is therefore rejected with cost."

Here it is clear that the learned Judge has not rejected the application because it was not in accordance with law or because it was incorrect but because though he waited for the decree-holder to return up, he did not do so. That is to say the application was dismissed in default. It is unnecessary for me to decide whether a Judge in execution has power to dismiss an application in default or not. What I have to consider at the moment is whether there was a decision on the merits. It is clear from that order that there was not, and consequently it cannot operate as *res judicata* on this point.

At the outset all that can be urged in connection with the order of November 2, 1933, is that it was ambiguous but if that is so, then the ambiguity must be construed in

favour of the person against whom the order is made. It would be unjust to place a party at a disadvantage because a Court uses language capable of two meanings. However as I have said, in my opinion, there is no ambiguity. The application was clearly rejected not because it was incorrect but because the decree-holder did not turn up after he had been given an opportunity to do so. That being so, it is the duty of the Courts now to decide whether the previous application was in accordance with law or not. I fully agree with the learned Counsel for the respondent that merely because an application of some sort is put in at a previous stage and nothing more is done about it, that would not serve to operate as a step-in-aid of execution.

As I have said the application was attacked in the lower Appellate Court on the two grounds set forth above. Two additional grounds were also urged in the arguments before me, namely that though there were repayments, the dates of those repayments have not been mentioned in the application, and also that the movable property of which attachment is sought has not been described. I will deal with these objections one by one.

First of all, as regards the address of the judgment-debtor, all that O. XXI, r. 11 (2) (b) requires is that the names of the parties should be specified in the application. It says nothing about the addresses. If this is compared with O. VII, r. 1 dealing with the particulars required in a plaint, it will be seen that in the case of a plaint not only is the name of the defendant necessary but also his place of residence. Therefore, if a decree-holder complies precisely with the terms of O. XXI, r. 11, it is impossible to say that his application is not in accordance with law, especially when the Code itself draws the distinction to which I have referred between plaints and applications for execution. It may be that in a given case the particulars required by the Code would be insufficient but in that case it is always open either for the Court or for the other side to ask for further and better particulars. The point is that an application which complies strictly with the terms of O. XXI, r. 11 cannot be said to be not in accordance with law.

Turning next to the question of costs, this is dealt with in O. XXI, r. 11 (2) (h). The amount of costs awarded in the present case amounted to Rs. 16-4 and the amount shown was Rs. 14. The question is whether this mistake or inaccuracy is enough to make the application so wrong as to be not in ac-

(2) 28 N L R 7; 134 Ind. Cas. 681; A I R 1931 Nag. 154; 14 N L J 101; Ind. Rul. (1931) Nag. 169 (F B).

(3) 31 N L R 333; 156 Ind. Cas. 114; A I R 1935 Nag. 131; 7 R N 220.

cordance with law. Now these particulars are required to enable the Court to get on with the execution and to further the ends of justice, so I do not think they should be used in such a way as to frustrate justice. If the decree-holder had asked for more costs than were actually due to him, that might have been another matter, but here, when he asks for something less, and the difference is of such a trivial character, I find it impossible to hold that the application is so vitiated as to be incapable of execution at all. Therefore although there has been a slight inaccuracy, there has, in my opinion, been a substantial compliance with the provisions in this behalf.

Turning next to the objection about the omission to give the dates of payments, all that sub-cl. (e) requires is that the payments made should be specified in the application. It says nothing about the dates of these payments. Therefore, as I have said, technicality can be met with technicality, and so long as the requirements of the Code have been complied with, it is impossible to hold that the application is not in accordance with law.

The same remarks apply to the objection that the property against which execution is sought has not been specified. As a matter of fact, it has been specified in a general manner. The application asks that the movable property be attached. It is true it does not state whose movable property, but since execution is sought against the judgment-debtor alone, it can only mean the movable property of the judgment-debtor. Therefore what remains to be determined is whether this property must be particularised. I have no doubt that it is desirable that this should be done and I have no doubt that when it is not done, it will ordinarily be necessary to ask for further and better particulars. But that is not the point. The question is whether the Code requires it in the first instance.

All that the clause in question of r. 11 states is :

"The mode in which the assistance of the Court is required, whether—

(i) by the delivery of any property specifically decreed;

(ii) by the attachment and sale, or by the sale without attachment, of any property, etc."

It will be noticed that it states nothing about the specification of the property. All that the decree-holder is required to set forth is the mode in which he seeks the assistance of the Court. This mode is sufficiently indicated when he states that he seeks attachment of the movables of the judgment-debtor.

Turning now to rr. 12, and 13 of O. XXI, when the application is for attachment of movable property belonging to a judgment-debtor but not in his possession, the decree-holder is required to annex to the application an inventory of the property to be attached containing a reasonably accurate description of the same, and so also when an attachment is sought of immovable property; a description of it is required. It is clear then that the Code has drawn a distinction between movables in the possession of the judgment-debtor and movables belonging to him but not in his possession and immovable property in his possession. When the Code itself draws such a distinction and does not ask for a list of movables when they are in the possession of the judgment-debtor, it is impossible to state that an application which does just what the Code requires is not in accordance with law. Consequently, I agree with the first Court that this application was made in accordance with law and disagree with the lower Appellate Court. It follows the present application is within time.

An objection was raised in this Court which was not raised in either of the Courts below to the effect that the present application is fraudulent in that the decree-holder has suppressed certain particulars with the intention of misleading the Court. Since no plea of fraud was raised, I decline to allow it to be raised at this stage.

Another objection is also taken which was not taken in the Courts below, namely that the present application for execution is defective in that it does not refer to the previous application of October 25, 1933, and also does not mention the results of the previous applications to which it does refer. It is stated that both were necessary under the provisions of the Civil P. C.

I agree that those details are necessary but they are details which are mere matters of procedure and therefore an omission can be rectified in the course of the proceedings. When the judgment-debtor appeared in this case, the only objection he raised was an objection about limitation and he himself furnished the necessary particulars in respect of the missing application. This was on July 4, 1936. If the present objection had been taken at that stage, the decree-holder could easily have amended his application and the application would then have been within time even if regarded as having been filed on July 4, 1936. Since these objections were not taken at that stage and have been taken for the first time in second appeal, I disallow them.

The appeal is allowed. The order of the lower Appellate Court is reversed and that of the first Court restored. Execution will now continue. Costs here and in the lower Appellate Court will be paid by the respondent. Counsel's fee Rs. 25.

D. Appeal allowed.

PATNA HIGH COURT

Appeal No. 414 of 1940

February 13, 1941.

VARMA AND SHEARER, JJ.

DEBI RADHA RANI—PLAINTIFF—

APPELLANT

versus

RAM DASS—DEFENDANT—RESPONDENT

Contract—Consideration—Wife forbearing to sue for maintenance on her husband's agreeing to pay her monthly allowance—Contract, if supported by consideration.

Where a wife has foreborne to sue her husband for maintenance allowance on his agreeing to pay her monthly allowance by way of maintenance, the contract is supported by consideration, as wife's forbearance to sue amounts to consideration for husband's agreement for payment of a monthly maintenance allowance to her.

[Case-law relied on.]

A. from the appellate decree of the Sub-Judge, Patna, dated April 29, 1940.

Messrs. B. N. Mitter, Rai Paras Nath and Sambhu Barmeshwar Prasad, for the Appellant.

Dr. D. N. Mitter and Mr. A. B. N. Sinha, for the Respondent.

Varma, J.—This is an appeal of the plaintiff, who is the wife of the defendant. The suit was for realization of arrears payable under an *ekrarnama*, which was executed on August 8, 1931. From that *ekrarnama* it appears that the husband agreed to pay the plaintiff a sum of Rs. 15 a month and a lump sum of Rs. 800 at the time of the daughter's marriage. The parties were married about 26 years before the date of the suit. There were two issues to the marriage, one son and one daughter and after the son died in the year 1928, misunderstandings arose between the parties and there are allegations of cruelty towards the plaintiff by her husband, as a result of which she went and stayed with her father. The defendant took a second wife. The defence was that the *ekrarnama* was executed by the defendant as a result of undue influence and coercion, inasmuch as there was at the time pending a criminal case under ss. 323 and 504, I. P. C., between the defendant and the defendant's father-in-law, that is to say, the father of

the present plaintiff. From the plaint it appears that the cause of action arose on August 10, 1931, the date of the execution of the *ekrarnama* and on the 30th of each month, from May 1932 to May 1938, at Mithapur, Thana Kotwāli, within the jurisdiction of the Court. The actual amount to be paid was a sum of Rs. 1,095 plus damages to the extent of Rs. 65-12-0 for the years in suit.

The lower Appellate Court has come to the conclusion that it cannot be held that the registered agreement (*viz.*, the *ekrarnama*) was executed under any coercion or undue influence. The next point that the lower Appellate Court formulated for determination was whether the agreement was valid under the Contract Act as well as under the Hindu Law, and the rest of its judgment is devoted to a consideration of the circumstances under which a Hindu wife is entitled to claim maintenance. The point of view from which the learned Subordinate Judge approached the case indicates that he has fallen into an error. As already mentioned in the earlier part of the judgment, the cause of action arose not on the non-payment of maintenance to the plaintiff as a Hindu wife but on the non-observance of the terms of the *ekrarnama* which came into existence on August 10, 1931. It is argued before us that there was no consideration for this agreement. I shall refer to the terms of the *ekrarnama* to show how far this point succeeds in favour of the defendant, the husband of the plaintiff. Reliance has been placed upon the decision in *Sm. Rajlukhy Debee v. Bhootnath Mookerjee* (1) in which the wife sued her husband to recover the arrears of allowance which the husband agreed to pay. Their Lordships of the Calcutta High Court decided that case on the ground that the recitals contained in the agreement in question did not show any consideration moving from the wife for the agreement by the husband. It appears from the judgment in that case that there was no promise on the part of the wife to do, or abstain from doing anything; she gave up no right. It was held in that case that there was no consideration and therefore the agreement was not binding. Now, let us see if there was a consideration in this case or not. A translation of the *ekrarnama* has been handed over to us by the learned Advocate for the appellant and its correctness has not been questioned. There, after narrating that the wife had become displeased with the husband on ac-

(1) 4 O W N 488.

count of difference and discord and had as a result gone away to her father's place the executant states as follows :

"Consequently the said my wife is about to sue me in the Civil Court for her maintenance allowance. I therefore think that the institution of a suit will put me to loss and disgrace and that it would be better if I made some provision for the maintenance of my aforesaid wife so as to enable her to lead a contented and happy life and so that she may not have any grievance, I, the executant, therefore made her agree to the proposal that I would give her a monthly allowance of Rs. 15 every month for life whether she lived with her father at her father's place or with me. . . . To this proposal of mine my aforesaid wife agreed and I, the executant, thought it meet and proper to execute in her favour a deed of maintenance so that she may be satisfied and may not be put to any trouble and inconvenience whatever."

The learned Advocate for the appellant (the wife) urges this forbearance to sue amounts to consideration under the Contract Act. As the document itself indicates, the wife was prepared to sue and forbore because this contract was entered into. In support of his proposition the learned Advocate has referred to the decision in *Gulab Chand v. Kamal Singh* (2), where it was held that

"if a person believes that he has a *bona fide* claim to enforce, his forbearance from trying to put that claim in a Court and to have it decided will be a good consideration for a contract, however the claim, if brought, may be decided."

In that case reference was made to *Miles v. New Zealand Alford Estate Co.* (3), a case on which reliance has also been placed by the learned Advocate for the respondent. A similar view was expressed in *Crears v. Hunter* (4) the placitum of which is as follows :

"For the purpose of inducing the plaintiff to give time to the defendant's father for payment of a debt, the defendant signed a promissory note whereby the defendant's father and the defendant jointly and severally promised to pay to the plaintiff the amount of the debt with interest half yearly at the rate of five per cent. per annum until the amount was paid. The plaintiff having forbore to sue for several years — held that the plaintiff having forbore from suing the defendant's father at the defendant's request, there was a good consideration for the defendant's liability on the note, although there was no contract by the plaintiff to forbear from suing."

In support of the same principle the decision in A. I. R. 1929 Lah. 485 corresponding to 116 Ind. Cas. 312 *Mangal Singh v. Ghasita* (5) has also been cited at the bar. There it was held that :

"Disputed and doubtful claims to legal or equitable

(2) 44 A 424; 67 Ind. Cas. 4; A I R 1922 All. 260; 20 A L J 285.

(3) (1886) 32 Ch. D 266; 55 L J Ch. 801; 54 L T 582; 34 W R 669.

(4) (1887) 19 Q B D 341; 56 L J Q B 518; 57 L T 554; 35 W R 821.

(5) 116 Ind. Cas. 312; A I R 1929 Lah. 585; Ind. Rul. (1929) Lah. 483.

rights will support the consideration for a compromise, and forbearing to sue for or releasing a *bona fide* claim, which is reasonably doubtful in fact or in law, though no proceedings have been commenced, is a good consideration."

As against this Dr. Mitter has, on behalf of the respondent, urged that forbearance to sue may amount to consideration ; but if the claim is fictitious on the face of it, then in that case forbearance to sue cannot be said to amount to consideration for the contract. For that proposition Dr. Mitter has referred us to various passages from Mayne's Hindu Law and Mulla's Hindu Law and has pointed out the circumstances under which these commentators say that a Hindu wife is entitled to maintenance. As I have already said before, the present suit is based on the *ekrarnama* and, if it were a suit for maintenance, the plaintiff might have led evidence to bring the case well within the circumstances entitling her to maintenance as a Hindu wife. But the suit was one on the *ekrarnama* and the incidents previous to the *ekrarnama* have not naturally been fully gone into nor was evidence led on those points. It is not possible to say in the present case that the plaintiff's claim for maintenance for which she was prepared to sue her husband was a fictitious one. In these circumstances I am of opinion that the judgments of the Courts below should be set aside and the plaintiff's suit should be decreed with costs throughout. Mr. A. B. N. Sinha on behalf of the respondent has raised the question that as the amount of the decree is a large one, and that, as his client is drawing a poor pay, instalments should be fixed by this Court. That is, however, a matter which can well be agitated before the executing Court. The result therefore is that the appeal is allowed with costs throughout.

Shearer, J.—I agree.

D.

Appeal allowed.

MADRAS HIGH COURT

Letters Patent Appeal No 99 of 1938

December 8, 1939

LEACH, C. J. AND KRISHNASWAMY

AYYANGAR, J.

THADI CHANDRAYYA AND OTHERS—

APPELLANTS

versus

VAITLA SEETHANNA AND ANOTHER

—RESPONDENTS

Limitation Act (IX of 1908), s. 14.—Plaint returned for presentation to proper Court for want of pecu-

niary jurisdiction—Plaintiff striking off part of claim to bring it within jurisdiction and representing amended plaint on date when suit was time-barred—Suit held must be deemed to have been instituted on date of representation and was barred—Plaintiff held could not claim benefit of s. 14.

A Court which has no jurisdiction cannot pass orders in the suit beyond directing the plaint to be presented to the proper Court and giving a direction with regard to the costs incurred upto the time of the return of the plaint.

A plaint was presented within limitation to the Court which had no pecuniary jurisdiction to try it and was, therefore, returned by the Court for presentation to the proper Court. The plaintiff amended the plaint by striking out a part of his claim in order to bring his claim within jurisdiction and represented it to the same Court. On the date of such representation the claim had become time-barred. The amendment was allowed by the Court and the plaint was treated as a continuation of the original plaint :

Held, that the suit must be deemed to have been instituted on the date of the representation of the plaint which the Court had jurisdiction to accept and was, therefore, barred by limitation. The plaintiff could not claim the benefit of s. 14, Lim. Act, because he deliberately undervalued his relief in the first instance.

[Case-law discussed.]

L. P. A. against the judgment and decree of Wadsworth, J. dated November 14, 1938.

Messrs. G. Lakshmana and G. Chandra-sekhara Sastri, for the Appellants.

Messrs. V. Viyanna and Ch. Raghava Rao, for the Respondents.

Leach, C. J.—The question which arises in this appeal is one of limitation. The suit was filed by respondent No. 1 in the Court of the District Munsif of Ramchandrapur. He was the reversioner to the estate of one Ramanna, which after Ramanna's death devolved upon his daughter Pullamma. The reversion opened on July 3, 1916, when Pullamma died. Respondent No. 1 was born on November 1, 1908 and therefore attained his majority on November 1, 1926, which gave him until November 1, 1929, in which to file the suit. On October 30, 1929, he filed a plaint in the Court of the District Munsif and asked for possession of the suit properties from the appellants who were in possession under the alienations created by Pullamma. In the plaint the properties were described in two Schs. A and B. The properties in Sch. A were valued at Rs. 693 and the mesne profits thereof at Rs. 2,040. The properties in Sch. B were valued at Rs. 250. In their written statement the appellants challenged the correctness of the valuation of the properties in Sch. B. They contended that there had been gross undervaluation. The consequence was that the District Munsif directed the appointment of a Commissioner to estimate the value of the

properties. But the plaintiff deliberately abstained from taking out the commission and from this conduct the District Munsif drew the legitimate inference that the aggregate value of the properties mentioned in the plaint was over Rs. 3,000 and he therefore held that he had no jurisdiction to entertain the suit.

On August 6, 1930, the District Munsif accordingly returned the plaint to respondent No. 1 for presentation to the Court of the Subordinate Judge. Respondent No. 1 took the plaint away, amended it by striking out his claim for possession of the properties mentioned in Sch. B, and later in the day represented it to the District Munsif. On August 11, 1930, the District Munsif again returned the plaint to respondent No. 1 as he considered that it was a new suit and which necessitated the filing of a new *vakalat*. On August 14, 1930, respondent No. 1's Pleader re-presented the plaint without filing a fresh *vakalat*. He contended that the plaint was a continuation of the plaint which was presented on October 30, 1929. On August 15, 1930, the Court once more returned the plaint to respondent No. 1, intimating that it must be treated as a fresh suit. On that date respondent No. 1's Pleader re-presented it with an application that the amendment which he had made might be allowed and the plaint approved. He also asked that the plaint should retain its old number. The District Munsif agreed to this course and passed a formal order of the nature indicated.

The only question which arises now is whether the suit must be deemed to have been instituted on October 30, 1929, when the original plaint was presented, or on August 6, 1930, when the plaint was re-presented after it had been returned by the District Munsif for filing in the proper Court and had been amended by the elimination of Sch. B and the relief claimed in respect of the properties therein mentioned. The District Munsif held that the suit must be deemed to have been filed on August 6, 1930, and therefore was barred by the law of limitation. On appeal the Subordinate Judge of Rajahmundry held that the suit was in time, as in his opinion the correct date was October 30, 1929. On Second Appeal, Wadsworth, J. agreed with the Subordinate Judge, but gave a certificate for a further appeal under cl. 15, Letters Patent. The learned Judge considered that the filing of the amended plaint on August 6, 1930, must be deemed to be a continuation of the suit which was filed on October 30, 1929,

and therefore was in time. We are of the opinion, that the District Munsif was right and that the date of the institution of the suit must be taken to be August 6, 1930. In *Kannaswami Pillai v. Jagathambal* (1), Sadasiva Ayyar, J. held that when a Court of first instance has decided that a suit is beyond its jurisdiction it has no power to pass any other judicial order, except those which statute expressly empowers it to pass, such as an order returning the plaint for presentation to the proper Court under O. VII, r. 10, Civil P. C., or an order awarding costs under s. 35 of the Code. We agree with this statement. A Court which has no jurisdiction cannot pass orders in the suit beyond directing the plaint to be presented to the proper Court and giving a direction with regard to the costs incurred upto the time of the return of the plaint. The opinion of Sadasiva Ayyar, J. was shared by Venkatasubba Rao, J. in *Govindaraja Naicker v. Kasim Sahib* (2).

In *Nayinakamen Bhattar v. Madureswara Bhattar* (3), a Bench of this Court, consisting of Collins, C. J. and Parker, J. had to deal with a case on all fours with the present one. The Court there held that the date of the suit was the date when the plaintiff presented to the Court a plaint which accorded with its jurisdiction. In that case the plaintiffs filed their suit in the Court of the District Munsif for certain offices in a temple and their emoluments. The case was carried to this Court which ordered the plaint to be returned for presentation to the proper Court, namely, the Court of the Subordinate Judge. Instead of presenting the plaint to the Subordinate Judge, the plaintiffs abandoned part of their claim so as to bring it within the jurisdiction of the Munsif's Court and re-presented the plaint to the District Munsif's Court. The Bench agreed with the Subordinate Judge that the plaintiffs were not entitled to the benefit of s. 14, Lim. Act, in the circumstances of the case. The first plaint was returned as the suit as framed was beyond the jurisdiction of the District Munsif's Court. The plaintiffs had then abandoned part of their claim and had sued again in the same Court which they might have done at first. In the circumstances it was held that the suit was barred.

(1) 41 M 701; 46 Ind. Cas. 265; A I R 1919 Mad. 1071; 35 M L J 27; (1918) M W N 497; 26 M L T 46; 8 L W 145.

(2) 54 M L J 409; 108 Ind. Cas. 542; A I R 1928 Mad. 384; 27 L W 291; I L T 40 Mad. 124.

(3) 5 M L J 58.

In the course of his judgment, Wadsworth, J. referred to *Karumhar Pandrapandaram v. Audimula Ponnappandaram* (4), *Ramachandrayya v. Venkataratnam* (5) and *Varada Pillai v. Govindaraja Pillai* (6). The judgment in these cases are not really in point. In *Karumhar Pandrapandaram v. Audimula Ponnappandaram* (4), the plaintiff filed a plaint in the District Munsif's Court and it was returned to him as he had undervalued the properties claimed. If they had been properly valued the value would have exceeded the pecuniary jurisdiction of the Court. After the plaintiff had obtained possession of the plaint he struck out part of the relief claimed, and in this way brought the value of the suit within the pecuniary jurisdiction of the District Munsif's Court. He then presented it to the District Munsif who accepted it. On an application for revision, Abdur Rahim, J. held that there was nothing illegal in the amendment and that it was competent to the Court to accept the amended plaint. But in this case there was no question of limitation. The Court was not called upon to decide whether the date of the presentation was the date when the plaint was originally filed or when the plaint was represented after amendment. Therefore we cannot regard this decision as conflicting with the opinion which I have just expressed. In *Ramachandrayya v. Venkataratnam* (5), the plaintiff was allowed to amend his plaint to bring it within the jurisdiction of the District Munsif's Court where he had filed it, instead of having the plaint returned to him for presentation to the Court of the Subordinate Judge. The District Munsif allowed the plaint to be amended, and the question was whether his order was passed without jurisdiction. Odgers, J. held that the District Munsif had jurisdiction. It is unnecessary to consider whether this decision is right. Here again there was no question of limitation. *Varada Pillai v. Govindaraja Pillai* (6), calls for no comment.

On behalf of the respondent a further case has been quoted to us, namely, the decision of Jackson, J. in *Neelachalam v. Narasingha Dass* (7). There the plaintiff had not paid the proper court-fee and he was ordered to provide the additional stamp required. Instead of doing so he reduced

(4) 33 M 262; 3 Ind. Cas. 725.

(5) A I R 1926 Mad. 133; 92 Ind. Cas. 800; 22 L W 582.

(6) 59 M L J 953; 129 Ind. Cas. 254; A I R 1931 Mad. 8; 32 L W 694; Ind. Rul. (1931) Mad. 254.

(7) 34 L W 252; 134 Ind. Cas. 816; A I R 1931 Mad. 716; (1931) M W N 677; Ind. Rul. (1931) Mad. 864.

the amount of his claim. By doing this the relief claimed was covered by the stamp. The question was whether the date of the suit should be taken to be the date of the filing of the plaint in the first instance or the date when it was amended and re-presented by the plaintiff. Here the Court had jurisdiction throughout and the only question was whether the plaintiff should pay the additional court-fee or whether he should reduce his claim and thus avoid the necessity of paying additional court-fee. We do not regard this case as having any bearing, but even if it has, it is not binding on us. We hold that the suit was instituted on August 6, 1930, when the Court was presented with the plaint which it had jurisdiction to accept. The hardship which respondent No. 1 is now experiencing is of his own making. He cannot claim the benefit of s. 14, Lim. Act, because he deliberately undervalued his relief in the first instance. If he had not done this we should have had no hesitation in granting relief under that section. He has however put himself out of Court. We have to decide the case on the technical objection which the appellant have raised. The objection is sound in law and therefore must be accepted. The appeal will be allowed with costs throughout.

N.-S.

Appeal allowed.

PATNA HIGH COURT

Appeal from Original Order No. 276 of 1939
July 26, 1940

FAZL ALI AND MEREDITH, JJ.
THE CHOTA NAGPUR BANKING
ASSOCIATION LTD.—APPELLANT
versus

RADHA GOBINDA SINGH AND OTHERS—
RESPONDENTS

Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939), s. 11—Order fixing instalments—Appealability—Notification of July 19, 1939, if includes Banks registered under old Act VI of 1882.

No appeal lies against an order fixing instalments under s. 11, Bihar Money-lenders Act, 193 Ind. Cas. Act VI 670 (1), followed.

The Govt. of Bihar Notification No. 1000-VIA-7/39-Com. issued on July 19, 1939, refers in specific terms to joint stock Banks registered under the Indian Companies Act, 1913, and no others. This cannot be taken to include Banks which were registered under some other Act *e. g.*, registered under the old of 1882.

A. from a decision of the Subordinate Judge of Purulia, dated July 20, 1939.

Mr. B. C. De, for the Appellant.

Messrs. S. C. Mazumdar and Ramanugrah N. Sinha, for the Respondents.

Meredith, J.—This is an appeal by the Chota Nagpur Banking Association, decree-holder, against an order of the learned Subordinate Judge of Purulia fixing instalments under s. 11 of the Money Lenders Act.

It has been held by this Court in *Dhanukdhari Singh v. Ramratan Singh* (1), that no appeal lies against such an order. Apart from that, however, there appears to be no merit in the appeal. The point raised is that on the date when the order was passed namely, July 20, 1939, the Banking Association together with other Banks had been exempted from the operation of s. 11 of the Money Lenders Act and consequently the learned Subordinate Judge had no jurisdiction to make an order fixing instalments under s. 11 of that Act. Actually on July 19, 1939, the Govt. of Bihar issued Notification No. 1000-VIA-7/39=Com. in the following terms:—

“In exercise of the power conferred by s. 3 of the Bihar Money-lenders (Regulation of Transactions) Act, 1939 (Bihar Act VII of 1939) as applied to the Chota Nagpur Division by Notification No. 736-VIA-32 Com., dated May 29, 1939, issued under sub-s. (1) of s. 92 of the Govt. of India Act, 1935, the Governor of Bihar is pleased to exempt in all areas of the Chota Nagpur Division the money-lenders or class of money-lenders or class of loans specified in col. 1 of the Schedule below from the provisions of the Bihar Money-lenders (Regulation of Transactions) Act, 1939 (Bihar Act VII of 1939) mentioned against them in col. 2 of the said Schedule, for the reasons mentioned against them in col. 3 of the said Schedule.”

In the schedule to the Notification the third item in col. 1 is “Joint Stock Banks registered under the Indian Companies Act, 1913” and in col. 2 is “ss. 4, 7, 8, 10, 11 and 12.” It, therefore, follows that at the time of the order the appellant Company must be taken to have been exempted from the Money Lenders Act if it is a Joint Stock Bank registered under the Indian Companies Act, 1913. The difficulty in the appellant’s way however, is that the Chota Nagpur Banking Association was not registered under the Act of 1913 but under the old Act, VI of 1882. Mr. De for the appellant contends that the Company must be deemed to be one registered under the Indian Companies Act, 1913, and he relies upon the definition of “Company” in that Act. Section 2 (2) of the Act of 1913 says “‘Company’ means a company formed and registered under this Act or an existing company.” Clearly, therefore, the word “Company” when used in the Act of 1913 will cover a company registered under the old Act such as the appellant Company. But the fact that the provisions of the Act of 1913 are made applicable to

(1) (1940) P W N 492; 193 Ind. Cas. 670; 19 Pat. 862; 21 P L T 1057; A I R 1941 Pat. 1; 7 B R 646.

such a company does not in my view render that company one actually registered under the Act of 1913. On the contrary, it is apparent from the very definition cited by Mr. De, that a distinction was drawn between companies registered under the Act and previously existing companies.

The Notification of July 19, refers in specific terms to joint stock Banks registered under the Indian Companies Act, 1913, and no others. In my opinion this cannot be taken to include Banks which were registered under some other Act. It is argued that if the Notification is interpreted in this way it will lead to an absurd result, which could not have been intended by Govt. That may or may not be so; but this is a point with which we are not concerned, for when the language is perfectly clear, no other interpretation is possible. There is no ambiguity in the language used and no absurdity in the wording itself. We understand that an application has already been made to Govt. to secure a correction of the Notification and if that be so, it clearly implies that the appellant Bank itself feels that a correction is necessary. In my view it must be held that the appellant Bank was not exempted from the Money Lender's Act by the Notification referred to. The order passed by the learned Subordinate Judge was, therefore, not without jurisdiction.

I would dismiss this appeal with costs.

Fazi Ali, J.—I agree.

s. *Appeal dismissed.*

CALCUTTA HIGH COURT

Appeals Nos. 71 of 1937 and 6 of 1938

August 6, 1940

R. C. MITTER AND MOHAMAD AKRAM, JJ.

Smt. BHADRABATI DEVI—DEFENDANT

No. 10—APPELLANT

versus

JIBANMAL BABU AND OTHERS—

RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Partition suit—Appointment of Receiver under O. XL—Title to property does not vest in Receiver—Court sanctioning loan on mortgage—Receiver can validly bind shares of parties by execution of mortgage—Mortgagee from Receiver held not entitled to first charge.

The title to properties does not vest in the Receiver, appointed under O. XL, Civil P. C., for the management and preservation of the properties in suit. The parties therefore have power to deal with their shares without reference to Court provided that their acts do not interfere with possession of the Receiver. The Receiver can exercise the powers of the owners in the matter of execution of documents and if the Court sanctions a loan on mortgage he can validly execute

the mortgage instrument so as to bind the shares of the parties. [p. 653, col. 1.]

In those cases where the order of the Court simply sanctions a loan by the Receiver on a first charge of the properties, but does not indicate the purpose for which the loan is sanctioned, the creditor who advances the money is entitled to assume that everything was in order and so he ought to get what the Court had promised to give him, namely precedence over earlier encumbrances created by the parties. In such cases the Court cannot break faith with him. He is not bound to look beyond the order. [p. 653, cols. 1 & 2.]

If the purpose of the loan as set out in the order is for preservation or protection of the property committed to the care of the Receiver, or is an order in an administration suit or one in a partition suit made for working out the rights, liabilities and obligations of the co-sharers of the joint properties in the course of partition, the mortgagee from the Receiver would have first charge in accordance with the order. *Herumboo Nath v. Satish Chandra* (1) and *Greenwood v. Algeciras (Gibraltar) Ry. Co.* (2), relied on.

The power of the Court to sanction a loan for protection or preservation of the property is incidental to and necessary for the performance of its duty to protect and preserve the subject-matter of the suit, which it has taken upon itself by appointing a Receiver, and must be measured and limited by its duty, where its exercise comes into conflict with the rights of third parties which are not before it and to whom no notice had been given, or who had not consented. In such a case the principle of breach of faith cannot, be the decisive factor. It is a question of power or jurisdiction of the Court. If the Court arrogates to itself a power which it does not possess—and such usurpation appears on the face of the order—and does an act affecting persons not parties to the suit, its acts cannot prejudice the rights of such persons. In such a case the mortgagee from the Receiver cannot protect himself on the presumption that the Court had acted within its powers, for the order on the basis of which he acted *ex facie* would indicate want of power in the Court. [p. 653, col. 2; 654, col. 1.]

In a suit for partition the Court sanctioned a loan to be raised by the Receiver on a mortgage, for payment to one of the parties. The order originally did not mention the purpose of the loan nor made it a first charge. The Receiver who was personally interested in raising the loan on the basis of the order raised an amount in excess of that sanctioned by the Court on the basis of promissory notes and on the assurance to the creditor that the loan would be a first charge on the property. The parties subsequently agreed that their property should be mortgaged for the loan and by suppressing the fact that it was already heavily encumbered misled the Court into making the mortgage by Receiver a first charge on the property. No notices were issued to the prior mortgagees. On the basis of the second order the Receiver mortgaged the aforesaid property to the creditor already mentioned on two mortgages for amounts far in excess of that sanctioned by the Court.

Held, that no priority could be claimed by the mortgagee from the Receiver, over the prior mortgagees. *Giridhari Lal v. Dharendra Krista* (3), distinguished.

As. from the original decrees of the Sub-Judge, Burdwan, dated September 21, 1936 and August 3, 1937, respectively.

Dr. S. C. Basak and Mr. Kamalaksha Basu (in both appeals), and Messrs. Atul Chaudhury Gupta and Apurba Charan Mukherji (in No. 71), for the Appellant.

Messrs. *Apurbadhan Mukherji* and *Rash Behari Mitra* (in No.6), for the Respondents.

Judgment.—These two appeals are in two suits, Nos. 222 of 1935 and 1 of 1937 of the Court of the Subordinate Judge of Burdwan. The appeals were heard together by consent of the parties. The first suit was filed by Jiban Mull and Dhanraj against ten defendants. In the suit they claimed to recover Rs. 57,748-4-0 by the enforcement of a mortgage executed in their favour on February 13, 1929, by defendants Nos. 1 to 6 and by defendant No. 8 on behalf of her ward defendant No. 7. Defendant No. 9, Mr. Nilmoni Kumar Chatterjee is a Receiver appointed by the Court in a suit (No. 142 of 1923 of the said Court) for partition between defendants Nos. 1 to 7, the sons of Rajendra Nath Dutt, and their co-sharers. Defendant No. 10, is Bhadrabati Devi, wife of Dinabandhu Tewari. The plaintiffs have impleaded her on the allegation that she was at best a puisne mortgagee in respect of some of the properties mortgaged to them. Defendants Nos. 1 to 7, of this suit will hereafter be designated as the heirs of Rajendra Nath Dutt. The second suit was filed by Girindra Nath Mitter and others, the legal representatives of Mr. Debendra Nath Mitter, to recover Rs. 39,999-15-1 by the enforcement of a mortgage executed by Anadi Nath Dutt on January 17, 1928, in favour of Debendra Nath Mitter. The defendants to the suit are (1) Anadi Nath Dutt, (2) Nilmony Kumar Chatterjee, the Receiver appointed in the said suit for partition (No. 142 of 1923). Defendant No. 3 is Bhadrabati Debi. She was impleaded by the plaintiffs on the same footing as in the other suit. In both the suits Bhadrabati Debi claims priority over the mortgages of the plaintiffs though her mortgages are later in point of time. Her claim has been negatived by the same learned Subordinate Judge by his judgments dated September 28, 1936, and August 3, 1937. She has accordingly preferred these two appeals. The point is the same in both the appeals, namely, whether she is entitled to priority in respect of her mortgages. It arises on the same set of facts, which we now proceed to recite.

In 1923, suit No. 142 of the Court of the Subordinate Judge at Burdwan was instituted for partition of the joint properties of the parties to that suit, who were Anadi Nath Dutt, the heirs of Rajendra Nath Dutt and Bibhuti Bhusan Dutt and others. In that suit Mr. Nilmony Kumar Chatterjee, a Pleader, was appointed Receiver on June 17, 1926. The two mortgages sought to be enforced in the two suits were executed after the ap-

pointment of the Receiver. It appears from the record that the said Receiver was directed by the learned Subordinate Judge, who appointed him, to realise the arrears of rent of the properties committed to his charge that fell due before his appointment (that is before 1333 B. S.) but to keep those collections separate from the collection of arrears of rent which fell due after his appointment. This direction was given with a view to payment to the parties according to their shares of such moneys as would be collected by the Receiver on account of arrears of rent for years prior to his appointment. The Receiver, however, disregarded the directions of the Court. He mixed the two funds in a general account and spent the whole of it, it is said, for the benefit of the estate. On November 21, 1929, the parties moved the Court for a direction on the Receiver to pay them according to their shares what had been collected from the tenants on account of those arrears. The Receiver represented to Court that he had no funds from which he could satisfy the demand. The parties present thereupon asked the Court to authorise the Receiver to raise a loan by mortgaging some joint property and to pay them from out of the money so raised. We will indicate hereafter in what way the Receiver had a personal interest in that proposal. On the said application the Court recorded order No. 596 on the same date. The order is not happily worded, but the meaning of the said order is apparent. The Court suggested one of two alternatives : (1) either the raising of a loan at 12 per cent. on mortgage of some joint property or (2) raising the required sum by letting out in *darpatni* some of the *khas* lands. The Court, however, expressly directed the Receiver to let it know beforehand what property he proposed to mortgage. One would expect from the spirit of the order that the Receiver was first to try the second alternative, and if that alternative failed then to raise a loan on mortgage but after informing the Court.

It does not appear from the record that the Receiver ever made any serious attempt to raise money by letting out in *darpatni* some of the *khas* lands. The evidence rather points out that he rushed to raise the loan without making any attempt to raise money by sub-letting *khas* lands. In this order (order No. 596) there was no indication that if the loan had to be raised the loan was to be a first charge on the property to be given as security. What the Receiver did appear from what has been brought out in his cross-examination by the plaintiffs in suit No. 222 of

1935. He at once borrowed Rs. 11,060 from Bhadrabati Debi, on two promissory notes. This was in November or December 1929. He took the loan without further reference to Court. He justifies his action on the ground that he took the said loan on basis of order No. 596, dated November, 21, 1929. We have already pointed out that the order did not justify such action on his part, for the Court made it clear that he was to inform it as to what property he proposed to mortgage before concluding the negotiations for loan. The reason for the great haste on his part to raise the loan appears from his cross-examination. His mother Sreemutty Krishna Kumari Debi had money-lending business and she had lent money to the parties. He raised the money from Bhadrabati and paid out of the money so raised the money due to his mother from the parties. He is the only son of his mother and we cannot countenance his attempt to take shelter behind the thin screen of loss of memory.

He says in his deposition given in suit No. 1 of 1937 that he assured Dinabandhu Tewary, the husband of Bhadrabati, that for the loan his wife would have priority and that if priority was not given to it by the Court the money advanced on the promissory notes would be refunded and it was on this assurance that Bhadrabati advanced the money. Even if he had misunderstood order No. 596, and took it to mean that he was authorized straightway to raise a loan on mortgage without being required first to make an attempt to raise money by letting out *khas* lands in *darpatni* there was no justification on his part to give that assurance. The unauthorized assurance was, in our judgment, given for the purpose of securing the money with the least delay so that his own mother may get satisfaction of her dues from the parties quickly. The aforesaid answer given by the Receiver indicates that he had at least suspicion that there were prior charges created by the parties on their properties, for, otherwise the question of priority of charge would not have entered his mind. He must have also disclosed at or before the time of the advance to Dinabandhu Tewary who was his friend and client the fact of the possibility of there being prior charges.

The matter of raising loan again came for consideration of the Court on January 11, 1930. On that date, Anadi Nath Dutt and the heirs of Rajendra Nath Dutt suppressed from Court the fact that they had already mortgaged their shares of the joint properties including the *patni taluq* in Chichuria. Touzi No. 12 of the Burdwan Collectorate.

Some of the parties did not agree to the Receiver raising money by mortgaging their shares but Anadi Nath Dutt and the heirs of Rajendra Nath Dutt consented to have their shares mortgaged. The Court by its order No. 603 passed on that date directed the Receiver to mortgage separately the shares of Anadi Nath Dutt (1/12) and of the heirs of Rajendra Nath Dutt (1/3) and directed the Receiver to pay Rs. 1,600 to the former. This obviously meant that a loan of Rs. 1,600 only was to be raised by mortgaging Anadi's 1/12 share in some property. The Court also directed the Receiver to raise the moneys by mortgaging the shares of joint properties other than *patni taluq* Chichuria if that was possible. The parties, that is Anadi Nath Dutt and the heirs of Rajendra Nath Dutt, proposed that the mortgages by the Receiver were to have precedence over other prior mortgages and on the basis of the said proposal the order was made to the effect that the Receiver's mortgages were to have precedence over other mortgages. The order was made in the absence of the plaintiffs and in ignorance of the fact that heavy amounts had been borrowed from them by Anadi Nath Dutt and the heirs of Rajendra Nath Dutt on mortgages. There cannot be any doubt on these facts that the Court was deliberately misled. But, as no case of fraud was pleaded by the plaintiffs and there was no issue of fraud we leave the matter there. If such a case of fraud had been made, possibly, Bhadrabati could have answered it by showing that she or her husband was unaware of the device by which the Court was induced to make the order in that form. In pursuance of this order, the Receiver executed two mortgages in favour of Bhadrabati, one on January 31, 1930, by which he mortgaged one-third share belonging to the heirs of Rajendra Nath Dutt in *patni taluq* Lot Chichuria, and in $4\frac{1}{2}$ *bighas* of land held in *mokarari mourasi* right at a rental of Rs. 11-8-1 in Khas Began in the town of Burdwan (items Nos. 1 and 14 of the schedule to the plaint of suit No. 222 of 1935), and the other on May 6, 1930, by which he mortgaged the 1/12th share of Anadi Nath Dutt in *patni taluq* Chichuria, the same share in some Chaukidari Chakran lands in that *taluq* and in *mehal* Bhutagore (items Nos. 14, 27 and 31 of the schedule attached to the plaint of suit No. 1 of 1937). The last mentioned mortgage was for Rs. 5,530 although the Court's order apparently was for raising a loan of Rs. 1,600 only. The mortgages in favour of the plaintiffs included those properties as also other properties. Both the mortgages

executed in favour of Bhadrabati recited the Court's orders Nos. 596 and 603, and stated that the said mortgages were to have precedence over other mortgages.

It is conceded by the parties that the mortgages in favour of the plaintiffs are valid notwithstanding the fact that the parties to the partition suit executed them after the appointment of the Receiver without any reference to the Court. The title to properties did not vest in the Receiver, he being a Receiver appointed under O. XL, Civil P. C., for the management and preservation of the properties it suit. The parties therefore had the power to deal with their shares without reference to Court provided that their acts did not interfere with possession of the Receiver. The Receiver could exercise the powers of the owners in the matter of execution of documents and if the Court sanctioned a loan on mortgage he could validly execute the mortgage instrument so as to bind the shares of the parties. These propositions have not and cannot be disputed, but the question is under what circumstances the Court appointing a Receiver can direct a mortgage to be executed by him which is to have precedence over earlier mortgages executed by the parties. In considering this question, we have to take into consideration the fact that sanctions for loans by Receivers are generally given in the absence of such prior incumbrancers and without notice to them. In most cases they have no knowledge of applications for loan, and in many cases the Court acts, as was in the case before us, without being apprised of such prior incumbrances. In these circumstances we think that a principle must be laid down which would not unduly infringe upon the rights of such third parties who had no notice of the application of the Receiver to raise loan on first charge and who had no opportunity to present their case before the Court. We must also on the other hand take into consideration the position of the mortgagee who advances money to the Receiver on the basis of the Court's order. Such a mortgagee is under a duty to see and usually sees the Court's order sanctioning the loan before he advances money. He is not bound to look beyond the order.

In those cases where the order of the Court simply sanctions a loan by the Receiver on a first charge of the properties, but does not indicate the purpose for which the loan is sanctioned, the creditor who advances the money is entitled to assume that everything was in order and so he ought to get what the Court had promised to give him, namely

precedence over earlier encumbrances created by the parties. In such cases the Court cannot break faith with him. In cases however where the order itself recites the purpose of the loan, different considerations should, in our judgment, apply, and the observations which we make hereafter must be taken to apply to such cases only and not to those cases where the order is silent as to the purpose of the loan and is simply one sanctioning a loan on first charge. If the purpose of the loan as set out in the order is for preservation or protection of the property committed to the care of the Receiver, or is an order in an administration suit or one in a partition suit made for working out the rights, liabilities and obligations of the co-sharers of the joint properties in the course of partition, the mortgagee from the Receiver would have first charge in accordance with the order. In the case where the purpose is the last mentioned one the principle has been formulated in *Herumboo Nath v. Satish Chandra* (1), at p. 1176. Where the purpose of the loan is for the protection or preservation of the properties committed to the care of the Receiver the principle seem to us to be this. By the appointment of the Receiver the Court takes upon itself the duty of protecting and preserving the subject-matter of the suit, which it discharges through its own office, namely the Receiver. It must therefore have all powers which are incidental and necessary for the discharge of that duty. It will have therefore the power to sanction loan to be raised by the Receiver, and if necessary, to direct the mortgage to be executed by him for securing it to have precedence over earlier mortgages executed by the parties. It may be unaware of such prior mortgages or even if aware may not give notice to those mortgagees.

This in our judgment is the principle underlying the practice in such cases. In *Greenwood v. Algeciras (Gibraltar) Ry. Co.*, (2), no reason was given but the judgment proceeded on established practice. All the cases cited at the Bar to illustrate the established practice were cases where the loan sanctioned on a first charge was for protection or preservation. This power of the Court being thus incidental to and necessary for the performance of its duty to protect and preserve the subject-matter of the suit, which it has taken upon itself by appointing a Receiver, must be measured and

(1) 35 C 1175, (1176).

(2) (1894) 2 Ch. 205; 63 L J Ch. 670; 7 R 620; 71 L T 133, 1 Manson 455.

limited by its duty, where its exercise comes into conflict with the rights of third parties which are not before it and to whom no notice had been given, or who had not consented. In such a case the principle of breach of faith cannot, in our judgment, be the decisive factor. It is a question of power or jurisdiction of the Court. If the Court arrogates to itself a power which it does not possess—and such usurpation appears on the face of the order—and does an act affecting persons not parties to the suit, its acts cannot prejudice the rights of such persons. In such a case the mortgagee from the Receiver cannot protect himself on the presumption that the Court had acted within its powers, for the order on the basis of which he acted *ex facie* would indicate want of power in the Court. The case in *Giridhari Lal v. Dhirendra Krista* (3), was a case where the purpose of the loan sanctioned was for the protection and preservation of the properties. The decision of the third Judge, Harrington, J., was based on two grounds namely, (1) that the loan was taken by the Receiver for the preservation of the property, (2) that the order made therein was not a nullity and had not been set aside.

In our judgment, the first ground was the governing one and the second ground followed from it. Harrington, J., however made an observation agreeing with Woodroffe, J., that there would be breach of faith on the part of the Court if the mortgagee from the Receiver be not given precedence but that observation must be read in our judgment with the facts of that case. In the case before us the order on the face of it indicated the purpose of the loan, which was not for the preservation or protection of the properties in suit. The proposed loan by the Receiver was also not for the purpose of settling the rights, liabilities and obligations of the co-sharers of the joint properties in the course of partition. We have also indicated, though the point is not material in the view we have taken that Bhadrabati Debi did not advance the money on the faith of the order of the Court giving the Receiver's mortgages precedence over prior mortgages, for she made the advance before order No. 603 was passed. We accordingly hold that the plaintiffs in both the suits have priority over the mortgages of Bhadrabati Debi. We are informed that all the properties included in the mortgages of the plaintiffs and of Bhadrabati Debi have been sold; so no question

of marshalling arises now. The appeals are dismissed, but in the circumstances without costs.

D.

Appeals dismissed.

PATNA HIGH COURT

Privy Council Appeal No. 27 of 1940

January 23, 1941

HARRIES, C. J. AND FAZL ALI, J.

ISHWARI PRASAD SINGH AND OTHERS—

PLAINTIFFS—PETITIONERS

versus

SIR KAMESHWAR SINGH BAHADUR

AND OTHERS—DEFENDANTS—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), s. 110 (2) —Suit for declaration that property could not be attached and sold in execution of certificate as same belonged to plaintiff—Suit valued at Rs. 7,699 for which certificate was issued—Suit decreed but on appeal dismissed by High Court—Appeal also valued at Rs. 7,699—Property in respect of which certificate was issued worth more than Rs. 10,000—Case held covered by s. 110 (2).

The plaintiffs brought a suit for a declaration that a certain property could not be attached and sold in execution of the certificate. They rested their claim in the suit on the ground that they had purchased it in execution of a mortgage decree obtained by them against the persons who owned the property. The suit was valued at Rs. 7,699 odd, because that was the amount for which the certificate was issued. The suit was decreed by the trial Court but on appeal the High Court dismissed it. The appeal was also valued at Rs. 7,699. But the property in respect of which the certificate was issued was worth more than Rs. 10,000 :

Held, that the case was fully covered by s. 110 (2) and was a fit one for appeal to His Majesty in Council from the decree of the High Court. 167 Ind. Cas. 670 (1), relied on.

P. C. A. for leave to appeal to His Majesty in Council.

Mr. Lalnarain Sinha, for the Petitioners.

Messrs. Murari Prasad. S. P. Srivastava and Rajani Kant Sinha, for the Opposite Party.

Order.—This is an application for leave to appeal to His Majesty in Council by the plaintiffs in a suit which was decreed by the trial Court but has been dismissed on appeal by the High Court. The suit was valued at Rs. 7,699 odd and the appeal bears the same valuation. It is contended on behalf of the applicants that they are entitled to leave as a matter of right, because the case falls under para. 2 of s. 110, Civil P. C., that is to say, the decree sought to be appealed from involves a claim or question to and respecting property of more than Rs. 10,000. The plaintiffs brought the suit for a declaration that a certain property could not be attached

and sold in execution of the certificate, in certificate case No. 1009 of 1934-35. They rested their claim in the suit to this property on the ground that they had purchased it in execution of a mortgage decree obtained by them against the persons who owned the property. The suit was valued at Rs. 7,699 odd, because that was the amount for which the certificate was issued. It has, however, been asserted in the applicants' petition that the value of the property itself which is liable to be sold is Rs. 52,000 odd. This statement is supported by an affidavit and has not been controverted in this Court on behalf of the proposed respondents. It must therefore be assumed that the property in respect of which the certificate was issued is worth more than Rs. 10,000.

The only question which is to be decided is whether that being so, the present case comes under para. 2 of s. 110, Civil P. C. In my opinion, this question must be answered in the affirmative. It is plain that if the plaintiffs do not succeed in this litigation the property which they have purchased in execution of their mortgage decree will be liable to be sold, and that property is worth much more than Rs. 10,000. That being so, it is difficult to hold that the decree which is sought to be appealed from does not involve indirectly a question respecting property more than Rs. 10,000. This view seems to us to be fully supported by the decision of the Allahabad High Court in *Nadir Husain v. Municipal Board, Agra* (1). In that case the plaintiff wanted a decree for the sale of the entire mortgaged property which was owned by the defendants for the realisation of Rs. 7,625. The property itself however was worth more than Rs. 10,000. The learned Judges who decided the case observed in dealing with it that they found it difficult to hold that the decree of the High Court did not directly or indirectly involve some claim or question to or respecting property to the value of Rs. 10,000. In our opinion, the present case is fully covered by para. 2 of s. 110, Civil P. C., and we think that the case is a fit one for appeal to His Majesty in Council from the decree of this Court. Let the usual certificate issue. We therefore allow this application with costs : hearing fee four gold mohurs.

D.

Application allowed.

(1) I L R (1937) All. 405; 167 Ind. Cas. 670; A I R 1937 All. 169; (1937) A L J 38; 1937 A L R 214; 9 R A 538.

MADRAS HIGH COURT

Civil Revision Petition No. 2543 of 1939

April 9, 1940

WADSWORTH AND PATANJALI SASTRI, JJ.

NIMMAGADDA RAMASESHAYYA—

PETITIONER

versus

ADUSUMILLI KUTUMBA RAO

AND ANOTHER—RESPONDENTS

Madras Agriculturists' Relief Act (IV of 1938), ss. 8, 9—Debt incurred before October 1, 1932, ripened into decree after such date—Scaling down is governed by s. 8 and not by s. 9.

Clause (1) of s. 8, Mad. Agri. Relief Act clearly contemplates the debt incurred before October 1, 1932, as the original debt which ultimately ripened into a decree, and consequently it must be the date of the original debt which is the governing factor and not the date of the decree. When, therefore, there is a debt incurred before October 1, 1932, which has ripened into a decree after October 1, 1932, the scaling down must be governed by s. 8 and not by s. 9. *Sreenivasachariar v. B. Krishniah Chetty* (5), referred to.

C. R. P. to revise the order of the Sub-Judge, Masulipatam, dated August 9, 1939.

Mr. A. Lakshmayya, for the Petitioner.

Mr. D. Narasaraaju, *Amicus Curiae*.

Wadsworth, J.—This revision petition raises the question of the meaning of the words "debts incurred before October 1, 1932" in s. 8 of the Mad. Act, IV of 1938. The transaction with which we are concerned is a decree dated August 21, 1936 which itself is passed on the basis of a promissory note of 1928 which promissory note was in renewal of an earlier promissory note of 1925. The learned Subordinate Judge has held that the debt to be scaled down is the decree itself and not the antecedent debt which formed the basis for the decree. He bases his decision on the definition of the word "debt" in s. 3 of the Act which contains the words:

"'debt' means any liability in cash or kind . . . due from an agriculturist, whether payable under a decree or order of a Civil or Revenue Court or otherwise."

He holds that since the definition of the word "debt" covers one payable under a decree we must regard the decree as the starting point and since the decree was passed in 1936, it must be scaled down under s. 9 of the Act and not under s. 8. The learned Subordinate Judge has not however considered two provisions in the Act which in our opinion render it impossible to hold the view which he expresses. Firstly, we have Part II of s. 7 which says;

"No sum in excess of the amount as so scaled down shall be recoverable from him or from any land or interest in land belonging to him; nor shall his property be liable to be attached and sold or proceeded against in any manner in the execution of any decree

against him in so far as such decree is for an amount in excess of the sum as scaled down under this Chapter."

This provision seems to contemplate the scaling down of the original debt notwithstanding a decree and it is difficult to give any meaning or purpose to this clause if the process of scaling down is to start with the decree. Secondly, we have cl. (1) of s. 8 which in dealing with the way in which debts incurred before October 1, 1932 shall be scaled down, speaks of interest outstanding on October 1, 1937 :

"whether the same be payable under law, custom or contract or under a decree of Court and whether the debt or other obligation has ripened into a decree or not."

It seems to us impossible to give any effect to the words "whether the debt or other obligation has ripened into a decree or not," if the debt contemplated in the initial words of the section is the decree itself. On the other hand this cl. (1) of s. 8 seems quite clearly to contemplate the debt incurred before October 1, 1932 as the original debt which ultimately ripened into a decree, and consequently it must be the date of the original debt which is the governing factor and not the date of the decree. The inclusion of a decree in the definition of "debt" in s. 3 (iii) of the Act is quite consistent with this view. For, obviously, there are many debts which start with the decree, as for instance, when there is a decree for damages which of itself creates a debt bearing interest and liable in certain circumstances to be scaled down. Clearly, the idea underlying these provisions is that when the decree merely enforces the payment of a pre-existing debt bearing interest that pre-existing debt shall be regarded as the liability the date of which shall govern the section to be applied.

The subject has come already before this Court, though there is apparently no considered decision of a Bench hitherto. In *Montina Kanakaraju v. Datta Atchutharamanaraju* (1), there is a very brief judgment of one of us, adopting the view which we have just adumbrated though it deals with another point which does not arise here. In *Narayanasami Naidu v. Rajamanickam Pillai* (2). Horwill, J. has taken the same view even with reference to a compromise decree. We are not now concerned with compromise decrees which may possibly

be affected by different considerations. But it is to be noted that the learned Judge definitely regards the debt incurred before October 1, 1932 as the original liability which has ripened into the decree and does not treat the decree itself as the starting point. Other cases have been quoted before us in which this view has been tacitly assumed to be correct without any argument or consideration of the point involved: *vide Anandam v. Muthukumaraswami Mudai* (3) and the decision of the Bench in *Perianna Goundan v. Sellappa Goundan* (4) at p. 222.

Unfortunately the respondent in the present case is not re-presented, but we have to express our gratitude to Mr. D. Narasaraju who has given us the benefit of his argument for the respondent as *amicus curiae*, he having gone into the subject with reference to another case posted for hearing by us in which a similar question arises. The only authority which he has been able to cite on behalf of the respondent is contained in a mere observation of Venkataramana Rao, J. in *Sreenivasachariar v. B. Krishniah Chetty* (5), where the learned Judge merely remarks that there is a good deal of force in the contention that when the decree has been passed after October 1, 1932 it is governed by s. 9 of the Act. He gives however no decision to this effect and the matter does not appear to have been argued at length before the learned Judge. We are clearly of opinion that when there is a debt incurred before October 1, 1932 which has ripened into a decree after October 1, 1932 the scaling down must be governed by s. 8 and not by s. 9. We therefore allow the petition and remit the matter to the lower Court with a direction to scale down the debt in accordance with this decision. The petitioner is entitled to costs.

N.-S.

Petition allowed.

(3) (1939) 2 M L J 658; 186 Ind. Cas. 458; A I R 1940 Mad. 52; 50 L W 587; (1939) M W N 1044; 12 R M 638.

(4) I L R (1939) Mad. 218 (222); 182 Ind. Cas. 879; A I R 1939 Mad. 186; (1938) 2 M L J 1068; 48 L W 954; (1939) M W N 106; 12 R M 203.

(5) (1940) M W N 329; (1940) 1 M L J 860; A I R 1940 Mad. 485; 52 L W 295.

(1) (1940) M W N 338; 192 Ind. Cas. 400; A I R 1940 Mad. 432; (1940) 1 M L J 600; 51 L W 452; 13 R M 552 (1).

(2) (1940) 1 M L J 225; A I R 1940 Mad. 419; 51 L W 237; (1940) M W N 265.

MADRAS HIGH COURT

Civil Revision Petition No. 1328 of 1936

December 8, 1939.

ABDUR RAHMAN, J.

PENTAKOTA AUDINARAYANA NAIDU

—PETITIONER

versus

PANCHAYAT BOARD OF MANGAPAKA

AND ANOTHER—RESPONDENTS

Contract Act (IX of 1872), s. 72—Payment made under mistake of fact, if voluntary—Voluntary payment of money under mistake of fact, whether can be recovered under s. 72—Person paying tax to Panchayat Board under mistaken notion that property for which tax was paid lay within jurisdiction of Board—Payment is under mistake of fact and can be recovered under s. 72 as money had and received for payer's use.

If money is paid under a mistake of fact, it cannot be said to have been voluntarily paid. If money is paid voluntarily under a mistake of fact, viz., in regard to the territorial limits of the Panchayat Board's jurisdiction, it is recoverable under s. 72, Contract Act. The payment need not arise out of contractual relation between the parties. The payer's ignorance and even forgetfulness would not by themselves disentitle him from claiming a refund unless he can be held to have been estopped or guilty of laches. Nor is it necessary that the mistaken payment must be of such a nature that if such payment were not rectified, the liability would be created against the persons paying. [p. 658, col. 2; p. 659, col. 1.]

[Case-law discussed.]

Where a person has paid taxes to the Panchayat Board under the mistaken notion that the properties in regard to which those were made were situated within the local jurisdiction of the Board and not beyond it. There can be no doubt that they are made under a mistake of fact and the payer is entitled to recover them as money had and received by the Board for the payer's use. 110 Ind. Cas. 299 (5) and *Meadows v. Grand Junction, Water Works Co.* (10), relied on. [p. 658, col. 1.]

O. R. P. to revise the decree of the Sub-Judge, Vizagapatam, dated July 28, 1936.

Messrs. K. V. Gopalaswami Rao and G. Balaparameswari Rao, for the Petitioner.

Mr. Kasturi Seshagiri Rao, for the Respondents.

Order.—This is a revision from the decree of the Subordinate Judge of Vizagapatam acting as a Judge of the Court of Small Causes in a suit instituted by one Pantakota Adi Narayana Naidu against the Panchayat Board of Mangapaka for the refund of money alleged to have been paid by him for profession and house taxes and in regard to the licensing fee for his rice mill and brick kiln under a mistaken belief that the properties or business in respect of which he had paid the license fees or other taxes were situated within the jurisdiction of the Panchayat Board. The levy of the profession tax was also questioned on the ground that the notice issued to the plaintiff by the

Panchayat Board did not comply with the requirements of law and the demand was therefore illegal. The Subordinate Judge disallowed the plaintiff's claim in regard to the refund of house tax and license fee as he held the payments made by the plaintiff to have been voluntary and not under a mistake of fact that arose out of contractual relation, although to use the Sub-Judge's words "there was an error in understanding the limits of this jurisdiction owing to ignorance of all parties concerned." In regard to the profession tax however, he passed a decree for the refund of the tax paid for the year 1934-35 as he found the notice served by the Board on the plaintiff to be illegal and the levy of the same consequently *ultra vires*. The claim for refund of the profession tax for prior years was not allowed as it was held that the plaintiff had failed to prove that the notices in regard to them were defective and the demand by the Board unjustified. This has led the plaintiff to file the present revision.

Although conceded by the trial Court, learned Counsel on behalf of the respondent contended in this Court that the mistake found to have been committed by the parties was one of law and not that of fact and would not therefore entitle the plaintiff to sue the Board on that basis. Mr. Bala Parameswari Rao (learned Counsel for the petitioner) denied this and contended on the other hand that s. 72, Contract Act, made no distinction between mistakes of fact and those of law and alleged that the money paid erroneously was refundable whether it was paid under one kind of mistake or the other. It must be admitted that the words of this section are very general and capable of bearing the interpretation which was attempted to be put upon them; but in view of s. 21, Contract Act, which provides that a contract is not voidable because it was caused by a mistake as to any law in force in British India, it has been decided in some cases that the mistake, to entitle a party to get the relief, must be one of fact and not of law: see *A. M. Appavu Chettiar v. S. I. Ry. Co. Ltd.* (1), *Sethupati Adergal v. Secretary of State* (2) and *Wolf & Sons v. Dadiba Khimji & Co.* (3) at p. 648. It may be argued that since the term 'coercion' used in

(1) A I R 1929 Mad. 177; 114 Ind. Cas. 358; 56 M L J 269; (1928) M W N 385; 28 L W 591; Ind. Rul. (1929) Mad. 278.

(2) A I R 1929 Mad. 179; 114 Ind. Cas. 829; 52 M L J 12; 55 M L J 770; 28 L W 667; Ind. Rul. (1929) Mad. 319.

(3) 41 B 631 (648); 58 Ind. Cas. 465; A I R 1920 Bom. 192; 21 Bom. L R 986.

s. 72, Contract Act, has been held by their Lordships of the Privy Council in *Kanhaya Lal v. National Bank of India Ltd.* (4) to have been used in the ordinary sense and the definition in s. 15 held not to control the meaning of that word in this section, the word mistake might similarly be construed in the ordinary sense and should not be controlled by s. 21 of the Act. It is unnecessary, however, for me to consider this question in this case as there is no doubt that the payments were made by the plaintiff to the defendant Board under the mistaken notion that the properties in regard to which those were made were situated within the local jurisdiction of the Board and not beyond it. Whether the plaintiff is entitled to recover them on the ground of failure of consideration or on the basis of an express or at least an implied request of the defendant, there can be no doubt that they were made under a mistake of fact and the plaintiff is entitled to recover them as money had and received by the defendant for the plaintiff's use. The observations of their Lordships of the Privy Council in *Tom Boevey Barrett v. African Products Ltd.* (5) are helpful and may be cited. They observed :

"It follows that in the absence of such proof, the payment made to the appellant in respect of his 1000 shares was, on the interpretation of the facts most favourable to himself, a payment made under a mistake of fact common to himself and the company, viz., that he was a share-holder for 1000 shares, when in truth he was not, and money so paid can be recovered as money had and received to the use of the company and this was the form of the action."

The lower Court's suggestion that even if the mistake under which the money was paid to the Board was one of fact, it was "not one that arose out of any contractual relation" and the money could not therefore be refunded was not justified. It is quite possible to conceive of cases where a payment may have been made by a party under a mistake of fact although there may have been no contractual relation between him and the person to whom the money was paid. The case in *Anrudh Kumar v. Lachmichand* (6) may be cited as one of the instances in which money paid by mistake was held to be recoverable although there was no contractual relation between the parties to that suit.

(4), 40 C 598; 18 Ind. Cas. 949; 40 I A 56; 17 C L J 478; 17 C W N 541; (1913) M W N 406; 13 M L T 406; 11 A L J 413; 15 Bom. L R 472; 184 P R 1913; 25 M L J 104 (P C).

(5) 29 L W 72; 110 Ind. Cas. 299; A I R 1928 P C 261 (P C).

(6) 50 A 818; 115 Ind. Cas. 114; A I R 1928 All. 500; 26 A L J 753; Ind. Rul. (1929) All. 338.

Since the main ground, on which the plaintiff's claim for refund was disallowed by the lower Court, was that the payments made by the plaintiff were voluntary in character, the next question to decide is how far the conclusion arrived at by the lower Court in this connection is correct. Money paid under a mistake of fact would only be recoverable when it is found that it was not paid by the plaintiff with the intention of making a gift or with an idea that the party receiving the money may have the benefit of the same whether the reason which led to the payment was correct or otherwise. Since the remedy under the section is of an equitable nature, it may also not be recoverable if the person who paid the money is found to be estopped from recovering it or even when the Receiver's rights in relation to third parties have been prejudiced. But where the position is not altered or the plaintiff has not been guilty of any laches, he would be entitled to recover the money paid by him under a mistake of fact even if he had been careless or negligent and failed to exercise due diligence to enquire into the facts or to remember them. If the money were paid under compulsion of legal process, it might have been a different matter, but when it was paid under the mistaken notion of fact that the defendant was entitled to receive this money from the plaintiff, there is no reason why he should not be entitled to recover it after the mistake was discovered. The following statement of law made by Lord Reading, C. J. in *Maskell v. Horner* (:), is if I may say so with great respect to that high authority correct in so far as it goes. It was to the following effect :

"If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received."

But this does not mean that the money not paid under compulsion of urgent and pressing necessity is not recoverable. A payment made under a mistake as provided in s. 72, Contract Act, is a case in point. If money is paid under a mistake of fact, it cannot be said to have been voluntary in the sense in which that term was used in law in connection with payments although there may have been no actual compulsion of urgent or pressing necessity. To be voluntary it must have been made by a person of one's own free will; but if it is made under a mistake of fact, how can it be said to have been so? There is no scope here for the application of decisions in cases such as *Munici-*

(7) (1915) 3 K B 106; 84 L J K B 1752; 113 L T 126; 31 T L R 332; 79 J P 406; 59 S J 429.

pal Council, Tuticorin v. Ralli Brothers (8) and Chairman, Municipal Council, Rajahmundry v. Subba Rao (9), where no question in regard to a mistake of fact was raised or considered. Indeed in the first of the above cases Krishnan Pandalai, J. observed :

"It has not been contended and very properly that the right to recover can be put upon any ground of mistake because if mistake there was it was a mistake of law and that is not sufficient."

This would show that the learned Judge was not considering cases where the mistake committed was one of fact. If money is paid voluntarily under a mistake of fact, such as the parties were under in this case, viz., in regard to the territorial limits of the Panchayat Board's jurisdiction, it is recoverable under s. 72, Contract Act. That a mistake like this was purely a mistake of fact cannot be doubted. It was so held by Lord Alverstone, C. J. in *Meadows v. Grand Junction Water Works Co.* (10). It must therefore be held that a payment under a mistake of fact cannot be regarded as a voluntary payment and the decision of the case against the plaintiff on that ground was erroneous. The decision in *Manilal Lalubhai v. Chandulal Tribhovandas* (11), does not decide that a voluntary payment, even if made by mistake, cannot be recovered from the party receiving it. The learned Subordinate Judge has however in refusing the reliefs prayed for by the plaintiff based his decision on certain other circumstances. These were firstly that the plaintiff was the President of the Board at the time when he made these payments and he did not care to read the notification limiting the jurisdiction of the Board to certain areas carefully, and secondly that the condition mentioned in *Lloyds Bank Ltd. v. Administrator-General of Burma* (12), which was to the effect that the mistaken payment must be of such a nature that if such payment was not rectified, the liability would be created against the persons paying, was not complied with. Both these grounds are, in my opinion, incorrect and do not disentitle the plaintiff from recovering the money. As to the first one I have already observed that the plaintiff's ignorance and even for-

getfulness would not by themselves disentitle him from claiming a refund unless the plaintiffs can be held to have been estopped or guilty of laches. This is borne out by the very case on which the Subordinate Judge relied in support of the second ground. The learned Judge of the Rangoon High Court expressed himself in the following words :

"The rule governing the recovery of money paid under a mistake of fact seems to be this. That the person paying under a mistake of fact however ignorant he may be and however forgetful he may have been, is entitled to recover such money unless he has at any time waived his claim or has been estopped by reason of conduct by which the payee has altered the position by parting with the money."

Learned Counsel for the respondent has cited *Raghunath Rithkaran v. Imperial Bank of India Ltd.* (13), in support of his contention that since the plaintiff was negligent in ascertaining the truth, s. 72, Contract Act, would be of no help to him. A reference to the decision would however show that it does not support the proposition for which it has been cited. It was found in that case that the persons who had paid a *hundi* on presentation were not entitled to recover the money, although they were not the drawees and had paid it under a mistake of fact. In recording his opinion the learned Chief Justice observed as follows :

"It would seem contrary to principles of common law that in cases of negotiable instruments mistakes of this kind should not be notified within a reasonable time. The fact that the party assumed the liability which was not cast upon him by the document which was presented to him for payment must be taken as a ground for holding that he was bound to notify the mistake within a reasonable time to the holder of the document."

The learned Chief Justice was, it must be remembered, dealing with a negotiable instrument in that case, and it would be wrong to extend its application to cases where considerations special to that type of cases are not to be taken into account. He held that in the circumstances of that case a duty was cast upon the plaintiffs to inform the bank within a reasonable time that they had accepted the position under a mistake of fact. The real reason for disallowing the claim was brought out by the other learned Judge when he observed :

"In this case however the plaintiffs have by their conduct made it impossible to restore the parties to their original position and this fact in my opinion affords a good defence to the suit."

This gives the real clue to the reason why the plaintiffs were held disentitled to recover the money paid by them under a mistake of

(8) 67 M L J 566; 150 Ind. Cas. 890; A I R 1934 Mad. 420; 39 L W 660; 7 R M 33.

(9) (1937) 1 M L J 496; 169 Ind. Css. 330; A I R 1937 Mad. 559; (1937) M W N 293; 45 L W 489; 10 R M 1.

(10) (1905) 21 T L R 538; 69 J P 255; 3 L G R 910.

(11) A I R 1930 Bom. 430; 125 Ind. Cas. 907; 32 Bom. L R 424; Ind. Rul. (1930) Bom. 395.

(12) 12 R 25; 151 Ind. Cas. 1018; A I R 1934 Rang. 66; 7 R Rang. 134.

(13) 50 B 49; 91 Ind. Cas. 342; A I R 1926 Bom. 66; 27 Bom. L R 1229.

fact. They were held to have been estopped on account of their silence, and estoppel, even if it is by conduct, is, as already observed, a good defence to a suit of this kind. The mere fact, therefore, that the plaintiff was himself the President of the Board during the period when he paid this amount and was ignorant of the limits of its jurisdiction could not, without anything else, justify the Court in disallowing his claim. As for the second ground, reliance was placed by the lower Court in its judgment and by the learned Counsel for the respondent here on an observation in *Lloyds Bank Ltd. v. Administrator-General of Burma* (12) appearing at p. 39*. It reads as follows :—

"But it has been laid down that the mistaken payment must be of such a nature that if such payment is not rectified a liability will be created against the person paying. This requirement is present here as any Administrator-General who parts with money belonging to an estate of which he has charge is obviously accountable for the loss thus sustained."

It would not be easy to assent to the proposition if the learned Judge was proposing to lay down a general rule applicable to all cases of payments under mistakes of fact. If the learned Judge was on the other hand giving an additional ground which was taken by him into consideration in granting the equitable relief, the observation would be innocuous but perhaps unnecessary. One cannot expect to find a circumstance like this in every case. In a large number of cases moneys paid by persons under mistakes of fact will be found to have belonged to themselves only and no further liability found to have been created if the money is not refunded to them; while in other cases although a liability may be found to come into existence if the money paid by a person is not refunded to him, yet it may not be possible to pass a decree in his favour; I am thus constrained to hold that a condition such as stated by the learned Judge in *Lloyds Bank Ltd. v. Administrator-General of Burma* (12) cannot be held to be a *sine qua non* for ordering a refund of money paid under a mistake of fact. There is nothing else which was said at the bar or which would point to the conclusion that the plaintiff had either waived his right to claim or was estopped from claiming this amount. Learned Counsel for the respondent seemed to suggest at one time that the money, after it was received by the Board, was utilized towards discharging certain liabilities and could not, therefore be recovered but the suggestion was not pressed seriously. It is

immaterial if the money paid under a mistake is spent by the recipient in works or things for which he would have paid anyhow whether the money paid under a mistake was received by him or not. It cannot be said in a case like this that the defendant has altered his position on account of the receipt of this payment and this could be no ground to disallow the plaintiff from recovering the money paid by him under a mistaken notion.

So far as the profession tax is concerned, the lower Court had disallowed the refund of payment for prior years only because it found that the plaintiff had not produced any notice like Ex. G in respect of those years. In doing so the Subordinate Judge appears to have overlooked para. 4 of the additional written statement filed by the defendant where it was admitted that the form employed in Ex. G was employed by the Board for all the notices sent during the period when the plaintiff was the President of the Board. This would show that the other notices sent to the plaintiff suffered from the same illegality as from which Ex. G was suffering and the same decree should therefore have been passed in regard to the other payments as well. There seems to be no force in the question of limitation so far as the payments other than those relating to profession tax are concerned. The suit was instituted by the plaintiff very shortly after the discovery of the mistake as found by the Court below and since the limitation under Art. 96 started from the date when the mistake became known to the plaintiff, his suit cannot be held to be beyond time. As to the profession tax the plaintiff would be entitled to a decree for such payments as he had made during the three years prior to suit. The revision must therefore be accepted and the plaintiff's suit decreed accordingly. In view however of the fact that the plaintiff's conduct had been negligent, I would leave the parties to bear their own costs throughout.

N.-S.

Revision accepted.

PATNA HIGH COURT

Criminal Revision No. 337 of 1940

January 28, 1941

DHAVLE, J.

RAMLAKHAN DHOBİ—PETITIONER

versus

RACHHEYA KALWAR AND OTHERS—

OPPOSITE PARTY

Criminal trial—Jurisdiction—Magistrate cannot

*Page of 12 R.—[Ed.]

try Sessions case by leaving out more serious charges and confining charges to minor ones—Magistrate held could not try case by framing charge under ss. 147 and 325 read with s. 149, Penal Code (Act XLV of 1860)—Criminal Procedure Code (Act V of 1898), s. 439 (2)—Revision against acquittal—Acquittal of persons whose names do not appear in application, cannot be touched.

Where a number of accused persons participate in rioting in the course of which grievous hurt and death are caused to some persons, it is not open to the Magistrate to bring the case within his jurisdiction by charging the accused with offences under ss. 147 and 325 read with s. 149, I. P. C. The fact that the accused charged with causing death is absconding is no ground for not framing charges against the accused under s. 302, I. P. C., or at least s. 304 read with s. 149. A case exclusively triable by a Court of Session cannot be brought within the jurisdiction of a Magistrate by leaving out the more serious charges and confining the trial to minor charges.

Where the names of certain persons who have been acquitted do not appear in the revision application against acquittal, their acquittal cannot be touched in revision.

Cr. R. against an order of the Sub-Divisional Magistrate, Motihari, dated March 1, 1940.

Mr. G. P. Shahi, for the Petitioner.

Messrs. K. P. Varma and Hareshwar Prasad Sinha, for the Opposite Party.

Order.—In this case 22 persons were sent up by the Police on a charge of rioting in the course of which grievous hurt was caused to two persons and death to a third. The Sub-Divisional Magistrate who tried the case charged the persons sent up with offences under ss. 147 and 325 read with s. 149 and also framed an individual charge under s. 435 against one of them, namely Motia Kalwar. At the end of the trial he did not consider that a "clear case" had been made out against any of the accused "under any head" and therefore, acquitted them all under s. 258, Criminal P. C. Ramlakhan Dhobi, on whose first information the case had been investigated and sent up by the Police has moved in revision against this order of acquittal, and it has been contended on his behalf that the order is without jurisdiction. The contention seems irresistible. According to the prosecution one Ramparichhan Dhobi was killed in the riot by Parmeshwar Kalwar with a *bhala* blow. The defence version of the occurrence was of course different. But even according to the accused Parmeshwar had struck and killed Ramparichhan with a *bhala* after the latter had given a *garasa* blow to one of the accused. Parmeshwar has been absconding, but his fatal *bhala* blow was as much a part of the riot alleged by the prosecution as the grievous hurt that was caused to Thag Dhobi and Ramlakhan Dhobi and led the learned

Magistrate to frame his charge under s. 325 read with s. 149. His absence was no justification for the failure of the learned Magistrate to frame a charge against the accused under s. 302 or at least s. 304 read with s. 149. But such a charge is exclusively triable by the Court of Session, and if the learned Magistrate had framed it, it would not have been open to him to pass any order of acquittal in the case, for the authorities are agreed that a case exclusively triable by a Court of Session cannot be brought within the jurisdiction of a Magistrate by leaving out the more serious charges and confining the trial to minor charges. The learned Advocate for the opposite party is not prepared to contend that the law is otherwise, the position being so clear. How this escaped the notice of the Magistrate does not appear. It follows therefore, that the application in revision must be allowed and the order of acquittal set aside.

Section 439 (2) lays down that no order shall be made under s. 439 to the prejudice of the accused unless he has had an opportunity of being heard either personally or by a Pleader in his own defence; and this raises another question on the present application made as it is ostensibly against 21 persons as the opposite party, while the number of persons dealt with by the Magistrate was 22. The names of the opposite party as given in the application for revision have been compared by the Bar with those given in the charges framed by the Magistrate; and the learned Advocates have agreed that three of the 22 names before the Magistrate, namely Malikchand, Birja and Sheogovind, do not clearly appear in the revisional application. The acquittal of Malikchand, Birja and Sheogovind cannot therefore be touched. As regards the other 19 persons before the Magistrate he must now be asked to take up the case again, consider the question whether a charge under s. 302 read with s. 149 ought not to be framed against these 19 persons, and proceed with the case in accordance with the law.

D.

Application allowed.

OUDH CHIEF COURT

Application No. 77 of 1940

May 2, 1941

GHULAM HASAN, J.

BRIJ LAL—DEFENDANT—APPLICANT
versus

SURAJMAN—PLAINTIFF—OPPOSITE PARTY

U. P. Agriculturists' Relief Act (XXVII of 1934), s. 39—Question whether particular receipt was a written document evidencing "loan", determination of—Court's decision, if open to revision—Question of jurisdiction—Receipt drawn up on printed form showing that defendant received certain sum of money from plaintiff in consideration of promissory note—Whether document furnishing evidence of loan—Scope of s. 39.

It is open to the Courts to determine the question whether the receipt upon which a suit is filed for the recovery of the amount was a written document evidencing the "loan" within the meaning of s. 39 of the U. P. Agri. Relief Act. In coming to a decision upon that question the Courts do not act illegally or with material irregularity. In such a case no question of the exercise of a jurisdiction not vested in the Courts by law, or failure to exercise jurisdiction so vested, or the exercise of jurisdiction illegally or with material irregularity arises. In this view of the matter the revision application against its decision is incompetent and cannot be entertained.

Receipt, drawn up on a printed form showing that the defendant had received Rs. 150 from the plaintiff in consideration of a promissory note which he had executed in his favour, furnishes evidence of the loan taken by the defendant from the plaintiff. Section 39 does not prescribe any particular form of a written document to evidence the loan. The words "written document" used in the section are wide enough to cover any writing which would unmistakably show that a loan was taken by the debtor, and no particular form of writing is necessary to evidence the transaction of the loan. The intention of the section is that loans taken by agriculturists shall be evidenced by a writing and should not be made dependent upon parole testimony. It is only to guard against an oral or parole transaction of loan that the section insists that the transaction shall be evidenced by a document.

App. for the revision of the order of the Civil Judge of Bara Banki, dated April 25, 1940.

Mr. Bhawani Shanker, for the Applicant.
Mr. B. K. Dhaon, for the Opposite Party.

Judgment.—This revision petition by the defendant arises out of an appellate judgment and decree passed by the Civil Judge of Bara Banki decreeing the plaintiff's suit.

The plaintiff brought a suit for recovery of Rs. 150 on the basis of a promissory note dated June 22, 1936, executed by the defendant in favour of the plaintiff. On the same date a receipt was also executed by the defendant in favour of the plaintiff. Both the promissory note and receipt bear postage stamps. The plaintiff alleged in the plaint that Rs. 150 were due to him on the principal amount of the promissory note and Rs. 60 on account of interest upto the date of the suit. He gave credit to the defendant for a sum of Rs. 20

alleged to have been paid to him, relinquished his claim in respect of Rs. 40 and sued for the balance of Rs. 150.

The defence to the suit was a denial of the loan. It was also pleaded that the promissory note and the receipt were not admissible in evidence as they were not properly stamped. There was a further plea that the plaintiff had obtained the defendant's thumb-impression upon the promissory note and receipt by fraud. Lastly, it was pleaded that the defendant is an agriculturist and the suit could not be decreed under s. 39, of the U. P. Agri. Relief Act against him.

The trial Court held that the promissory note was inadmissible in evidence for want of proper stamp but admitted the receipt in evidence upon payment of the necessary penalty. The trial Court further held that Ex. 2, the receipt, evidenced the loan in question within the meaning of s. 39, of the U. P. Agri. Relief Act. It, therefore, decreed the suit against the defendant.

The learned Civil Judge dismissed the appeal. It is against this decision that the present revision petition has been preferred.

Learned Counsel on behalf of the defendant, applicant argued that the Courts below were wrong in holding that the loan was evidence by a written document within the meaning of s. 39, of the U. P. Agri. Relief Act. It was also argued that the provisions of s. 39 (1) and (2), have not been complied with and consequently the plaintiff was not entitled to charge any interest on the alleged loan. The contention was that no copy of the written document evidencing the loan had been given to the defendant and there was no entry made upon the written document specifying the date by which repayment must be made. No copy of the written document having been furnished to the debtor, it was argued that the plaintiff was not entitled to charge any interest within the meaning of cl. (3) of s. 39, of the U. P. Agri. Relief Act. Lastly it was urged that the Courts below had omitted to give credit for the payment of Rs. 20 which the defendant had made to the plaintiff.

I am of opinion that no question of the exercise of a jurisdiction not vested in the Court below by law, or failure to exercise jurisdiction so vested, or the exercise of jurisdiction illegally or with material irregularity, arose in the present case. It was open to the Court below to have determined the question whether the receipt (Ex. 2) was a written document evidencing the loan within the meaning of s. 39 of the U. P. Agri. Relief Act. In coming to a decision upon that ques-

tion it cannot be contended that the Courts below acted illegally or with material irregularity. In this view of the matter the revision application is incompetent and cannot be entertained.

I have, however, examined the merits of the case and I quite agree with the finding arrived at by the Courts below that Ex. 2 is such a written document evidencing the loan as is contemplated by s. 39, of the U. P. Agri. Relief Act. Exhibit 2, the receipt, is drawn up on a printed form and shows that the defendant had received Rs. 150 from the plaintiff in consideration of a promissory note which he had executed in his favour. Upon a reasonable interpretation of the language used in the receipt it seem to me clear that the document furnishes evidence of the loan taken by the defendant from the plaintiff. Section 39, does not prescribe any particular form of a written document to evidence the loan. The words "written document" used in the section in my opinion are wide enough to cover any writing which would unmistakably show that a loan was taken by the debtor, and no particular form of writing is necessary to evidence the transaction of the loan. The intention of the section appears to be that loans taken by agriculturists shall be evidenced by a writing and should not be made dependent upon parole testimony. It is only to guard against an oral or parole transaction of loan that the section insists that the transaction shall be evidenced by a document. I uphold the decision of the Courts below that Ex. 2 evidences the loan by a written document as required by s. 39 of the U. P. Agri. Relief Act.

As regards the other question raised, it appears that no plea was raised in the written statement, that no copy had been furnished to the defendant and no issue was framed on that point. The point has not been raised in the ground of revision to this Court. I am unable to entertain this plea in revision at this late stage. If the plea had been raised at the proper stage in the trial Court, the plaintiff would have been in a position to produce evidence. It cannot be allowed to be raised at this stage now.

As regards the last point that Rs. 20 were not credited towards the account of the defendant, the plea has no substance. It is quite clear from the account given in the plaint that a credit was given to the defendant for Rs. 20 and the plaintiff relinquished Rs. 40 out of the total amount of Rs. 60 as interest. This plea also has no force.

The result is that the application fails and is dismissed with costs.

D.

Application dismissed.

PATNA HIGH COURT

Special Bench

Original Title Suit No. 1 of 1941

(Originally No. 46 of 1939)

April 17, 1941

HARRIES, C. J., FAZL ALI AND
MANOHAR LALL, JJ.

Babu JHALAK PRASAD SINGH
AND OTHERS—PLAINTIFFS

versus

THE PROVINCE OF BIHAR—

DEFENDANTS

Bihar Agricultural Income Tax Act (VII of 1938), ss. 2 (a), 3, 4—Income Tax Act (XI of 1922), s. 2 (1)—Bengal Cess Act (IX of 1880), ss. 4, 41, 100, 105—Government of India Act, 1935, (25 & 26 Geo. V, Ch. 42), ss. 108, 299, 109 (2) (a), 52 (2), 44—Permanent Settlement Regulation (I of 1793)—Bihar Act whether ultra vires as a whole because definition of "agricultural income" given in Act is wider or narrower than that given in Income Tax Act—Definition of "agricultural income" in Bihar Act and Income Tax Act compared—Word 'local rate' in s. 2 (1), Income Tax Act, if covers cess—Collector acting under Cess Act acts as officer of Crown, as such and not as agent of 'local authorities'—Bihar Act is ultra vires only in so far as it covers income from revenue free agricultural land in a Municipality—Income of raiyats and tenure-holders of revenue free land, if covered by definition of "agricultural income"—Regulation I of 1793, construction—Effect of—Tax under Bihar Act, if infringement of rights granted to zemindars by Permanent Settlement Regulation—Bihar Act not invalid due to non-compliance with s. 299, Government of India Act or Para. XVIII of Instrument of Instructions—Regulation I of 1793 is not Act of Parliament—Bihar Act is not therefore invalid by reason of s. 108 (2), Government of India Act—Bihar Agricultural Income Tax Act repeals by necessary implication provisions of Regulation I of 1793 which are inconsistent with it.

The omission to include cl. (c) of the definition contained in the Income Tax Act in the definition contained in the Bihar Agri. Income Tax Act cannot make the latter Act *ultra vires*. In effect the Bihar Govt. are proposing to tax less than they are entitled to do. The greater must include the less, and if the Provincial Govt. are entitled to tax all agricultural income as defined in s. 2 (1), Income Tax Act, then they are clearly entitled to tax a part only of such income. It is impossible to hold that the omission to tax some forms of agricultural income could render the whole of the Bihar Act *ultra vires* and of no effect. [p. 667, col. 2.]

The word "revenue" in s. 2 (1), Income Tax Act is used to denote income or a revenue receipt as opposed to a capital receipt and, therefore, covers all income from agricultural land other than rent. No real distinction can be drawn between the expressions "rent or revenue" in Income Tax Act and "rent or income" in—

Bihar Agri. Income Tax Act, and it cannot be said that by the use of the words "rent or income" the Provincial Govt. are taxing something more than is permissible by the definition in the Income Tax Act. [*ibid.*]

The expression "local rate" used in Income Tax Act in the definition of "agricultural income" is wide enough to cover cess which is a term used in Bihar for local rates levied on immovable property for the benefit of local authorities. Hence the addition of the words "local cess" in the definition of "agricultural income" given in the Bihar Act does not affect the matter in any way and does not in any way extend the field of taxation. [p. 668, col. 1.]

Under the Ben. Cess Act, 1880, the rate of cess to be levied is fixed by the District Board and the proceeds are paid into a district fund. The assessment and collection of cess is however, ordinarily made by the Collector, and the Collector, when he performs his duties under the Cess Act is in no way a servant of the District Boards. He does not act under their supervision but under the supervision of the higher Govt. authorities. Hence when the Collector performs the duties cast upon him by the Ben. Cess Act he performs them as Collector that is, as an officer of the Crown and not as an agent of the local authorities. [p. 669, cols. 1 & 2.]

What s. 100 of the Ben. Cess Act empowers the Board of Revenue to do is to invest a person with the powers of a Collector under the Act. Once such a person is invested with such powers, he is, as far as those duties are concerned, a Collector, and he performs his duties not as a servant or agent of the District Boards but as a Collector. Even such a person must be regarded as a Collector and he performs his duties as a Collector, that is, as an officer of the Crown as such. The cess in Bihar is therefore assessed and collected by officers of the Crown as such and that being so there is no real difference between the two definitions of the "agricultural income" in the Income Tax Act and the Bihar Agri. Income Tax Act as far as the assessment and collection of cess is concerned. [p. 669, col. 2.]

Revenue free agricultural land in a Municipality is subject to a local rate collected under a Bihar and Orissa Municipal Act, and, therefore, comes within the definition given in the Agri. Income Tax Act. As the local rate, however, is collected by the servants of the Municipality and not by the officers of the Crown as such, the income derived from such lands is not within the definition of agricultural income given in the Income Tax Act. Hence, in so far as the definition of "agricultural income" in the Bihar Agri. Income Tax Act, covers income from revenue free agricultural land in a Municipality it is *ultra vires* but this does not make the whole Act *ultra vires*. [*ibid.*]

[Case-law referred to.]

It is open to the High Court so to limit the definition given in the Bihar Act as to bring it within the competence of the local Legislature. [p. 671, col. 1.]

The income of a *raiyat* does not fall within s. 2 (a) (1) of the Bihar Agri. Income Tax Act but rather falls within s. 2 (a) (2) (1) of that Act. His income is derived from land by agriculture and clearly falls within the definitions given in both the Bihar Act and the Income Tax Act. [p. 670, col. 1.]

The income of tenure-holders of revenue free land falls within the definition given in both the Bihar Agri. Income Tax Act and the Income Tax Act and, therefore, the Bihar Agri. Income Tax Act cannot be held to be *ultra vires* upon this ground. [p. 670, col. 2.]

Regulation I of 1793 contains no assurance or undertaking to the *zemindar* that he would for ever thereafter be immune from taxation such as that imposed by the Bihar Agri. Income Tax Act. The Regulation merely contains an assurance that the *jama* or land

revenue payable by the *zemindar* would never be increased. [p. 675, col. 2.]

The tax imposed on agricultural income by the Bihar Agri. Income Tax Act, 1938, is in no way an infringement of the rights granted to *zemindars* by the Permanent Settlement Regulations. 125 Ind. Cas. 871 (9), relied on. [p. 677, col. 1.]

The tax imposed by the Bihar Act is a tax on income though limited to income derived from agricultural sources. It is in no sense a tax on the land or payment in the nature of *jama* because it is imposed on the income derived from the land and not on the land itself. It cannot therefore be said that the Bihar Agri. Income Tax does in any way purport to affect, vary or repeal any provision in the Permanent Settlement Regulations particularly Ben. Regulation I of 1793. [p. 677, col. 2; p. 678, col. 1.]

The Bihar Act cannot be held to be invalid on the ground of failure to comply with s. 299, Govt. of India Act by reason of the provisions of s. 109 (2) (a) of that Act. So also it cannot be held to be invalid by reason of the Governor's failure to reserve the bill as directed by para. XVIII of the Instrument of Instructions in view of s. 52 (2), Govt. of India Act. [p. 678, col. 2.]

The Ben. Regulation I of 1793 is an enactment of the Governor-General in Council and not an enactment of the Parliament in England, and hence the Bihar Agri. Income Tax Act, is not invalid by reason of the provisions of s. 108 (2) (a), Govt. of India Act. [p. 680, col. 2.]

The expression "Governor-General's Act in [s. 108 (2) (b)] refers to Acts which are contemplated in s. 44, Govt. of India Act, 1935, that is, to Acts enacted by the Governor-General after the Govt. of India Act came into force. The Permanent Settlement Regulation was in no sense an Act of the Governor-General but was an Act of the then Governor-General in Council. That being so, s. 108 (2) (b), Govt. of India Act, can in no way render the legislation invalid. [*ibid.*]

A subsequent general Act will repeal the provisions of an earlier special Act if the provisions of the subsequent Act are clear and unambiguous and clearly apply to the matters dealt with by the earlier special legislation. Under the Bihar Agri. Income Tax Act, all agricultural income is made taxable without distinction, and that being so, any protection afforded to agricultural income by any earlier Act is repealed by this subsequent Act. The Court is therefore bound to hold that the Bihar Agri. Income Tax Act repeals by necessary implication any provision in the earlier Regulation I of 1793 which is inconsistent with it. 102 Ind. Cas. 845 (10) and 84 Ind. Cas. 31 (19), referred to. [p. 281, col. 2; p. 782, col. 1.]

Sir Sultan Ahmed, Messrs. P. R. Das, M. N. Pal, B. C. De, P. K. Banerji, G. C. Das, J. M. Ghosh, H. R. Kazimi, R. J. Bahadur, Kalil Ahmad, A. H. Akbari and Ujjal N. Sinha, for the Plaintiffs.

The Advocate-General and Mr. Phulan Prasad Verma, for the Defendants.

Harries, C. J.—The plaintiffs are *zamin-dars* holding a permanently settled estate in the District of Patna in this Province.

On March 17, 1939, a notice was served on them by the Agricultural Income-tax Authorities of this province under s. 17 (2) and other sections of the Bihar Agri. Income Tax Act calling upon them to make a return of their agricultural income for the previous year to enable an assessment to agricultural income-tax to be made. The plaintiffs have

declined to make such a return and claim that the provincial Agricultural Income-tax Authorities have no power to call for such a return. The present suit has been filed claiming declaratory relief to that effect.

The suit was originally instituted in the Court of the First Subordinate Judge, Patna. The points involved are difficult and of very great importance and with the consent of all the parties the case was transferred to this Court for hearing and disposal. In view of the importance of the case to all persons interested in agriculture in this Province, this Special Bench has been constituted to hear the matter.

In para. 1 of the plaint it is stated that the plaintiffs are *zamindars* holding a permanently settled estate. Then follow a number of paragraphs purporting to describe the position of *zamindars* before and after the Permanent Settlement Regulation (Regn. I of 1793). In para. 6 it is said that the Permanent Settlement Regulation is an Act of Parliament, and in para. 7 it is pleaded that as the Bihar Agri. Income Tax Act is repugnant to a Governor-General's Act or a Parliamentary Statute and purports to alter the character of the Permanent Settlement the previous sanction of the Governor-General was necessary to the introduction of the bill in the Legislature and further that the bill should have been reserved for signification of His Majesty's pleasure. In para. 8 it is stated that the Bihar Agri. Income Tax Act directly infringes the rights granted by Regn. I of 1793 and as it repeals either directly or indirectly such regulation it is *ultra vires*. In para. 9 it is pleaded that the Bihar Agri. Income Tax Act is *ultra vires* as the previous sanction of the Governor under s. 299, Govt. of India Act, 1935, and of the Governor-General under s. 108 (2) (b) of that Act was not obtained before the introduction of the bill before the local legislature. In para. 10 it is stated that the powers given in Art. 41, List II, Seventh Schedule, Govt. of India Act, 1935, enable the Provincial Govt. only to tax agricultural income from estates other than those permanently settled. In para. 11 the fact that a return was demanded from them by the Income-tax Authorities is stated, and in para. 14 it is said that the necessary notice under s. 80, Civil P. C., was served on April 18, 1939, on the defendants, the Provincial Govt. through the Collector of Patna. The reliefs claimed by the plaintiffs are as follows:—

"(i) That the Court be pleased to declare that the Provincial Legislature of Bihar has or had no jurisdiction to enact the Bihar Agri. Income Tax Act (Act VII

of 1938) and the Bihar "Agricultural" (Amendment) Act (Act V of 1939) imposing agricultural tax on estates settled under Permanent Settlement Regn. I of 1793 so long as the said Regulation stands unrepealed. (ii) That the Court be further pleased to declare that the Bihar Agri. Income Tax (Amendment) Act (Act V of 1939) being repugnant to the Permanent Settlement Regn. I of 1793 and other cognate regulations of 1793 and to other existing Indian Laws are *ultra vires* of the Provincial Legislature in that they seek to impose agricultural tax on permanently settled estates and are not binding on and wholly ineffective against the plaintiffs or other estates and that any act done under these acts by any officer including the issuing of and serving of notice on plaintiffs under ss. 17 (2) and 30 of Act VII of 1938 and also assessment of agricultural income-tax, as aforesaid is without jurisdiction, illegal invalid and ineffective. (iii) That the Court be pleased to grant the plaintiffs any other relief to which they in the opinion of the Court, be entitled to get."

The defendants in their written statement deny the plaintiffs' allegations and plead that the Act was validly enacted under the provisions of the Govt. of India Act, 1935. They deny that it affects in any way the terms of the Permanent Settlement Regulation and plead that the plaintiffs were rightly called upon under the provisions of the Bihar Agri. Income Tax Act to render a return of their income for the previous year for the purposes of assessment to Agricultural Income-tax. The defendants deny that the plaintiffs are entitled to any relief whatsoever. Certain other pleas were taken in the written statement, but as those pleas were not pressed before us it is unnecessary to set them out in this judgment.

In the Court of the Subordinate Judge the following issues were framed:—

- "1. Is the suit as framed maintainable?
2. Is the suit bad for any want of or defect in the notice under s. 80, Civil P. C.?
3. Does the impugned Acts require the previous sanctions of the Governor and the Governor-General under ss. 299 (3) and 108 (2) of the Govt. of India Act, 1935, or should they have been reserved for the signification of His Majesty's pleasure under the said Act? Was the previous sanction and approval of the Governor obtained?
4. Were the impugned Acts illegal, inoperative, repugnant and *ultra vires*?
5. Can the impugned Acts be questioned in the Civil Court?
6. Does Art. 41 in List II of the Govt. of India Act, 1935, empower the Provincial Legislature to make laws with respect to taxes on agricultural income arising out of estates settled under Regn. I of 1793 and other cognate regulations?
7. Are the impugned Acts an invasion on the rights of the landlords under the Permanent Settlement? If so, are they *ultra vires* of the Provincial Legislatures?
8. Whether the notices and the assessment under the impugned Acts are legal; operative and binding on the plaintiffs?
9. Does the Permanent Settlement create a new right or merely recognise a pre-existing right?

10....What other relief, if any, the plaintiffs are entitled to?

No evidence was called at the hearing of the suit as the defendants through the Advocate-General admitted that the plaintiffs were holders of a permanently settled estate in this Province and that they had been served with a notice by the Agricultural Income-tax Authorities calling upon them to make a return of their income under the Act. It was conceded that no such return had been made and the defendants further admitted that a valid notice under s. 80, Civil P. C., had been served upon them through the Collector of Patna as alleged by the plaintiffs. It is common ground that the plaintiffs' estate is a revenue paying one. No questions of fact are, therefore, involved in this suit and the questions to be decided are pure questions of law. I shall now deal with the issues raised in the case :

Issue No. 1.—It was not contended on behalf of the defendants that the suit was not maintainable in its present form and that being so this issue must be decided in favour of the plaintiffs.

Issue No. 2.—The defendants now admit receipt of the notice in question and, therefore, this issue must be decided in favour of the plaintiffs.

Issue No. 5.—The defendants did not contend that the validity of the Bihar Agri. Income Tax Act could not be questioned in a Civil Court and, therefore, this issue is decided in favour of the plaintiffs.

Issues Nos. 3, 4, 6, 7, 8, 9 and 10.—These issues raise the questions involved in the case and the contentions of the plaintiffs can be shortly summarised as follows :—

(1) The whole of the Bihar Agri. Income Tax Act, 1938, is *ultra vires* and not binding on the plaintiffs by reason of the fact that it purports to tax a wider range of income tax than is permissible under the powers given to the Provincial Legislature by the Govt. of India Act, 1935, and further because it does not tax all agricultural income as defined in the Govt. of India Act, 1935.

(2) The said Act purports to deal with rights and privileges relating to land revenue and repeals or modifies the terms of the Permanent Settlement and as the previous sanction of the Governor was not obtained to the introduction of the bill as required by s. 299, Govt. of India Act, the Act was not validly enacted and is not binding on the plaintiffs. Further, the bill was not validly enacted as it was not reserved for the consideration of the Governor-General as required

by the Instrument of Instructions issued to the Governor of the Province.

(3) The said Act purports to repeal or modify the Permanent Settlement Regulations and in particular Regn. I of 1793 which is a Act of Parliament or a Governor-General's Act. The said Act was not validly enacted by reason of the fact that the previous sanction of the Governor-General was not obtained for the introduction of the bill as required by s. 108 (2), Govt. of India Act, 1935.

(4) Even assuming the said Act to be validly enacted it does not on its true construction purport to tax agricultural income derived from permanently settled estates. The Bihar Agri. Income Tax Act is a General Act whereas the Regn. I of 1793 is a special Act and the former should not be held to repeal any provisions in the latter.

The plaintiffs' first contention is that the whole of the Bihar Agri. Income Tax Act of 1938 and the Amending Act of 1939 are *ultra vires* the powers of the Provincial Legislature because they purport to tax a wider range of income than is permissible under the powers granted to Provincial Govts. by the Govt. of India Act, 1935. The Bihar Agri. Income Tax Act, 1938, purports to define "agricultural income" and it is contended that the definition contained in the Act is too wide and consequently the whole Act which deals with taxation of such income is *ultra vires* null and void and of no effect.

The power to impose a tax on agricultural income is given to the Provincial Govt. by s. 100, and Art. 41, List II, Seventh Schedule Govt. of India Act. Section 100 (3), Govt. of India Act is in these terms :

"Subject to the two preceding sub-sections, the Provincial Legislatures has, and the Federal Legislature has not, power to make laws for a province or any part thereof with respect to any of the matters enumerated in List II, in the said schedule (hereinafter called the Provincial Legislature List.)"

The schedule referred to is the Seventh Schedule of the Act. Article 41, List II, Seventh Schedule of the Act empower a Provincial Govt. to impose "Taxes on Agricultural Income."

Section 311 (2), Govt. of India Act, 1935, provides that unless the context otherwise requires the expression "agricultural income" means agricultural income as defined for the purposes of the enactments relating to Indian income-tax. In the Indian Income Tax Act which relates to Indian income-tax the phrase "agricultural income" is defined in s. 2 (1), of the Act. The definition is as follows:

"(a) 'Agricultural income' means any rent or revenue derived from land which is used for agricultural purpose

and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of the Crown as such :

(b) Any income derived from such land by (i) agriculture, or (ii) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market, or (iii) the sale by a cultivator or receiver of rent-in-kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in sub-cl. (ii) ;

(c) any income derived from any building owned and occupied by the receiver of the rent or revenue of any such land, or occupied by the cultivator, or the receiver of rent-in-kind, of any land with respect to which, or the produce of which, any operation mentioned in sub-cl. (ii) and (iii) of cl. (b) is carried on :

Provided that the building is on or in the immediate vicinity of the land, and is a building which the receiver of the rent or revenue or the cultivator or the receiver of the rent-in-kind by reason of his connection with the land, requires as dwelling house, or as a store-house, or other out-building."

Section 110 (b) (ii) prohibits a Provincial Legislature except in so far as is expressly permitted by any subsequent provisions of the Govt. of India Act, 1935, to make any law amending any provision of the said Act.

In the Bihar Agri. Income Tax Act, 1938, agricultural income is defined in s. 2 (a), ss. 3 and 4 charge agricultural income derived from land in Bihar to agricultural income-tax. By s. 5, however, incomes not exceeding Rs. 5,000 are exempted. Sections 6 and 7 deal with modes of determining agricultural income, and s. 17 requires persons to render a return of their agricultural income. Section 18, deals with assessment to tax, and by s. 31 the tax assessed is made payable by the assessee in four instalments. Other sections deal with matters which are incidental to the assessment and collection of the tax which are not material for the purposes of this judgment.

"Agricultural income" is defined in the Bihar Agri. Income Tax Act in s. 2 (a) which is in these terms :—

" 'Agricultural income' means—

(1) any rent or income derived from land which is used for agricultural purposes, and is either assessed to land revenue in Bihar or subject to a local cess or rate assessed and collected under any Ben. Act or under any Bihar and Orissa Act or under any Bihar Act ; (2) any income derived from such land by (i) agriculture, or (ii) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market, or (iii) the sale by a cultivator or receiver of rent-in-kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in sub-cl. (ii) ;"

It will be noted, in the first place, that cl. (c) of the definitions of "agricultural income" contained in the Indian Income Tax Act is entirely omitted from the Bihar Agri.

Income Tax Act, and it was contended that such omission rendered the whole of the Act *ultra vires*. It was urged that the Provincial Govt. could only tax agricultural income as defined in the Indian Income Tax Act and as they had not purported to do so the Act was *ultra vires*. In my view the omission to include cl. (c) of the definition contained in the Indian Income Tax Act in the definition contained in the Bihar Agri. Income Tax Act cannot possibly make the latter Act *ultra vires*. In effect the Bihar Govt. are proposing to tax less than they are entitled to do. The greater must include the less, and if the Provincial Govt. are entitled to tax all agricultural income as defined in s. 2 (1), Indian Income Tax Act, then they are clearly entitled to tax a part only of such income. It is impossible to hold that the omission to tax some forms of agricultural income could render the whole of the Bihar Act *ultra vires* and of no effect.

In the Indian Income Tax Act definition the words used are :

" 'Agricultural income' means (a) any rent or revenue derived from land which is used for agricultural purposes....."

In the Bihar Agri. Income Tax Act, the words used are :

" 'Agricultural income' means any rent or income derived from land which is used for agricultural purposes....."

It was argued that there was some difference in this part of the definition, though it was not stated with any clearness as to what that distinction was. In my view the word "revenue" in the Indian Income Tax Act is used to denote income or a revenue receipt as opposed to a capital receipt, and, therefore, covers all income from agricultural land other than rent. No real distinction can be drawn between the expressions "rent or revenue" and "rent or income", and in my view it cannot be said that by the use of the words "rent or income" the Provincial Govt. are taxing something more than is permissible by the definition in the Indian Income Tax Act.

In the definition in the Bihar Agri. Income Tax Act the word "Bihar" is substituted for the expression "British India" which appears in the definition in the Indian Income Tax Act. This alteration was, of course, necessary to limit the application of the Provincial Act to this province and can in no way affect the validity of the Act.

It was next urged that there was a material difference in the two definitions in that the Bihar Agri. Income Tax Act purported to tax income from land which is either assessed to land revenue or subject to a local cess or

rate assessed or collected under any Bengal Act or under any Bihar and Orissa Act or under any Bihar Act, whereas the Govt. of India Act only permitted taxation of agricultural income as defined in the Indian Income Tax Act, namely income from agricultural land which is either assessed to land revenue or subject to local rate assessed and collected by officers of the Crown as such.

In the definition of "agricultural income" in the Indian Income Tax Act the land must be assessed to land revenue or must be subject to a local rate, whereas in the definition in the Bihar Act the land may be either assessed to land revenue or subject to a local cess or rate. In my judgment the addition of the word "cess" in the definition in the Bihar Act does not widen the range of income taxable. The expression "local rate" is wide enough to cover cess which is a term used in this province for local rates levied on immovable property for the benefit of local authorities. That being so, the addition of the words "local cess" in the definition of "agricultural income" given in the Bihar Act does not affect the matter in any way and does not in any way extend the field of taxation.

A more substantial point urged on behalf of the plaintiffs is that income from revenue free agricultural lands may be taxable under the Bihar Agri. Income Tax Act though such would not be agricultural income within the definition given in the Indian Income Tax Act. Under the Indian Income Tax Act income from revenue free agricultural land can only be regarded as "agricultural income" if the land is subject to a local rate assessed and collected by officers of the Crown as such, whereas under the Bihar Act income from revenue free agricultural land would be agricultural income if it was derived from land subject to a local rate or cess assessed and collected under the provisions of certain local acts, no matter how such local rate or cess was assessed or collected or by whom. In other words, in the definition contained in the Indian Income Tax Act the local rate must be assessed and collected by officers of the Crown as such, whereas under the Bihar Act the local rate or cess may be assessed or collected by persons other than officers of the Crown. It is said that cess in this province is not assessed and collected by officers of the Crown as such.

As I have stated earlier, the lands in this case are revenue paying lands and are clearly within both the definitions; but it is contended that if it is established that the

definition in the Bihar Act is wider than that given in the Indian Income Tax Act, the whole Act must be declared *ultra vires* and, therefore, would not be applicable even to this case where the lands are revenue paying lands.

In order to ascertain whether definition of "agricultural income" in the Bihar Agri. Income Tax Act is wider in its scope than that given in the Indian Income Tax Act, it will be necessary shortly to consider the provisions of the Cess Act (Ben. Act IX of 1880) under which local cess is collected in this province. If under the provisions of that Act local cess is assessed and collected by officers of the Crown as such, then there would be no material difference between the two definitions. Section 5 of the Cess Act makes all immovable property in the province liable to a local cess. Part II of the Act deals with the mode of assessment. By s. 12 the Board of Revenue may order a valuation or re-valuation of property and then follow provisions as to returns to be rendered by holders of such immovable property. If returns are not furnished, the Collector is required under s. 21 of the Act to make such valuation. Where returns are untrue or incorrect the Collector can value under s. 22 and may recover the expenses of such valuation under s. 23. Sections 24 and 25 *et seq* further deal with the Collector's powers in relation to valuation and by s. 37 the Collector may reduce a valuation and make a valuation and assess and levy cess upon any estate or tenure which for any reason whatever has been omitted from the valuations and assessments for the time being in force or which was not in existence when such valuation or assessment was made.

Chapter III of Part II of the Act deals with the rate and levy of cess. Section 38 provides that the local cess shall be levied at such rate as may be determined for such year by the District Board, and s. 40 provides for the publication of the rate and the levying of the cess.

By the terms of this section it is clear that this duty devolves upon the Collector. Section 41 deals with payment of cess by holders of estates. Section 98 provides that every amount due or which may be due to the Collector under the provisions of the Act in respect of any arrears of cess may be realized by such Collector in the manner provided for the realisation of a public demand.

Section 4 defines "Collector" and the term includes any person specially invested with the powers of a Collector for the purposes of

this Act. By s. 100 the Board of Revenue may at any time invest any person with the powers of a Collector under the Act such powers to be exercised by such person under the control or supervision of the Collector or independently of such control and supervision, as the Board of Revenue shall direct.

Section 9 of the Act provides that the proceeds of the local cess in each district shall be paid into the district fund of the district, and "district fund" is defined in s. 4 as meaning the fund formed under s. 52 of the Ben. Local Self-Govt. Act of 1885.

From these provisions it is clear that the rate of cess to be levied is fixed by the District Board and the proceeds are paid into a district fund. It is, however, clear that the assessment and collection of cess is ordinarily made by the Collector, and it is conceded that a Collector is an officer of the Crown. It is, however, urged that when the Collector is acting under the Cess Act he is not acting as an officer of the Crown but as an officer or servant of the District Board. What he collects he pays not into any Crown or Govt. fund but into the district fund, and that being so, it is urged that he is acting not as a Collector and not as an officer of the Crown as such but as an officer of the local authorities. In my judgment, however, the Collector, when he performs his duties under the Cess Act is in no way a servant of the District Boards. All the latter have to do is to determine the rate of cess, and when once that is done they appear to have nothing further to do with the matter. Questions of valuation, assessment and collection are matters entirely for the Collector, and the act makes him in no way responsible to the District Boards. He does not act under their supervision but under the supervision of the higher Govt. authorities: see s. 105 (b). This sub-section places the Collector under the supervision of the Commissioner and the Board of Revenue. There appears to be no definition of the expression "officer of the Crown", but that expression as used in the Indian Income Tax Act clearly covers a Collector. The latter is in one sense an officer of the Provincial Govt., but there can be no doubt that in India he is also an "officer of the Crown." Under the present administration at least all the senior "Officers of Govt." are "officers of the Crown" as that expression is understood in this country. In my judgment when the Collector performs the duties cast upon him by the Cess Act he performs them as

Collector that is, as an officer of the Crown and not as an agent of the local authorities.

The Act, however, does provide that persons other than Collectors can perform the duties of a Collector under the Act. Section 100 empowers the Board of Revenue at any time to invest any person with the powers of a Collector under Part II of the Act which includes powers of assessing and collecting cess, such persons, it is said, cannot possibly be officers of the Crown and are not acting as such when performing their duties under the Act. What s. 100 of the Act empowers the Board of Revenue to do is to invest a person with the powers of a Collector under the Act. Once such a person is invested with such powers, he is, as far as those duties are concerned, a Collector, and he performs his duties not as a servant or agent of the District Boards but as a Collector. In my view, even such a person invested by the Board of Revenue must be regarded as a Collector and he performs his duties as a Collector, that is, as an officer of the Crown as such. That being so, it appears to me that cess in this province is assessed and collected by officers of the Crown as such and that being so there is no real difference between the two definitions as far as the assessment and collection of cess is concerned.

Cess, however, is not payable in respect of any estate within the limits of a municipality—see the present proviso to s. 2 of the Cess Act. Such lands however are assessed to local rates—see s. 98 and the following sections of the Bihar and Orissa Municipal Act (Act VII of 1922). These rates are not collected by the Collector but are collected by officers or servants of the municipality—see s. 120 and the following sections of the Bihar and Orissa Municipal Act. It is, therefore, contended, that the definition of "agricultural income" in the Bihar Agri. Income Tax Act covers income from revenue-free agricultural land in a municipality, whereas the definition in the Indian Income Tax Act does not. This contention is well-founded. Revenue free agricultural land in a municipality is subject to a local rate collected under a Bihar and Orissa Act, and, therefore, comes within the definition given in the Agri. Income Tax Act. As the local rate, however, is collected by the servants of the municipality and by the officers of the Crown as such, the income derived from such lands is not within the definition of agricultural income given in the Indian Income Tax Act.

No evidence has been led before us with

a view to showing that there is any revenue free agricultural land within municipalities in this Province though doubtless there must be such land. However, the income arising from such land must be small, and it seems clear that the framers of the definition in the Bihar Agri. Income Tax Act have overlooked this matter.

As the definition of the "agricultural income" given in the Bihar Agri. Income Tax Act may include income which is not included in the expression "agricultural income" as defined by the Indian Income Tax Act, it is argued that the whole of the Bihar Agri. Income Tax Act is *ultra vires* and, therefore, not binding upon the plaintiffs who are themselves clearly within both definitions as they pay revenue for their lands.

It was also contended on behalf of the plaintiffs that the Act was *ultra vires* because it purported to tax the agricultural income of tenure-holders and *raiyats* of revenue free lands upon which cess was payable. It was urged that such income did not fall within the ambit of the definition of "agricultural income" in the Indian Income Tax Act but that it was within the definition of such income given in the Bihar Agri. Income Tax Act. The argument was that tenure-holders and *raiyats* of revenue free lands pay cess not to the Collector but to the person from whom they hold their interests.

Section 41, Cess Act, makes tenure-holders and *raiyats* liable to pay cess but in their case the cess is not collected by the Collector but is payable by the tenure-holder to the proprietor and by the *raiyat* to the proprietor or tenure-holder as the case may be. Such cess, therefore, can be said to be assessed and collected under a Ben. Act, but it cannot be said to be cess collected by an officer of the Crown as such. That being so, it is contended that agricultural income of such tenure-holders and *raiyats* is taxable under the Bihar Agri. Income Tax Act though such income is not within the definition given in the Govt. of India Act, 1935, and the Indian Income Tax Act.

The income of a *raiyat* does not fall naturally within s. 2 (a) (1) of the Bihar Agri. Income Tax Act but rather falls within s. 2 (1) (a) (2) of that Act. His income is derived from land by agriculture and clearly falls within the definitions given in both Acts.

A tenure-holder of revenue free land not himself cultivating lands does derive income from land used for agriculture upon

which cess is payable by the proprietor and that cess is assessed and collected by the Collector who is an officer of the Crown, and, as I have already held, it is assessed and collected by the Collector as such. Therefore, income of tenure-holders of revenue free land falls within the definition given in both the Bihar Agri. Income Tax Act and the Indian Income Tax Act and, therefore, the Bihar Agri. Income Tax Act cannot possibly be held to be *ultra vires* upon this ground.

The only instance, therefore, where the Bihar Agri. Income Tax Act taxes income not within the definition of agricultural income given in the Indian Income Tax Act is in the case of revenue free lands in a municipality. Can this render the whole Act *ultra vires*? As I have stated, there can be but little of such income, but that is said to be wholly immaterial. The definition of "agricultural income" it is argued, permeates the whole Act affects all its provisions. It is contended that it is impossible to separate such part of the definition in the Bihar Act as offends against the provisions of the Govt. of India Act, 1935, from the remainder and that being so the whole Act must be held to be *ultra vires*. The Court, it is urged, cannot substitute the definition of "agricultural income" given in the Indian Income Act for that given in the Bihar Act, as, such definition was never made part of the Act by the Local Legislature and was never assented by the Governor. The definition of "agricultural income" is so inextricably mixed up with the other provisions of the Act that is impossible to sever the offending portion of the definition, and that being so, the whole Act must be declared *ultra vires*.

Reliance was placed on two recent cases of the Privy Council, the first of which is *Attorney General of Canada v. Attorney General for Ontario* (1), in which it was held that the Employment and Social Insurance Act, 1935, of the Parliament of Canada, which in substance provided for a system of compulsory unemployment insurance throughout Canada, was *ultra vires* of the Dominion Parliament. In pith and substance the Act was an Insurance Act affecting the civil rights of employers and employed in each province and was accordingly within the exclusive competence of the Provincial Legislature under s. 92, head 13, of the British North America Act,

(1) (1937) A C 355; 168 Ind. Cas. 316; A I R 1937 P C 89; 9 R P C 272; 106 L J P C 37; 156 L T 307; 81 S J 215; 53 T L R 332 (P C).

1867 which provided that, 'in each Province the Legislature may exclusively make laws in relation to... (13) Property and civil rights in the Province'. It was held that the Act was *ultra vires* by reason of the fact that the other parts of the Act were so inextricably mixed up with the insurance provisions of Part III that it was impossible to sever them.

The other case relied upon by the plaintiffs was *Attorney-General for British Columbia v. Attorney-General of Canada* (2), in which it was also held that the offending portion of the Natural Products Marketing Act, 1934, as amended by the Natural Products Marketing Act, 1935, was so inextricably interwoven with the other portions of the Act that the whole Act must be held to be *ultra vires*.

In my view, however, it is possible in the present case to hold that the Bihar Agri. Income Tax Act, in so far as it taxes agricultural income falling within the definition given in the Indian Income Tax Act, is *intra vires* and only *ultra vires* in so far as it taxes income which falls outside the definition of "agricultural income" given in the Act. It is in my judgment, open to this Court so to limit the definition given in the Bihar Act as to bring it within the competence of the local Legislature.

In *Macleod v. Attorney-General for New South Wales* (3), their Lordships of the Privy Council construed a definition of "bigamy" given in s. 54 of the Criminal Law Amendment Act, 1883, so as to bring the Act within the competence of the New South Wales Legislature. Section 54 of the Criminal Law Amendment Act, 1883, enacted that

"Whosoever being married marries another person during the life of the former husband or wife, whosoever such second marriage takes place, shall be liable to penal servitude for seven years."

Their Lordships held that these words must be intended to apply to those actually within the jurisdiction of the Legislature, and consequently that there was no jurisdiction in the Colony to try the appellant for the offence of bigamy alleged to have been committed in the United States. Their Lordships construed the words "whosoever being married" as meaning "whosoever being married, and who is amenable at the time of the offence committed, to the jurisdiction of the Colony of New South Wales" and construed "whosoever" as meaning "where-

(2) (1937) A C 377; 168 Ind. Cas. 10; A I R 1937 P C 93; 106 L J P C 64; 81 S. J. 235; 53 T L R 330; 9 R P C 347.

(3) (1891) A C 455; 60 L J P C 55; 65 L T 321; 17 Cox. C C 341.

soever in this Colony the offence is committed".

The Advocate-General who appeared for the Province also relied on *Great West Saddlery Co. v. The King* (4) and the *New Castle and Humber River Steamship Co. Ltd. v. Attorney-General for the Commonwealth* (5) in which it was held that when the offending portions of an Act were severable only such portions should be held to be *ultra vires* and the remainder of the Act should be held to be *intra vires*.

Further, it seems clear from a recent decision of the Federal Court that in a case such as the present one the whole Act should not be held to be *ultra vires*. In *Subrahmanyam Chettiar v. Muthuswamy Goundan* (6) the question arose whether the Mad. Agri. Relief Act, 1938, was *ultra vires* the powers of the Provincial Legislature. By the terms of that section the Courts were entitled to interfere with and reduce interest on loans granted to agriculturists. It was contended that the Act was *ultra vires* by reason of the fact that it empowered Courts to reduce interest on bills of exchange and promissory notes which were subjects in the Federal list and which could not be affected in any way by legislation of a Provincial Legislature. The Federal Court (Sulaiman, J. dissenting) held that on the facts of that particular case the question whether the Act was *ultra vires* or not did not arise. Sulaiman, J., however, held that the Act was *ultra vires* in so far as it purported to deal with interest on negotiable instruments but only to that extent. The Act applied to all debts payable by an agriculturist and "debt" was defined as meaning any liability in cash or kind, whether secured or unsecured, due from an agriculturist, whether payable under a decree or order of a Civil or Revenue Court or otherwise. The definition of debt was wide enough to cover debts due on negotiable instruments, and Sulaiman, J. was of opinion that in so far as it dealt with such debts the Act was *ultra vires* but only to that extent. Varadachariar, J., though he held that the point did not strictly arise, observed at p. 192* :

"The argument of total invalidity need not be dealt with at any length, not only because it was not seriously

(4) (1921) 2 A C 91; 90 L J P C 102; 125 L T 136; 37 T L R 436.

(5) 29 Com. L R 357.

(6) 22 P L T 155; 192 Ind. Cas. 225; A I R 1941 F C 47; 53 L W 109; 13 R F C 47; 1941 O L R 157; 7 B R 523; 1941 M W N 100; 46 C W N F C 1; (1941) 1 M L J 1 Sup; 1941 O W N 425; 73 C L J 1; 1941 R D 205; 3 F L J 157 (183) (F C).

pressed, but also because there is little force in it. If an enactment deals in part with matters beyond the competence of the Legislature which enacted it, it must be held to be wholly invalid only in cases which the valid and invalid provisions are inseparably intermixed or the 'innocent' provisions are merely ancillary to the offending provisions. This cannot be said to be the position in the present case. Further, as there is no provision in the Act dealing in terms with negotiable instruments, any objection based on the wide scope of the Act may be obviated by so interpreting the general terms used in the Act as to limit them to cases with which alone the Legislature was competent to deal."

From these observations it would appear that Varadachariar, J. would also have been prepared to hold that even if the provisions of the Mad. Agri. Relief Act dealt with matters upon which the Provincial Legislature could not legislate, nevertheless the whole Act would not be invalid upon that ground. The Act would only be *ultra vires* in so far as it purported to deal with matters outside the jurisdiction of the Provincial Legislature.

In *Shyama Kant Lal v. Rambhajan Singh* (7) Sulaiman, J. observed :—

"It is a well-established principle that if the invalid part of an Act is really separate in its operation from other parts and the rest are not inseparably connected with it then only such part is invalid, unless of course the whole object of the Act would be frustrated by the partial exclusions. If the subject which is beyond the legislative power is perfectly distinct from that which is within such power the Act can be *ultra vires* in the former while *intra vires* in the latter.

The test is said to be whether a statute with the invalid portions omitted would be a substantially different law as to the subject-matter dealt with by that remained from what it would be with the omitted portions forming part of it." See *King v. Commonwealth Court of Conciliation* (8).

It appears to me that these principles should be followed in this case. A Court might be bound to hold that the Bihar Agri. Income Tax Act was *ultra vires* in so far as it purported to tax income from revenue free estates in a Municipality, but, on the other hand, the Court could and should hold that in so far as it deals with other agricultural income the Act is *intra vires*. To hold that the Bihar Agri. Income Tax Act, 1938, does not tax agricultural income from revenue free lands in a Municipality, would not affect the remainder of the Act which would apply to all other income rightly within its scope.

For these reasons I am satisfied that the Bihar Agri. Income Tax Act, 1938, and the amending Act cannot be held to be *ultra vires* because the definition given in that Act

does cover some income not falling within the definition of "agricultural income" in the Indian Income Tax Act.

The next contention urged by the plaintiffs was that the Bihar Agri. Income Tax Act, 1938, was *ultra vires* in so far as it purported to tax income of *zamindars* holding permanently settled estates and in the alternative it was argued that if the Act is not *ultra vires* it should be held that on its true construction it did not tax income of *zamindars* holding permanently settled estates but only the income of *zamindars* holding estates temporarily settled. Shortly stated, the argument was that the rights and privileges of permanently settled *zamindars* are governed by the Permanent Settlement Regulation, Regulation I of 1793, which is an Act of Parliament or a Governor-General's Act. By s. 108 (2) no Provincial Legislature can enact Legislature which repeals, amends or is repugnant to any provision of an Act of Parliament or any Governor-General's Act with the previous sanction of the Governor-General. As the previous sanction of the Governor-General was not given in this case, the Provincial Legislature had no power to legislate in a manner affecting the rights and privileges of permanently settled *zamindars*. It was also contended that by reason of s. 299, Govt. of India Act, no bill affecting the *zamindars'* rights or privileges in respect of land revenue could be introduced in the Local Legislature without the previous sanction of the Governor and as no such sanction was given the Act was not validly passed.

Further, it was argued that in assenting to the Bihar Agri. Income Tax Act His Excellency the Governor had acted contrary to the instalment of instructions issued to him and therefore the Act had not been validly passed.

In dealing with these contentions, it will be necessary to consider what is the true meaning of the Permanent Settlement Regulation in order to see whether the provisions of the Bihar Agri. Income Tax Act are in conflict with the provisions contained in such Regulations and whether the Act repeals, varies or modifies those provisions in any way.

Mr. P. R. Das who appeared for the plaintiffs in a detailed and elaborate argument on this part of the case invited us to come to a finding as to the precise legal position of *zamindars* before the Permanent Settlement Regulations came in to force. Mr. Das cited passages from numerous authoritative works and original documents such as Field's Regu-

(7) 20 P L T 473 (488); 182 Ind. Cas. 161; A I R 1939 F C 74; 1939 O L R 399; 12 R F C 1; 5 B R 2756; (1939) M W N 674; (1939) F C R 193; 43 C W N F C 68; (1939) Kar. F C 165; 71 C L J 369; (1939) 2 M L J 45 Sup; (1939) 2 F L J 183 (F C).

(8) (1910) 11 Com. L R 1.

lations of the Bengal Code, Phillips's Land Tenures of Lower Bengal, Minutes of the Marquis Cornwallis and Sir John Shore. In my view it is not necessary to consider whether the *zamindars* were or were not proprietors of the land in the true sense of the term before the Permanent Settlement Regulations, and I am fortified in this view by an observation of Lord Russell in the case of *Prabhatchandra Barua v. King-Emperor* (9), in which their Lordships were called upon to consider the effect of the Permanent Settlement Regulations. I shall have to deal with this case at some length later in the judgment, but at this stage it is only necessary to refer to Lord Russell's observation relating to this historical argument. At p. 440* he observed :

"Incidentally to this argument, the Board was invited to consider and, indeed, pronounce upon the question, mainly historical, of the position of the governing authority immediately before the Permanent Settlement in regard to ownership of the land or of some proprietary interest therein. The attention of their Lordships was called to the various views expressed in such works and documents as Field's 'Regulations of the Bengal Code' Phillips's 'Land Tenures of Lower Bengal' and Shore's Minutes. Their Lordships were also referred to certain reported decisions of the Courts. Their Lordships, however, are of opinion that there is here no occasion for any pronouncement by them upon the question of the exact nature of the rights and interests in relation to the land which existed in the Governing Authority before 1793, but that this appeal falls to be determined upon a consideration of the language of the Regulations and of the Indian Income Tax Act, 1922."

It will appear later that their Lordships of the Privy Council were called upon in the case of *Prabhatchandra Barua v. King-Emperor* (9) to consider much the same argument as that addressed to us in this case, and in my judgment it is unnecessary in this case to come to any definite conclusions as to the respective rights of the Governing Authority and the *zamindars* in the land before the Permanent Settlement Regulations, and this case as *Prabhatchandra Barua's case* (9) falls to be decided upon a consideration of the Regulations themselves.

The state of affairs immediately preceding the Permanent Settlement Regulations is clearly described by Ghosh, J. in the case of *Emperor v. Prabhat Chandra Barua* (10). At p. 895 he observed :

"From the period of the East Indian Company's accession to the financial administration of Bengal, (9) 58 C 430; 125 Ind. Cas. 871; 34 C W N 1017; Ind. Rul. (1930) P C 295; A I R 1930. P C 209; 32 L W 458; 52 C L J 225; (1930) A L J 1361; 32 Bom. L R 1541; 59 M L J 814; 57 I A 228; 5 I T C 1 (P C).

(10) 54 C 863 (895); 102 Ind. Cas. 845; 45 C L J 323; A I R 1927 Cal. 432; 31 C W N 765 (F B).

*Page of 58 C.—[Ed.]

Bihar and Orissa by the Dewany Grant of 1765, one settlement of land revenue only, that of 1772, was concluded by Warren Hastings for a term of five years and this was made chiefly with farmers, to the exclusion of the hereditary land-holders. With this exception, the settlements of revenue, mal and sayer, were in general adjusted from year to year, in some instances with the land-holders and in others with farmers, e. g. the settlement for 1777, 1778, 1779 and 1780. When the *zemindars* or land-holders declined to enter into managements in respect of the revenue demanded from them, the rents payable by the under-tenants were collected immediately from them under what was known as *khas management* by the officers of Govt., an allowance, usually one-tenth of the actual receipts from the lands, when held *khas*, being given to the dispossessed *zemindar* or land-holder. It was a system which was described by the Court of Directors as inimical to the general prosperity of the country and a striking provision in Pitt's India Act of 1784 (24 Geo. III, C. XXV) declared that 'and whereas complaints have prevailed, that divers Rajas, *zemindars polygars, taluqdars* and other native land-holders within the British territories in India have been unjustly deprived of or compelled to abandon and relinquish their respective lands, jurisdiction, rights, and privileges, or that the tributes, rents, and services required to be by them paid or performed for their respective possession to the said united Company, are become grievous and oppressive; And whereas the principles of justice, and the honour of this country, require that such complaint should be forthwith enquired into and fully investigated, and if founded in truth effectually redressed. Be it, therefore, enacted that the Court of Directors of the said united Company shall, and they are hereby accordingly, required forthwith to take the said matters into their serious consideration, and to adopt take and pursue such methods enquiring into the causes, foundation and truth of the said complaints, and for obtaining a full and perfect knowledge of the same and of all circumstances relating thereto, as the said Court of Directors shall think best adapted for that purpose; and thereupon, according to the circumstances of the respective cases of the said Rajas, *zamindars* etc. to give orders and instructions to the several Govts. and Presidencies in India, for effectually redressing, in such manner as shall be consistent with justice and the laws and customs of the country, all injuries and wrongs which the Rajas, *zamindars, polygars, talukdars* and other native land holders, may have sustained unjustly in the manner aforesaid and for the settling and establishing upon principles of moderation and justice, according to the laws and constitution of India, the permanent rules by which their respective tributes, rents and services shall be in future rendered and paid to the said united Company."

Thereafter enquiries and investigations followed and in 1790-91 a complete Code of Regulation for the conclusion of a new settlement of the land revenue for Bengal, Bihar and Orissa was promulgated by Lord Cornwallis, Decennial Settlement of 1790-91 was made permanent by Regn. I of 1793. The settlement embraced, roughly speaking, the tracts of the country now comprised in the divisions of Burdwan, the Presidency, Rajshahi, Dacca, Chittagong, Patna and Bhagalpur, exclusive of part of the Santal Parganas. It also extended to Hazaribagh and Manbhum districts in the Chhota Nag-

pur Division and to Jalpaiguri and Goalpara, then forming part of the Rangpur Collectorate.

From the above it will be seen that conditions were somewhat chaotic before the Permanent Settlement Regulations were enacted. The *zamindar* was never certain as to what revenue would be demanded from him. Whenever it was thought that his position had improved, re-assessment was made and a larger sum demanded from him as revenue. In cases where the *zamindar* refused to pay he was dispossessed and the land given to farmers or administered directly by Govt. Officers, the *zamindar* being given a small sum for his maintenance. This state of affairs was regarded by the British Parliament and by the Court of Directors of the East India Company as inimical to the best interests of the Company itself and of the inhabitants of the territory administered by the Company. In order to remedy the matters, Lord Cornwallis came to this country in 1786 and immediately caused investigation to be made into the question of land revenue. As a result of prolonged and detailed investigation he came to the conclusion that it was desirable that the lands in Bengal, Bihar and Orissa should be permanently settled with the *zamindars* which would give them fixity of tenure and render certain the *jama* to be thereafter payable by them. Lord Cornwallis appears to have been determined that *zamindars* should no longer be penalised by increased assessments whenever they were able to improve their estates and their financial condition.

In the year 1793 a large number of Regulations were enacted giving effect to this policy of Permanent Settlement, but the most important Regulation I of 1793. In argument before us other Regulations have been referred to; but it appears to me that this case must be decided upon the construction to be given to Regulation I of 1793 and particularly Art. 6 thereof as observed by Lord Russell in the case of *Prabhatchandra Barua v. King-Emperor* (9) at p. 444*.

"In regard to this part of the case, their Lordships desire to make this observation. The Ben. Regulations of 1793 are lengthy and numerous. In the course of the arguments before the Board attempts were made to support the respective arguments by a phrase picked from one Regulation or a passage chosen from another, even though the particular Regulation only purported to deal with some matter incidental to the Permanent Settlement. In the opinion of their Lordships, this part of the case falls to be determined primarily upon a consideration of the language of Regulation I of 1793. While bearing in mind the passages in order Regula-

tions, to which their attention was drawn, their Lordships feel that the above mentioned Regulation is the master Regulation for the immediate purpose before the Board, and that its provisions constitute the overriding feature in the present case."

• In that case their Lordships were called upon to consider what was the precise assurance or undertaking given to the *zamindars* by the Permanent Settlement; and in the view of their Lordships such would have to be gathered from Regulation I of 1793. In my judgment the observations of Lord Russell apply with equal force to the present case, and this case also falls to be decided primarily upon a consideration of the language of Regulation I of 1793.

Regulation I of 1793 bears date May 1, 1793, but is retrospective and operates as from March 22, 1793. The last mentioned date was the date of a proclamation, to certain articles of which the Regulation gave legislative effect.

The material provisions of Regulation I of 1793 are as follows :

"I. The following articles of the proclamation relative to the limitation of the public demand upon the lands, addressed by the Governor-General in Council to the *zemindars*, independent *talukdars*, and other actual proprietors of land paying revenue to Govt., in the Provinces of Bengal Bihar and Orissa, are hereby enacted into a Regulation, which is to have force and effect from March 2, 1793, the date of the proclamation.

II. Article I.—In the original Regulations for the decennial settlement of the public revenues of Bengal, Bihar and Orissa, passed for those provinces, respectively on September 18, 1789, November 25, 1789 and February 10, 1790, it was notified to the proprietors of land, with or on behalf of whom a settlement might be concluded, that the *jama* assessed upon their lands under those Regulations would be continued after the expiration of ten years and remain unalterable for ever, provided such continuance should meet with the approbation of the Honourable Court of Directors for the affairs of the East India Company, and not otherwise.

III. Article II.—The Marquis Cornwallis, Knight of the Most Noble Order of the Garter, Governor-General in Council, now notified to all *zemindars*, independent *talukdars* and other actual proprietors of land paying revenue to Govt., in the provinces of Bengal, Bihar and Orissa, that he has been empowered by the Honourable Court of Directors for the affairs of the East India Company to declare the *jama*, which has been or may be assessed upon their lands under the Regulations above mentioned, fixed for ever.

IV. Article III.—The Governor-General in Council accordingly declares to the *zemindars*, independent *talukdars* and other actual proprietors of land with or on behalf of whom a settlement has been concluded under the Regulations above mentioned, that at the expiration of the term of the settlement no alteration will be made in the assessment which they have respectively engaged to pay, but that they and their heirs and lawful successors will be allowed to hold their estates at such assessment for ever.

V. Article IV.—The lands of some *zemindars*, independent *talukdars* and other actual proprietors of land, having been held *khas*, or let in farm, in consequence of their refusing to pay the assessment required of them

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under the Regulations above mentioned the Governor-General in Council now notifies to the *zemindars*, independent *talukdars* and other actual proprietors of land whose lands are held *khas*, that they shall be restored to the management of their lands, upon their agreeing to the payment of the assessment which has been or may be required of them, in conformity to the Regulations abovementioned, and that no alteration shall afterwards be made in that assessment, but that they and their heirs and lawful successors, shall be permitted to hold their respective estates at such assessment for ever; and he declares to the *zemindars*, independent *talukdars* and other actual proprietors of land, whose lands have been let in farm, that they shall not regain possession of their lands before the expiration of the period for which they have been farmed (unless the farmers shall voluntarily consent to make over them the remaining term of their lease, and the Governor-General in Council shall approve of the transfer), but that the expiration of that period, upon their agreeing to the payment of the assessment which may be required of them, they shall be reinstated, and that no alteration shall afterwards be made in that assessment, but that they, and their heirs and lawful successors, shall be allowed to hold their respective estate at such assessment for ever.

VI. *Article V.*—In the event of the proprietary right in lands that are, or may become, the property of Govt. being transferred to individuals, such individuals and their heirs and lawful successors, shall be permitted to hold the lands at the assessment at which they may be transferred for ever.

VII. *Article VI.*—It is well known to the *zemindars*, independent *talukdars* and other actual proprietors of land, as well as to the inhabitants of Bengal, Bihar and Orissa, in general, that from the earliest times until the present period the public assessment upon the lands has never been fixed, but that according to established usage and custom, the rulers of these provinces have from time to time demanded an increase of assessment from the proprietors of land; and that, for the purpose of obtaining this increase, not only frequent investigations have been made to ascertain the actual produce of their estates, but that it has been the practice to deprive them of the management of their lands, and either to let them in farm or to appoint officers on the part of Govt. to collect the assessment immediately from the *raiyats*. The Honourable Court of Directors, considering these usages and measures to be detrimental to the prosperity of the country, have with a view to promote the future ease and happiness of the people, authorised the foregoing declarations; and the *zemindars*, independent *talukdars* and other actual proprietors of land, with or on behalf of whom a settlement has been or may be concluded, are to consider these orders fixing the amount of the assessment irrevocable, and not liable to alteration by any persons whom the Court of Directors may hereafter appoint to the administration of their affairs in this country.

The Governor-General in Council trusts that the proprietors of land, sensible of the benefits conferred upon them by the public assessment being fixed for ever, will exert themselves in the cultivation of their lands under the certainty that they will enjoy exclusively the fruits of their own good management and industry, and that no demand will ever be made upon them, or their heirs or successors, by the present or any future Govt. for an augmentation of the public assessment in consequence of the improvement of their respective estates."

It was contended that this Regulation contains a promise, undertaking or assurance that the public demand would never be increased. According to the plaintiffs; this public de-

mand was in the nature of a tax and as the agricultural Income-tax is a tax on such profits, the passing of the Bihar Agri. Income Tax Act is a breach of the assurance or undertaking given by Lord Cornwallis and is an attempt to repeal or modify the provisions of the Permanent Settlement Regulation. It is true that the amount of the *jama* fixed at the time of the Permanent Settlement was fixed after a consideration of the profits or income then derived from the land, but in my view Regn. I of 1793 contains no assurance or undertaking to the *zamindars* that he would for ever thereafter be immune from taxation such as that imposed by the Bihar Agri. Income Tax Act. The Regulation merely contains an assurance that the *jama* or land revenue payable by the *zamindar* would never be increased. It must be remembered that Regn. I of 1793, as its name implies, was a Settlement Regulation. The decennial settlement had been made for ten years, and Lord Cornwallis by the Regulation made that settlement permanent. The *jama* which the *zamindar* had engaged to pay in the decennial settlement was made permanent and was not to be increased in consequence of the improvement of the *zamindars'* estates. What was to be fixed for ever was the annual payment which the *zamindars* had undertaken to pay as a condition of holding their estates. The *zamindars* were recognized as proprietors, and the payment which was a condition of such recognition was declared to be for ever fixed. The effect of the Regulation is that re-assessment and re-settlement of the lands should be for ever barred and the Govt. would no longer be entitled to increase the *jama* by reason of an increase in the *zamindar's* income.

There was a considerable conflict of legal opinion in this country as to the effect of the Permanent Settlement Regulation, Regn. I of 1793; but in my view that conflict has now been set at rest by the decision of their Lordships of the Privy Council in *Prabhatchandra Barua v. King-Emperor* (9). In this case the income-tax authorities had assessed the appellant to income-tax under the Indian Income Tax Act, 1922, in respect of income, profits and gains other than agricultural income derived from his *zamindari*. The assessee objected to such assessment, and the matter came before a Bench of the Calcutta High Court. As there were conflicting decisions in that Court, the matter was referred to a Full Bench consisting of five Judges. The main question to be decided in the case was whether, having regard to the terms of the Permanent Settlement Regulation, in-

come derived from land in permanently settled estates subject to the exemption provided by the legislature was liable to assessment to income-tax. Ghose, Buckland and Panton, JJ. held that such non-agricultural income was liable to be assessed under the Indian Income Tax Act, whereas Mukerji and Suhrawardy, JJ. took a different view. On appeal to His Majesty in Council their Lordships held that while the Bengal Regulations contained assurances against any claim to an increase of the *jama*, based on an increase of the *zamindari* income, they contained no promise that *zamindar* should in respect of the income which he derived from the *zamindari* be exempted from liability to any future general scheme of property taxation, or that the income of a *zamindari* should not be subjected with other incomes to any future general taxation of incomes. Accordingly they held that under the Indian Income Tax Act, 1922, the *zamindar* of a permanently settled estate was assessable to tax under the Act in respect of income, profits and gains derived from his *zamindari*, subject to the exemptions in s. 4 sub-s (3) of the act (agricultural income), and the assessment should be computed after making proper allowance under s. 12, sub-s. (2) in respect of the *jama* assessed and paid. In this case their Lordships had to consider the effect of the Permanent Settlement Regulation, Regn. I of 1793, which they pointed out was the master regulation and which contained the provisions most favourable to the assessee, the *zamindar*. At p. 446* Lord Russell, who delivered the opinion of the Board, observed :—

"Their Lordships, after careful consideration of the Regulations, have arrived at the conclusion that the argument of the appellant cannot succeed. They are unable to find in the Regulations any statement or assurance that a *zamindar* will never be liable to taxation in respect of the income derived from his *zamindari*, or (to put the matter from another point of view) that a *zamindar* will, as to so much of his property as consists of income derived from his *zamindari*, be exempt from schemes of taxation applicable generally to the incomes of the inhabitants of British India.

The language used in Regulation I, Art. VI, does not, in their Lordships' opinion, mean anything other than this :—"You have in the past been liable to have the amount of the *jama* increased according as the actual produce of the estate increased: to enable the Govt. to obtain this you have been subjected to frequent investigations to ascertain the actual produce and you have even been deprived of the management of your estates. All this shall cease. You shall have fixity of payment and fixity of tenure. If you improve the revenue of your *zamindari*, you shall enjoy the fruits of your improvements without fear of the Govt. claiming that because the revenue produced by the estate has increased the payment you make to Govt. as a condition of holding that estate shall be increased also.

Their Lordships have ventured to paraphrase Art. VI, but they think that their paraphrase expresses with sufficient accuracy the true intent and meaning of the article. In their Lordships' opinion, while the Regulations contain assurance against any claim to an increase of the *jama* based on an increase of the *zamindari* income, they contain no promise that a *zamindar* shall in respect of the income which he derives from his *zamindari* be exempt from liability to any future general scheme of property taxation, or that the income of a *zamindari* shall not be subjected with other incomes to any future general taxation of incomes.

Their Lordships agree with the views expressed by Ghose, J. in the following passage from his judgment : "There was no promise or engagement of any description whatsoever by which the Govt. of the day surrendered their right to levy a general tax upon incomes of all persons irrespective of the fact whether they are *zamindars* with whom the Permanent Settlement was concluded or not."

It is to be observed that a very similar view as to the true meaning of Regulation I of 1793 had been expressed in earlier cases. In *Freeman v Fairli* (11), the Lord Chancellor at p. 342 observes :—

"I think it is to be collected from those Regulations that the proprietors of and in India had an absolute ownership and dominion of the soil; that the soil was not vested generally in the Sovereign; that the proprietors did not hold at the will of the Sovereign; but held the property as their own with the power of disposing of it absolutely; and if not disposed of, that it descended to their families. It is liable, indeed to a tribute to the Govt. but it appears that the tribute was not fixed but was increased at the arbitrary will of the Govt. and it appears further that if the tribute was not paid Govt. had the power of taking possession of the lands for the purpose of obtaining payment. Still notwithstanding these circumstances and these charges I think it impossible to read those Regulations which were prepared obviously with great caution and consideration by persons well acquainted with the subject and possessing every means of obtaining the most accurate information on it, and as far back as 1793, without coming to the conclusion that the *zamindars* and the *talukdars* were owners of the soil subject only to a tribute such as I have stated to Govt., and it was the object of those Regulations of 1793 to make the tribute which had been considered as dependent on its amount on the will of the governing power fixed and permanent."

In *Haradas Acharjya Chowdhuri v. Secretary of State for India* (12), Lord Buckmaster, who delivered the judgment of the Board, at p. 601* observes : "The object of the Permanent Settlement was to confirm the *zamindars* in their holdings at a fixed and immovable rent." Lord Buckmaster here was, I think, using the word "rent" not in its strict sense but rather as meaning as payment which was a condition of holding the estate. In both these cases the *jama* is not regarded as a tax as that term is usually used but rather as a tribute or payment which was a condition of holding the estate

(11) 1 M I A 305 (342); 1 Sar. 123 (P C).

(12) 26 C L J 590; 43 Ind. Cas. 361; A I R 1917 P C 86; 22 M L T 438; (1918) M W N 28; 20 Bom. L R 49 (P C).

as owners. It appears to me that the decision of their Lordships in *Barua's case* (9), concludes the matter and compels me to hold that the tax imposed on agricultural income by the Bihar Agri. Income Tax Act, 1938, is in no way an infringement of the rights granted to *zamindars* by the Permanent Settlement Regulations.

Counsel for the plaintiffs attempted to distinguish *Prabhatchandra Barua's case* (9), on the ground that it dealt with the non-agricultural income of a *zamindar* and not with his agricultural income, and it was urged that the case would have been decided otherwise if agricultural income was sought to be taxed. It must be remembered, however, that under the provisions of the Indian Income Tax Act, 1922, agricultural income as defined in that Act was expressly exempted from taxation—see s. 4 (3), of the Act; but it is clear from the question propounded that no distinction was made between agricultural and non-agricultural income. I have already set out the question which the Courts were called upon to answer, and that question was in the most general terms whether income derived from land in permanently settled estates subject to the exemptions provided by the Legislature was liable to assessment to income-tax. In their judgment their Lordships draw no distinction whatsoever between the two classes of *zamindari* income and hold that a tax on *zamindari* income is no breach of any undertaking or assurance contained in the Permanent Settlement Regulation. But for the express exemption of agricultural income contained in s. 4 (2), Indian Income Tax Act, the case would have applied with equal force to agricultural income. Counsel for the plaintiffs was compelled to concede that if the exemption of agricultural income from taxation in the Indian Income Tax Act was removed, *Prabhatchandra Barua's case* (9) would apply, and we would be bound to hold that agricultural as well as non-agricultural income would be taxable. It was contended however, that different principle applies when an act was passed which purported to tax agricultural income only.

It was argued that as the Bihar Act taxes agricultural income only it imposes not a tax on income but a tax on land in the nature of a public demand as that expression is used in the Permanent Settlement Regulations. It was said that income-tax is a tax on income generally without reference to its source and that a tax on income with specific reference to its source is not in reality a tax on income from that source but rather tax on

the source itself. Reference was made in support of the argument to *London County Council v. Attorney-General* (13), in which Lord Macnaughten observed:

"Income-tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else. It is one tax, not a collection of taxes essentially distinct. There is no difference in kind between the duties of income-tax assessed under Schedule D and those assessed under Schedule A or any of the other schedules of the charge. One man has fixed property another lives on his wits; each contributes to the tax if his income is above the prescribed limit. The standard of the assessment varies according to the nature of the source from which taxable income is derived. That is all."

I must confess that I am unable to follow this contention. The charging section of the Indian Income Tax Act is s. 6 and that in terms charges all income from five sources, and it is clear that the tax is not a tax on each of these five sources but a tax on income derived from any one or more of the sources. The tax imposed by the Bihar Agri. Income Tax Act is a tax on income though limited to income derived from agricultural sources. It is in no sense a tax on the land because it is imposed on the income derived from the land and not on the land itself. If there is no income, there is no tax, and the greater the income the greater the yield from the tax, whereas if the tax was imposed on the land itself it would be payable irrespective of the rise or fall in income. A tax on land which is based on valuation or such like is not like the present tax which is a variable one rising and falling with the income which is derived from the land. In my judgment the present Act clearly imposed a tax on income and is in no sense a land tax or any payment in the nature of a *jama*.

It was further argued that even if the tax could be regarded as a tax on income the principles laid down in the *Prabhatchandra Barua's case* (9) could have no application to the present case. Their Lordships of the Privy Council have held that the Permanent Settlement Regulation contained no assurance that *zamindars* would be immune from any general scheme of property taxation or would not be liable with other citizens to a general tax on income. It is urged that the Bihar Agri. Income Tax Act imposes a tax on the assesses in their capacity as *zamindars* and not as members of the public. The tax, it is said, is a tax on a particular class of persons and is in short a *zamindar's* tax. As it is specifically directed at the *zamindars* the principles of *Barua's case* (9) cannot apply,

(13) (1901) A C 26; 70 L J K B 77; 83 L T 605; 49 W R 686; 65 J P 227.

and the tax must be regarded as a breach of the assurance contained in the Permanent Settlement Regulations.

It is clear, however, that the tax imposed by the Bihar Agri. Income Tax Act is not a tax on *zamindars* only. It imposed a tax on income derived from lands used for agriculture and from agriculture. Tenure-holders and *rai-yats* are liable to taxation just as much as *zamindars* and *zamindars* of non-permanently settled areas are in the same position as *zamindars* holding permanently settled estate. The Act applies generally to persons deriving income from agriculture and lands used for agriculture. It does not create a special tax upon the income of permanently settled *zamindars*. Further this Act merely abolishes the exemption in favour of agricultural income contained in the Indian Income Tax Act, 1922. What was specifically exempted from taxation is now made liable to taxation, and persons deriving income from agriculture and lands used for agriculture are placed on a similar footing to persons deriving income from other sources. There is only one difference, and that is that the tax on agricultural income is to be imposed under the terms of the Govt. of India Act, 1935, not by the Central Govt. which imposes income-tax generally but by Provincial Govts. The result of the Bihar Agri. Income Tax Act is that *zamindars* in this province like all other citizens, are now liable to income-tax on all their income, though the tax on such portion of their income as is derived from agriculture or from lands used for agriculture is levied and collected not by the Central authority but by the province. In my view no valid distinction can be drawn between the present case and *Barua's case* (9) and that being so, it cannot be said that the Bihar Agricultural Income-tax does in any way purport to affect, vary or repeal any provision in the Permanent Settlement Regulations. That being so, plaintiffs' claim for the declarations set out in their plaint must fail.

Assuming, however, I am wrong in holding that the Bihar Agricultural Income-tax does not modify or vary in any way the terms of the Permanent Settlement Regulations, can it be said that the Act is invalid?

Section 299 (3), Govt. of India Act, 1935, requires the previous sanction of the Governor of a Province for legislation extinguishing or modifying rights or privileges in respect of land revenue, and it is common ground that no such previous sanction was obtained. The Governor of the Province,

however, assented to the bill, and by reason of s. 109 (2) (a) Govt. of India Act, an Act cannot be held to be invalid by reason of the failure to obtain the Governor's sanction before the bill was introduced. That subsection expressly provides that no Act of a Provincial Legislature and no provision in any such Act shall be invalid by reason only that some previous sanction of the Governor was not given if the Governor subsequently assented to such Act. It is, therefore, clear that the Act cannot be held to be invalid by reason of s. 299, Govt. of India Act.

Paragraph XVIII of the Instrument of Instructions to Governors requires a Governor to reserve for consideration of the Governor-General any bill which would repeal or be repugnant to any provision of law in British India or any bill which would alter the character of the Permanent Settlement. It is conceded that the Governor of this Province did not reserve this bill for the consideration of Governor-General; but even assuming that the bill does alter the character of the Permanent Settlement, such failure to reserve the bill for consideration would not make the present Act invalid. The Instrument of Instructions to Governor was issued under the provisions of s. 53, Govt. of India Act, and sub-s. (2) of that section provides that

"the validity of anything done by the Governor of a Province shall not be called in question on the ground that it was done otherwise than in accordance with any Instrument of Instructions issued to him."

There is no provision in the Govt. of India Act itself requiring such a bill to be reserved for the consideration of the Governor-General, and that being so the Act cannot be held to be invalid by reason of the Governor's failure to reserve the bill as directed by para. XVIII of the Instrument of Instructions.

On the other hand, however, if the Bihar Agri. Income Tax Act, 1938, varies, modifies or repeals any portion of the Permanent Settlement Regulation I of 1793 the Act would require the previous sanction of the Governor-General if the Permanent Settlement Regulation I of 1793 is an Act of Parliament. Section 108 (2), Govt. of India Act provides that

"unless the Governor-General in his discretion thinks fit to give his previous sanction there shall not be introduced into, or moved in a Chamber of Provincial Legislature any Bill or amendment which (a) repeals, amends, or is repugnant to any provisions of any act of Parliament extending to British India....."

It is argued on behalf of the plaintiffs that Regulation I of 1793 is an Act of

Parliament extending to British India. On behalf of defendant, however, it was pointed out that British India is defined in s. 311 (1) Govt. of India Act, in these terms:—

"British India" means all territories for the time being comprised within the Governor's Provinces and Chief Commissioners' Provinces.

The Permanent Settlement Regulation of 1793 applies in the main to Bengal, Bihar, Assam and Orissa and does not apply to very large tracts, territory within other Governors' Provinces and Chief Commissioner's Provinces. That being so, it was argued that even if the settlement was an Act of Parliament s. 108 (2) (a) would have no application whatsoever. The plaintiffs contended that the expression "British India" in s. 108 (2), Govt. of India Act, must mean British India or any part thereof; but when such was intended the Legislature has in other sections used appropriate language. In s. 110, for example, it is provided that "nothing in this Act shall be taken (a) to affect the power of Parliament to legislate for British India, or any part thereof."

If the expression British India meant British India or any part thereof, it would be necessary to add the words "or any part thereof" in this particular section. It may, therefore, be argued that previous sanction of the Governor-General is only necessary when a Provincial Act is repugnant to the provisions of an Act of Parliament affecting the whole of the British India and that such sanction is not necessary if the Act of Parliament applied to a province or some of the provinces only in British India.

I do not find it necessary to decide this question because I am unable to hold that Regulation I of 1793 is an Act of Parliament. "Act of Parliament" is not defined in the Govt. of India Act, and Regulation I of 1793 cannot be said to have been enacted in the usual manner in which an Act of Parliament is passed. In the ordinary meaning of the expression an "Act of Parliament" is an act which has been passed by the House of Commons, the House of Lords and assented to by the King, Regulation I of 1793 was an enactment of the Governor-General in Council in India and was never before Parliament in England. It is clear, however, that this Regulation together with the other Permanent Settlement Regulation were enacted pursuant to the provisions and directions contained in s. 39, Pitt's India Act of 1784 (24 Geo. III, c. 25). That section, which I have, earlier in this judgment quoted at length, required the authorities in India to

give orders

"for settling and establishing upon principals of moderation and justice, according to the laws and constitution of India, the permanent rules by which their respective tributes, rents and services of the Rajas, zamindars, polygars, talukdars and other native holder should be in future rendered and paid to the United Company."

As I have already stated, the Marquis Cornwallis arrived in India in 1786 and immediately instituted enquiries into the land system and the assessment of revenue, and in 1793 the Permanent Settlement Regulations, including Regulation I of 1793 were promulgated by the Governor-General in Council, Regulation I of 1793 is headed

"A Regulation for enacting into a Regulation certain articles of a Proclamation, bearing dated March 22, 1793, passed by the Governor-General in Council, on May 1, 1793."

In para. 1 of the Regulation it is stated that

"the following articles.....are hereby enacted into a Regulation which is to have force and effect from March 22, 1793, the date of the proclamation."

It is clear, therefore, that the Regulation purports to be an enactment of the Governor-General in Council and not an enactment of the Parliament in England.

The Governor-General in Council did have legislative powers which had been granted by s. 36, East India Company Act 1773 (13 Geo. III, c. 63). By that section the Governor-General in Council was empowered

"to make and issue such rules, ordinances, and regulations for the good order and civil Government of the said United Company's settlement at Fort William aforesaid, and other factories and places subordinate or to be subordinate thereto, as shall be deemed just and reasonable, (such rules, ordinance, and regulations, not being repugnant to the laws of the realm), and to set, impose, inflict and levy, reasonable fines and forfeitures for the breach or non-observance of such rules, ordinances and regulation; but nevertheless, the same or any of them, shall not be valid or of any force or effect, until the same shall be duly registered and published in the said supreme Court of Judicature, which shall be, by the said new charter, established with the consent and approbation of the said Court....."

It is said that this provision only empowered the Governor-General in Council to legislate for the actual settlement in Calcutta; but it is to be observed that the power was given not only to legislate for the settlement at Fort William but also other factories and places subordinate or to be subordinate thereto. It may be that this English Act did not empower the Governor-General to enact the Permanent Settlement Regulations, and such appears to be the view of any authors of works on the Indian Constitution.

It must be remembered however, that at this time the East India Company were *de facto* sovereign if not *de jure*. It has been said that the Company exercised sovereign powers

in trust for the Crown. Be that as it may, they were in fact the sovereign of the territories affected by the Permanent Settlement and as such undoubtedly claimed the right to legislate for such territory and its inhabitants.

It appears to me that the Marquis Cornwallis must have enacted these Regulations by virtue of the powers of legislation given to or assumed by the Governor-General in Council, and that being so, it cannot be said that the Permanent Settlement Regulation I of 1793 is in any sense an Act of Parliament. The plaintiffs, however, contended that the Governor-General in Council have no such power to legislate as to enable him to enact Regulation I of 1793, consequently that Regulation must be regarded as an executive order or as a kind of Regulation or by law made in pursuance of powers given by an Act of Parliament. If such was the case, it is urged that the Regulation forms part of the Act of Parliament itself. Reliance was placed on the case of *Willingale v. Noris* (14) in which it was held that where a statute gives power to an authority to make regulations, a breach of the regulation so made is an offence against the provisions of the statute. In that case the Commissioners of Police were empowered to make regulations under an Act of Parliament, and it was held that a breach of those regulations was a breach of the provisions of the Act. Bigham, J. at p. 66* observed: "In my opinion to break the regulations made under the authority of a statute is to break the statute itself" and Walton, J. at p. 67* observed:

"That action gives power to make regulations and I think there is involved in this that regulations so made must be obeyed, and if so it follows that a breach of such regulations is a breach of the law contained in that section."

Another case relied upon by Counsel for the plaintiffs was *Powell v. Appollo Candle Company* (15) in which their Lordships of the Privy Council, held certain duties levied by an Order in Council under s. 133, Customs Regulation Act, were levied by authority of the Legislature and not of the executive. Here the section in question expressly empowered the Governor to direct a duty to be levied on substitute for dutiable articles.

In my judgment there is little in common between these cases and the enactment of the Permanent Settlement Regulation by the Governor-General in Council. The latter did

have or assumed power to legislate and did legislate, though it may be that the validity of such legislation was questionable at the time it was enacted. The Permanent Settlement Regulations, however, have been regarded as validly enacted for a century and a half, and it is now too late to question their validity. As the regulations cannot be regarded an Act of Parliament, the Bihar Agri. Income Tax Act is not invalid by reason of the provisions of s. 108 (2) (a) Govt. of India Act.

It was faintly argued that the Bihar Agri. Income Tax Act was invalid by reason of the fact that it was repugnant to a Governor-General's Act, and reliance was placed on s. 108 (2) (b) Govt. of India Act. In my view the expression Governor-General's Act in s. 108 (2) (b), refers to Acts which are contemplated in s. 44, Govt. of India Act, 1935, that is, to Acts enacted by the Governor-General after the Govt. of India Act came into force. The Permanent Settlement Regulation was in no sense an Act of the Governor-General but was an Act of the then Governor-General in Council. That being so, s. 108 (2) (b), Govt. of India Act, can in no way render the legislation invalid.

Lastly, it was contended that assuming that the provisions of the Bihar Agri. Income Tax Act are repugnant to Regulation I of 1793 and assuming further that the Bihar Act was validly enacted the latter Act on its true construction should not be held to repeal or affect in any way the provisions of Regulation I of 1793. It was argued that the Bihar Agri. Income Tax Act is general Act, whereas Regulation I of 1793 is a special Act dealing with permanently settled estates. On a true construction of the Bihar Act it was contended that this Court should hold that it applied to non-permanently settled estates only and not to permanently settled estates. In the view I have taken of the effect of Regulation I of 1793 the question as to the true construction of the Bihar Act does not really arise, but I refer to the question shortly in deference to the elaborate argument which has been addressed to us.

Regulation I of 1793 is undoubtedly a special enactment dealing with permanently settled estates, whereas the Bihar Agricultural Income-tax Act deals generally with income derived from agricultural lands and from agriculture within the Province of Bihar. It must be remembered, however, that Bihar was one of the areas which was permanently settled under the Permanent Settlement Regulation and that most of the zamindars

(14) (1909) 1 K B 57; 78 L J K B 69; 72 J P 495; 25 T L R 19.

(15) (1885) 10 A C 282; 54 L J P C 7; 53 L T 638.

*Pages of (1909) 1 K B—[Ed.]

of this Province hold permanently settled estates.

The Govt. of India Act, 1935, empowers all provinces to tax agricultural income, and no distinction is drawn between Bengal, Bihar and Orissa in which lands are permanently settled and other Provinces in which lands are temporarily settled. Each province is given the right to tax agricultural income. It is clear from the provisions of the Govt. of India Act, 1935, that the British Parliament had the Permanent Settlement in mind. As I have already pointed out s. 299 affords some protection to persons enjoying privilege relating to revenue and permanently settled *zamindars* do enjoy such privilege, though not to such an extent as *zamindars* holding revenue free lands. Again the Instrument of Instructions issued to the Governors expressly provides that Governors of Provinces should reserve for the consideration of the Governor-General any bill purporting to affect the Permanent Settlement and the rights thereunder. As it is clear that the Legislature had not overlooked the Permanent Settlement, can it be said that it was not the intention of the Legislature to permit the Provincial Govt. of Bengal, Bihar and Orissa to tax agricultural income of *zamindars* holding permanently settled estates? Did the Legislature merely intend that in Provinces in which land had been permanently settled, the Provincial Govt. should only have the right to tax the income of temporarily settled *zamindars* who would be few in number?

The rule that general words in a later statute should not be held to repeal earlier legislation upon a particular matter is clearly laid down by Lord Selborne in *Seward v. Vera Cruz* (16). He observed:—

“Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of particular intention to do so.”

Counsel for the plaintiffs also relied on *Associated News Papers Ltd. v. Corporation of the City of London* (17). In that case the occupiers of certain hereditaments situate in the city of London and forming part of the area reclaimed from the river Thames, were rated to so much of the general rate levied under the City of London (Union of

Parishes) Act, 1907, as represented the consolidated rate and the Police rate, which was imposed by the City of London Police Act, 1939. The land had been re-claimed under the provision of 7 Geo. III, c. 37 and under s. 51 of that Act owners of such re-claimed lands were to be “free from all taxes and assessments whatsoever.” The City of London Sewers Act, 1848, which provided for the levying of the sewer rate and the consolidated rate, enacted by s. 169 that every such rate shall be made upon every occupier of any house or building in the city

“whether such person shall be now liable in respect of such house or building to be assessed to the relief of the poor, or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house or building being situate in my precinct or extra-parochial place, or otherwise.”

It was held (Lord Sumner dissenting) that s. 169 of the City of London Sewers Act, 1848, did not impliedly repeal the exemption from all taxes and assessments so far as the consolidated rate was concerned.

Another case relied upon by the plaintiffs was *Pole Carew and St. Levan (Lord) v. Creddock* (18). A ferry was established and maintained upon Act of 1790, which was to be deemed to be public Act, and which contained provision that the then proprietors, or their respective heirs or assigns, “shall not be rated or assessed for or towards the payment of any tax, rate or assessment whatsoever, parliamentary or parochial, for or in respect of the said ferry.....”

The owners of the ferry were assessed to income-tax, but the Court of Appeal held that the exemption granted by the statute extended to parliamentary taxes whether in existence at the date of the Act, or not, and therefore, included income-tax, although that tax was first imposed subsequently to the passing of the Act of 1790.

It was contended that the principles laid down in these cases apply to the present case and that this Court must hold that the Bihar Agri. Income Tax Act does not repeal or modify any of the provisions of the Permanent Settlement. In my view, however, the Court would be bound to hold that the Bihar Agri. Income Tax Act repeals by necessary implication any provision in the earlier Regulation I of 1793 which is inconsistent with it. The Provincial Govt. of Bihar which is province made up in the main of permanently settled estates has been specifically given the power to tax income derived from agricultural land. When that power was given to Bihar, it seems to me clear that it

(18) (1920) 3 K B 109; 89 L J K B 507; 123 L T 309; 36 T L R 447.

(16) (1885) 10 A C 59; 54 L J P C 9; 52 L T 474; 33 W R 477; 5 Asp. M C 386; 49 J P 324.

(17) (1916) 2 A C 429; 85 L J K B 1786; 115 L T 419; 80 J P 393; 14 L G R 1027; 60 S J 694; 32 T L R 700.

was intended that the Provincial Govt. of this Province should be able to tax income derived from agricultural land whether such land was permanently settled or not. A subsequent general Act will repeal the provisions of an earlier special Act if the provisions of the subsequent Act are clear and unambiguous and clearly apply to the matters dealt with by the earlier special legislation. In the present case all agricultural income is made taxable without distinction, and that being so, any protection afforded to agricultural income by any earlier Act is repealed by the present Act. The view which I have expressed is in accordance with the view expressed by Rankin, C. J., in *Emperor v. Prabhat Chandra Barua* (19) and by the majority of the Full Bench of the Calcutta High Court in *Emperor v. Prabhat Chandra Barua* (10). As I have stated, however, the point does not really arise in this case.

For the reasons which I have given, I am satisfied that the plaintiffs are not entitled to the relief claimed, and would dismiss their suit with costs.

The question as to whether the Bihar Agri. Income Tax Act is *ultra vires* the powers of the Provincial Legislature or is *ultra vires* in so far as it purports to tax agricultural income of permanently settled zamindar involved substantial points of construction of the Govt. of India Act, 1935 and I would, therefore, grant a certificate to the plaintiffs under s. 205 (1) of that Act.

Fazl Ali, J.—The plaintiffs who are the proprietors of a permanently settled estate in the District of Patna have brought this suit against the "Province of Bihar" as defendant, for a declaration that the Bihar Agri. Income Tax Act (VII of 1938) and the Bihar Agri. Amendment Act (V of 1939) are *ultra vires* of the Provincial Legislature and that at any rate they cannot affect the permanently settled estates of the Province including the plaintiffs' estate. According to the plaint every step taken by the defendant to promote this piece of Legislation between the date of the introduction of the Bills in the Provincial Assembly and the date when they became law constituted a distinct cause of action for the plaintiffs but apparently their principal cause of action was the service upon them of a notice dated August 4, 1939, by which they were assessed with agricultural income tax and

which they wish to be pronounced as being "without jurisdiction, illegal and invalid".

The suit was originally instituted in the Court of the Subordinate Judge at Patna, but on the application of the plaintiffs it was transferred to this Court. Before it was transferred a written statement had been filed on behalf of the defendant and no less than ten issues had been framed by the Subordinate Judge. In the written statement the defendant contested the view of law set forth in the plaint and asserted that the Act was in no sense an invasion of the rights enjoyed to the zamindars under the Permanent Settlement Regulations; and, even if it were so that would not make the Act void. The defendant also pleaded that the court-fee paid by the plaintiffs was insufficient; that the plaintiffs had no cause of action; that the notice required by s. 80 of the Civil P. C. had not been properly served and that the Acts challenged by the plaintiffs could not be questioned in the Civil Courts; but these pleas have been abandoned and the parties have confined their dispute before us to issues Nos. 3, 6 and 7 which embrace two main questions, namely, (1) whether the whole Act is *ultra vires* of the Provincial Legislature and (2) whether the Act even if *intra vires*, affects the permanently settled estates.

Section 100, cl. (3) of the Govt. of India Act provides that

"subject to the two preceding sub-sections, the Provincial Legislature has and the Federal Legislature has not power to make laws for a province or any part thereof with respect to any of the matter enumerated in Sch. II hereinafter called the Provincial Legislative List."

As agricultural income is Item No. 41 of the Provincial list otherwise called list No. 2, the Provincial Legislature of Bihar purporting to act under this section enacted what is known as the Bihar Agri. Income Tax Act in 1938 and some time later it passed another small Act slightly amending the provisions of the former Act. The Bihar Act VII of 1938 which is the main Act, received the assent of the Governor of Bihar on August 20, 1938 and was published in the *Bihar Gazette* of October 12, 1938. Section 2 of the Act defines agricultural income and s. 3 provides that the agricultural income tax at the rate or rates specified in the schedule to the Act shall be charged for each financial year in accordance with and subject to the provisions of the Act on the total agricultural income of the previous year, of every person. Sections 5 to 15 which are the remaining sections in Chap. II con-

(19) 51 C 504; 84 Ind. Cas. 31; A I R 1924 Cal. 668.

tains provisions as to the limits of taxable income and other cognate subjects such as what class of owners of agricultural property are to be exempted and how the tax on other class of persons is to be assessed. Chapter III enumerates the class of Income-tax Authorities appointed under the Act and ss. 17 and 18 of Chap. IV provide respectively for the submissions of return of agricultural income and assessment of tax upon such income by the Agricultural Income Tax Officer. The other provisions of the Act deal with a number of other matters with which we are not concerned in the present case.

With these introductory remarks I shall now proceed to state the principal points which were urged on behalf of the plaintiffs before this Court. These points were as follows—:

(1) That inasmuch as the definition of agricultural income, as given in the Bihar Act, is in some respects narrower and in some respect wider than the definition adopted by the Govt. of India Act, the Provincial Act must be held to be *ultra vires*.

(2) That the Agri. Income Tax Act is also *ultra vires* for the following reasons :—

The Permanent Settlement Regulation (I of 1793) and other connected Regulations of that year have fixed the public demand on the agricultural lands of all permanently settled estates and provided that there shall be no augmentation of the demand in future. The agricultural income tax now imposed under the Provincial Act is substantially augmentation of the demand and therefore it virtually repeals the regulation. But as the Permanent Settlement Regulation (I of 1793) must, having regard to the circumstances under which it was passed, be regarded as an Act of Parliament, no measure repealing the Regulation could be introduced into the Provincial Legislature without the previous sanction of the Governor-General and in any event the Governor-General's assent not having been obtained to the Act, the Act must be declared to be *ultra vires*.

(3) That Item No. 41 in list 2 of the Govt. of India Act, 1935, does not empower the Provincial Legislature to make laws with respect to taxes on agricultural income arising out of estates settled under Regulation I of 1793 and on the true construction of the Bihar Act, all that can be held is that it does not affect permanently settled estates but applies to such agricultural

income only as does not arise out of such estates.

For the purpose of dealing with the first point it is necessary to refer to s. 314 cl. (2) and s. 141 (1) of the Govt. of India Act respectively. In s. 311 (2) the expression "agricultural income" is defined as follows :—

"Agricultural income means agricultural income as defined for the purposes of the enactments relating to Indian income-tax."

Section 141 (1) provides that no Bill of amendment varying the meaning of the expression "agricultural income" as defined above shall be introduced or moved in either chamber of the Federal Legislature except with the previous sanction of the Governor-General in his discretion.

Now in order to appreciate the argument which was advanced before us it will be useful to set out the definition of "agricultural income" as given in the Indian Income Tax Act side by side with the definition of that expression as given in the Bihar Agri. Income Tax Act :

Section 2 (1) of the Indian Income Tax Act

" 'Agricultural income' means—(a) any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of the Crown as such : (b) any income derived from such land by—(i) agriculture, or—(ii) the performance by a cultivator or receiver of rent in kind of any process ordinarily employed by a cultivator or receiver of rent in kind to render the produce raised or received by him fit to be taken to market, or—(iii) the sale by a cultivator or receiver of rent in kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in sub-cl. (ii); (c) any income derived from any building owned and occupied by the receiver of the rent or revenue of any such land, or occupied by the cultivator, or the receiver of rent in kind, of any land, with respect to which, or the produce of which, any operation mentioned in sub-cl. (ii) and (iii) of cl. (b) is carried on : Provided that the building is on or in the immediate vicinity of the land and is a building which the receiver of the rent or revenue or the cultivator or the receiver of the rent in kind by reason of his connection with the land, requires as a dwelling house, or as a store house, or other out building.

Section 2 (a) of the Bihar Agri. Income Tax Act.

" 'Agricultural income' means—(1) any rent or income derived from land which is used for agricultural purpose, and is either assessed to land revenue in Bihar or subject to a local cess or rate assessed and collected under any Bengal Act or under any Bihar and Orissa Act or under any Bihar Act. (2) Any income derived from each land by (i) agriculture, or (ii) the performance by a cultivator or receiver of

rent in kind of any.....process ordinarily employed by a cultivator or receiver of rent in kind to render the produce raised or received by him fit to be taken to market, or (iii) The sale by a cultivator or receiver of rent in kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in sub-cl. (ii).

It will be noticed that the definition given in the Bihar Act differs from the definition given in the Indian Income Tax Act in two important respects; firstly, cl. (c) of the Indian Income Tax Act which deals with the income derived from any building owned and occupied by receiver of rent etc. has been wholly omitted in the Bihar Act; secondly (a) of the Indian Income Tax Act is not couched exactly in the same terms as the latter provision.

It is quite clear that as the result of the omission of cl. (c) the definition given in the Bihar Act is somewhat narrower than the definition given in the Indian Income Tax Act, but in my opinion this fact by itself will not make the Act *ultra vires*. If it is assumed that the Bihar Legislature, having regard to the terms of the Govt. of India Act, is competent to levy tax on income derived from land as well as buildings of certain description, it is clearly competent to tax income from land only for the present it being open to it to tax the income from buildings referred to in cl. (c) of the Indian Income Tax Act, if and when it chooses to do so in future. The Legislature has therefore, in no way exceeded its power and am not prepared to hold that it has contravened the provisions of the Govt. of India Act by merely adopting a definition which is narrower than the definition given in that Act.

The second contention, however, is a more serious one, because the substance of that contention is that cl. (i) of the Bihar Act is wider than cl. (a) of the Indian Income Tax Act and so the definition enables the Bihar Legislature to tax income which it has not been empowered to tax under the Govt. of India Act. For the purpose, therefore, of determining whether this contention is correct, we have to compare carefully the two corresponding provisions.

The first difference which has been pointed out to us between the two provisions is that the Bihar Act substitutes the word "income" for revenue in cl. (i). But as revenue in cl. (a) of the Indian Income Tax Act is used in the same sense as income, the difference in the two provisions is merely a difference in phraseology and not a differ-

ence in substance. The Bihar Legislature was also perfectly justified in substituting the word "Bihar" "for British India" in the following sentence—"land which is assessed to land revenue in British India". The real difference however, between the two provisions is to be found in the concluding lines and may be summarised as follows:—

(i) Whereas the Indian income-tax uses the expression "subject to a local rate only" the Bihar Act has used the word "subject to a local cess or rate" and (2) whereas the Indian Income Tax Act make it necessary that the local rate to which the agricultural land is to be subject, should be assessed and collected by officers of the Crown as such, all that the Bihar Act requires is that the "local cess or rate should be assessed and collected under any Bengal Act or under Bihar and Orrisa Act or under any Bihar Act". It omits the words "by officers of the Crown as such" and substitute the words "under any Bengal Act" etc. The contention put forward on behalf of the plaintiffs is that this change is a vital one and unduly widens the scope of the definition.

The plaintiffs object to the word "cess" on the ground that it is neither assessed nor collected by officers of the Crown as such, though they concede that it may be regarded as a local rate which presumably means a rate or tax for the benefit of local authorities such as District Boards and Municipalities etc. The case in Bihar is levied under Act IX of 1880 which was an Act :

"To amend and consolidate the law relating to rating for the construction, charges and maintenance of district communications and other works of public utility and of provincial public works."

Section 5 of the Act provides that from the commencement of the act all immovable properties in any district shall be liable to the payment of a local cess.

The other provisions show that the cess is to be levied on lands as well as on mines, railway and other immovable property. As we are concerned with the cess levied on land only in the present case, it will be necessary to refer to some of the provisions relating to this subject. Mr. P. R. Das, who appears on behalf of the plaintiffs relies upon ss. 9 and 38 of the Act in support of his contention that "cess" is not assessed by Officers of the Crown but by the District Board. Section 9 provides that the proceeds of local cess in each district shall be paid into the local funds of the district and s. 38 provides that the cess shall be assessed and

levied at such rate as may be determined for such year by the District Board. This last provision seems at the first sight to support the contention of Mr. Das, but when the other provisions of the Act are taken into consideration it becomes manifest that the authority which assesses the cess is not the District Board but the Collector. The District Board has merely an advisory function and its knowledge of the local conditions is utilised for the purpose of determining the rate, but after the rate is so determined, the collector publishes the rate in the *Gazette* and otherwise and specifies from which date it will take effect. The Collector then fixes the amount of the cess payable by each person or estate upon the valuation of the lands. This shows that the final act of assessment rests with the Collector though the assessment is made according to the rate determined by the District Board.

There can also be no doubt that the cess payable under the Act is collected by the Collector. This is clear from a number of Provisions which are to be found in the Act, e. g., s. 98 which provides that every amount due or which may be due to any Collector under the provisions of this Act in respect of any arrears of cess etc. may be realised by such Collector by any process provided by law for the realisation deemed to be a public demand under such law.

The difficult question, however, which is raised on behalf of the plaintiffs is whether the Collector in assessing and collecting the cess acts as an Officer of the Crown as such Mr. P. R. Das refers us in this connection to s. 100 of the Cess Act which runs as follows :—

"The Board of Revenue may be any time invest any person with the powers of a Collector under this part to be exercised by such person under the control or supervision of the Collector or independently of such control or supervision as the Board of Revenue shall direct".

Mr. Das contends that this section shows that the powers of the Collector are derived from certain specific provision in the Cess Act and are not exercised by virtue of his being an Officer of the Crown. It is further contended by him that inasmuch as s. 100 provides that any person, whether he be an Officer of the Crown or not, may be appointed to exercise the function of the Collector by the Board of Revenue, the Act does not contemplate that the power exercised under its provision should necessarily be exercised by an Officer of the Crown. Mr. Das in support of his argument refers us

to *Gilbert v. The Corporation of Trinity House* (20) and *Metropolitan Meat Industry Board v. Sheedy* (21). In the former case it was held that the Corporation of Trinity House in whom the superintendence and management of all light-houses and beacons in England were vested not by virtue of the Act constituted servants of the Crown. In the latter case it was held that a debt due to the Metropolitan Meat Industry Board who were entrusted with the maintenance and control of the slaughter house and meat markets in Sydney and adjoining Districts was not a debt due to the Crown. In my judgment both the cases relied on by Mr. Das are distinguishable and the cess payable under the Cess Act must be held to be assessed as well as collected by Officer of the Crown. The Corporation of Trinity House was, as pointed out in the case relied on by Mr. Das, nothing more than an amalgamation by the authority of the State of a vast number of bodies having general authority over the light-houses and beacons throughout the country for the general convenience. Thus in view of its nature and origin the Corporation of Trinity House could be regarded as an emanation from the Crown. Similarly the Meat Industry Board could not be regarded as a representative of the Crown, because the powers conferred upon it were to be exercised at its own discretion and without consulting the direct representatives of the Crown, and also because the charges it levied went to its own fund. The position in this case, however, is not the same. I think that inasmuch as in India both the Govt. at the centre and in the province, is carried on in the name of the Crown, the expression "Officers of the Crown" occurring in an Indian Statute may be taken to be synonymous with the expression "Officers of the Govt.". The Collector of the District undoubtedly exercise his authority as a representative of the Govt. and the cess is also levied by the Govt., though what is collected under the Act is allotted to the District Board for the purpose of maintaining roads etc. If any person other than the Collector is appointed under the Act, to assess and collect cess, he must be deemed also to act as a representative of the Govt. and the powers which are given to him are to be exercised not at his own discretion, but under the supervision of the Board of Revenue which

(20) (1886) 17 Q. B. D 795; 56 L. J. Q. B. 85; 35 W. R. 30.

(21) (1927) A. C. 899; 137 L. T. 782; 43 T. L. R. 701.

is a department of the Govt. In my opinion the test is whether the cess is a levy by a private or local body or whether it is Govt. levy. If it is levied and collected on behalf of the Govt., then, no matter how the money is spent, the persons who levy and collect it must be regarded as officers of the Crown.

So far the definition of agricultural income as given in the Agri. Income Tax Act may be supported, but it appears to me that the omission of the words 'assessed and collected by officers of the Crown as such' was unfortunate, because it is conceivable that in some cases at least a local rate may be assessed and collected under a Bengal or Bihar Act and yet it may not be assessed and collected by Officers of the Crown as such. Such is the case with a local rate levied by the Municipality to which the Cess Act does not apply. The rate levied by the Municipality is assessed and collected under the Municipal Act by the officers of the Municipality and not by Officers of the Crown as such. If therefore there are any estates in Bihar which are revenue free and which are not liable to pay cess, being situated within a Municipality, and because they are liable to Municipal rates under the Municipal Act, the income from the lands of such estates will clearly be agricultural income under the Bihar Act though it is not such "income" under the Indian Income Tax Act. It has not been pointed out to us that there are in fact any such estates in Bihar, but assuming that there may be such estates we have still to consider whether that fact alone will make the whole Act *ultra vires*.

We must remember that one of the objects of defining agricultural income in the Govt. of India Act was to ensure that expression may not be differently understood by the Central and Provincial Authorities. Therefore it would be going too far to say that the framers of the Bihar Act had not power to introduce even verbal changes in the definition of agricultural income adopted in the Govt. of India Act. All that they were required to guard against was that there was no change in the meaning or scope of the expression "agricultural income" and the definition in the Bihar Act was not wider than that to be found in the Indian Income Tax Act. If, however, the definition is found to be wider, it does not, in my judgment, necessarily follow that the whole Act thereby becomes *ultra vires*.

We have on this point for our guidance a number of authoritative pronouncements which laid down that if a part of an Act can be held to be valid and another part invalid,

then if the offending provisions are so interwoven into the other scheme of the Act they are not severable from the other provision, the whole Act is *ultra vires*, but if the two parts are severable then the Act will be partly valid and partly invalid, it being invalid only in regard to the offending provisions. This view has been clearly set out in the judgment of Sulaiman, J. in *Subrahmanyam Chettiar v. Muthuswami Goundan* (6), at pp. 179 and 180* and in *Shyama Kant Lal v. Rambhajan Singh* (7) at pp. 487 and 488†. In the last mentioned case his Lordship stated the principle in these terms :—

"It is a well established principle that if the invalid part of an act is really separate in its operation from the other parts, and the rest are not inseparably connected with it, then only such part is invalid, unless, of course the whole object of the Act would be frustrated by the partial exclusion. If the subject which is beyond the legislative power is perfectly distinct from that which is within such power, the act can be *ultra vires* in the former, while *intra vires* in the latter."

In my opinion the principle enunciated above must govern this case. I have already stated that it has not been shown to us that there are any revenue free estates situated within the limits of a Municipality in Bihar, but if there are such estates it will be legitimate to hold that no agricultural income tax can be imposed on their income. The plaintiffs, however, are the proprietors of a revenue paying estate and it cannot be said that the definition of agricultural income does not cover their estate.

Mr. P. R. Das relied in this connection on *Attorney-General for British Columbia v. Attorney-General for Canada* (2) and *Attorney-General for Canada v. Attorney-General for Ontario* (1). In the first case the Natural Products Marketing Act, 1934, of the Parliament of Canada as amended by a later Act was held to be *ultra vires* and Lord Atkin who delivered the judgment in that case summed up the view of the Privy Council as follows :—

"In the result, therefore, there is no answer to the contention that the Act in substance invades the provincial field and is invalid. It was, however, urged before us that portion of the Act, notably s. 9 in the first part, and the whole of part II, are within the competence of parliament.....There appear to be two answers. In the first place, it appears to their Lordships that the whole texture of the Act is inextricably interwoven, and that neither s. 9 nor Part II can be contemplated as existing independently of the provisions as to the creation of Board and the regulation of produces.....In the second place, both the Dominion and the British Columbia in their cases filed on this appeal assert that the sections now said to be severable are incidental and ancillary to the main legislation. Their Lordships are of opinion that this

*Pages of 22 P L T.—[Ed.]

†Page of 20 P L T.—[Ed.]

is true, and that as the main legislation is invalid as being in pith and substance an encroachment upon the provincial rights the sections referred to must fail with it as being in part nearly ancillary to it."

In the second case another Act was held to be *ultra vires* of the Dominion Parliament of Canada on similar grounds, it being held that in pith and substance the Act was an encroachment upon the Provincial field and that part of the Act which did not encroach were so inextricably mixed up with the offending provisions, that it was impossible to sever them. In my opinion neither of these cases can be of help to the plaintiffs. Agricultural income being one of the subjects mentioned in List II otherwise called the Provincial List of the Govt. of India Act, it cannot be said that in pith and substance this Act is an encroachment upon the rights of the Central Govt. It is true that the definition has been somewhat carelessly drafted, but all that can be said is that if there is any estate the income of which cannot be regarded as agricultural income according to the definition of that expression as given in the Indian Income Tax Act then much part of the Act as purports to be income of such estate shall be held to be invalid. The learned Advocate General in meeting the argument of P. R. Das referred us to *Macleod v. Attorney-General for New South Wales* (3) and *Geat West Saddlery Co. v. The King* (4) and *New Castle and Humber River Steamship Co. Ltd. v. Attorney-General for the Commonwealth* (5), but it seems to me that the principles of "pith and substance" and "severability" are so well established and their application to the present case is so clear that it is wholly unnecessary to discuss these.

Before concluding this topic I might mention that according to Mr. P. R. Das, owing to the omission of the words "cess assessed and collected by the Officers of the Crown as such", the tenure-holders and *raiyyats* holding lands within the estates of Bihar cannot also be taxed under the Bihar Act, because it is contended that this lands are neither subject to the payment of land revenue nor subject to cess assessed and collected by Officers of the Crown as such. The argument, however, cannot be accepted because the income of these persons clearly comes within cl. (2) sub-cl. (i), (ii) and (iii) of the definition of agricultural income as given in the Bihar Act which correspond exactly to cl. (b) sub-cl. (i) and (ii) and (iii) of the definition to be found in the Indian Income Tax Act. The argument further overlooks an important fact. If the lands in

possession of tenure-holders and *raiyyats* are situated within a revenue paying estate, then there can be no doubt that inasmuch as the revenue is payable upon all the lands within that estate, their lands also must be held to be assessed to land revenue. If, however, the estate is revenue free, then unless the estate is situated within a Municipality, the *zamindar* must pay the cess for all the lands of the estate including those in possession of the tenure-holders and *raiyyats* under him. The mere fact that the tenure-holders and *raiyyats* pay cess into the hands of the *zamindar* does not alter the position. What we have to see is whether the land which they hold is subject to cess or not. In my opinion, therefore, the argument that tenure-holders and *raiyyats* cannot be taxed under the Act is untenable. The point, however, is not material, because the plaintiffs are neither tenure-holders nor *raiyyats* but are admittedly the proprietors of a revenue paying estate.

The second point urged on behalf of the plaintiffs was that the Agri. Income Tax Act in so far as it affects the permanently settled estates is *ultra vires* of the Bihar Legislature because that legislature had no power to pass an Act inconsistent with the Permanent Settlement Regulation without following the procedure laid down by the Govt. of India Act. In urging this point Mr. P. R. Das, Counsel for the plaintiffs, read out to us extracts from certain despatches which had passed between Lord Cornwallis and the Directors of the East Indian Company and from the Minutes recorded by Sir John Shore before the enactment of Regulation I of 1793 in order to show firstly, that the Permanent Settlement was made on the footing that the landlords were the petitioners of the soil and secondly, that the *jama* or the revenue which was fixed at the time of the Permanent Settlement was a land tax. Learned Counsel also read to us all the relevant sections of the Permanent Settlement Regulation and certain other Regulations to support his contention that these Regulations had declared in clear terms that, beyond the *jama* which was already fixed, there shall be no new or additional demand or assessment upon the permanently settled estates. His next argument was that the Bihar Agri. Income Tax Act being passed in violation of the terms of the Permanent Settlement Regulation had in effect repealed the latter enactment. Lastly, he argued that inasmuch as the Act was passed without following procedure laid down by ss. 108

and 299 of the Govt. of India, it is wholly *ultra vires*.

Section 108 cl. (2) provides among other things that unless the Governor-General in his discretion thinks fit to give his previous sanction, there shall not be introduced into or moved in Chamber of Provincial Legislature any Bill or amendment which repeals, amends or is repugnant to any provisions of any act of Parliament extending to British India; or repeals, amends or is repugnant to any Governor-General's Act or any Ordinance promulgated in his discretion by the Governor-General. Section 299 cl. (3) provides that no Bill or amendment making any provisions for the extinguishment or modification of rights in any land including rights or privileges in respect of land revenue shall be moved in a Chamber of Provincial Legislature without the previous sanction of the Governor in his discretion. It was recognised by Mr. Das that these sections are to be read with s. 109 (2) of the Act which provides that no Act of Provincial Legislature and no provision in any such Act shall be invalid by reason only that some previous sanction or recommendation was not given, if assent to that Act was given (a) where the previous sanction or recommendation required was that of the Governor, either by the Governor, by the Governor-General, or by His Majesty; (b) where the previous sanction or recommendation required was that of the Governor-General, either by the Governor-General or by His Majesty. It is, however, contended that in the present case the subsequent consent of the Governor does not cure the defect, because the Permanent Settlement Regulation was an Act of Parliament and, therefore, required at least the assent of the Governor-General under s. 109 cl. (a) after the measure had been enacted.

The first question which arises for consideration is whether the Agri. Income Tax Act in any way affects the Permanent Settlement Regulation or, as Mr. Das put it, whether the imposition of the tax under the Act amounts to an augmentation of the *jama*. In my opinion, this is the most important question in the case, because if it is answered in the negative no further question arises. I am also of the opinion that it has to be answered in the negative, because it is also answered by the Privy Council in *Barua's case* (9), which must be regarded as the last word on the subject and which I accordingly propose to discuss at some length. It appears that prior to 1926 conflicting view had been expressed by the Calcutta High

Court as to whether income derived from permanently settled estates was liable to income-tax notwithstanding the Permanent Settlement Regulation: *Emperor v. Probbhat Chandra Barua* (19) and *King-Emperor v. Indu Bhusan Sarkar* (22). In May 1926, *Barua's case* (10) came up before a Bench consisting of Sanderson, C. J. and Rankin, J. who referred the following question among others for decision to a Full Bench.

"Whether having regard to the terms of the Permanent Settlement Regulation, income derived from land in permanently settled estates subject to the exemptions provided by the legislature is liable to assessment to income tax."

This question was answered by the majority of the Judges constituting the Full Bench in the affirmative and their view was upheld by the Privy Council after referring to certain provinces of the Indian Income Tax Act summarised his conclusion as to the effect of these provisions as follow :—

"Upon this part of the case therefore their Lordships are of opinion that the Indian Income Tax Act, 1922, by ss. 6 and 12 brings into charge for the purposes of income-tax the income derived from a *zemindari* and that a *zemindar* is assessable in respect of incomes, profits and gains derived from that source."

His Lordships then proceeded to consider whether the imposition of income-tax in respect of the income derived from *zamin-dari* was to any and what extent inconsistent with the provisions of the Regulation. On the subject his Lordship thought that Regulation I of 1793 was the master Regulation though a number of other Regulations also had been referred to before the Privy Council and that the case fell to be determined primarily upon the consideration of the language of that Regulation and specially the third sentence of Art. VI of the Regulation which clearly set out the promise on which the assessee based his cases. This sentence runs as follows :—

The Governor-General in Council trusts that the proprietors of land, sensible of the benefits conferred upon them by the public assessment being fixed for ever, will exert themselves in the cultivation of their lands, under the certainty that they will enjoy exclusively the fruits of their own good management and industry, and that no demand will ever be made upon them or their heirs or successors by the present or any future Govt. for an augmentation of the public assessment in consequence of the improvement of their respective estates."

His Lordship having reproduced this sentence proceeded to paraphrase it in these words :—

"You have in the past been liable to have the amount of the *jama* increased according as the actual produce of the estate increased, to enable the Govt. to obtain this you have been subjected to frequent investigation to ascertain the actual produce and you have even been

(22) 53 C 524; 95 Ind. Cas. 539; 30 C W N 524; A I R 1926 Cal. 819; 44 C L J 427.

deprived of the management of your estate. All this shall cease. You shall have fixity of payment and fixity of tenure. If you improve the revenue of your *zamindari* you shall enjoy the fruit of your improvements without fear of the Govt. claiming that because the revenue produce by the estate has increased, the payment you make to Govt. as a condition of holding that estate shall be increased also."

His Lordship then summarised his conclusion thus:—

"In their Lordships' opinion, while the Regulations contain assurances against any claim to an increase of the *jama*, based on an increase of the *zamindari* income they contain no promise that a *zamindar* shall in respect of the income which he derives from his *zamindari* be exempt from liability to any future general scheme of property taxation, or that an income of a *zamindari* shall not be subjected with other incomes to any future general taxation of incomes."

His Lordship also quoted with approval the following passage from the judgment of Ghose, J. in the Full Bench case:—

"There was no promise or engagement of any description whatsoever by which the Govt. of the day surrendered their right to levy a general tax upon income of all persons irrespective of the facts whether they are *zamindars* with whom the Permanent Settlement was concluded or not."

In my opinion the decision of the Privy Council establishes the following points:—

(1) That for the purpose of deciding the matter in controversy it is not necessary to decide whether the landlords were proprietors of the soils or what was "the exact nature of the rights in relation of the land which existed in the Govt. Authority before 1793". (2) That the *jama* was payment by the *zamindars* to the Govt. as a condition of holding the estate, or, in other words, it is more like rent than a tax on income. (3) That though there was a clear assurance given in the Regulation I of 1793 that there would be no increase of *jama* based on the increase of the *zamindari* income, it contained no promise that should there be any scheme of taxing income generally in future, the *zamindari* income will not be brought into the general scheme and will be exempt from taxation, even though other income may be subjected to taxation.

The last two propositions clearly imply that *jama* is not a tax on income and if a statute was enacted by competent authority in India to tax income from *zamindari* such statute could not be regarded as being inconsistent with or repugnant to the Permanent Settlement Regulation.

Both Mr. P. R. Das and Sir Sultan Ahmad, who appeared on behalf of the plaintiffs, tried to show that the decision of the Privy Council is not applicable to the present case, but in my opinion they have not succeeded in doing so. Sir Sultan Ahmad pointed out

to us that the case before the Privy Council did not relate to agricultural income but certain classes of non-agricultural income such as "*jalkar* or rent received from fisheries; ground-rent from land used for potteries; ground-rent for land used as brickfields, fees received from tying of boats against the assessee's land, fees received from cart stands" etc., etc. His contention was that their Lordships of the Privy Council intended to draw a distinction between *zamindari* income by which they meant agricultural income and income derived by a *zamindar* from his *zamindari* which according to him was a wider expression including non-agricultural income. In my opinion, however the two expressions have the same meaning and I do not agree with his contention that their Lordships intended to draw any distinction between them. Their Lordships, however, did recognise the distinction between agricultural income and other income derived from *zamindari*, because as was pointed by them, though in s. 4 (3) of the Income Tax Act, 1922, which enumerates the incomes to which the Act shall not apply, agricultural income is included, the wider expression "income derived from a *zamindari*" is not included in the section. The decision of the Privy Council, in my opinion, is fully applicable to this case, because the chief point to be decided in *Barua's case* (9) was the same as in this case and the argument for the assessee as reproduced in certain reports and as summarised in the judgment of the Privy Council was more or less the same as the argument advanced in the present case.

Mr. P. R. Das tried to distinguish the Privy Council case by following a different line of argument. He conceded that notwithstanding the Permanent Settlement Regulation, the state may impose a tax on income, but he strenuously contended that the tax which is imposed under the Agri. Income Tax Act is not a tax on income but is a land tax, or in other words, a tax of the same description as the *jama* or revenue payable by the *zamindar*. According to Mr. Das the land tax is different from the income-tax, because whereas the former is referable to the land which is being taxed, the income tax is a tax levied on income in general irrespective of and without any reference to the sources from which the income may be derived. This, say, Mr. Das is sufficient to distinguish the present case from *Barua's case* (9) for that case only lays down that the *zamindari* income may consistently with the Permanent Settlement Regulation be charged to income-tax.

In my opinion at least one of the main premises upon which this argument is based is not correct. Even assuming for the sake of argument that the *jama* is a kind of land tax, it is difficult to say that the tax imposed under the Bihar Act is not an income-tax but a land tax. Whatever may be the origin of the *jama* it is quite clear that it has no longer any reference to the income of the estate, because such income may rise or fall, but the *jama* remains the same. On the other hand the tax which the Bihar Act proposes to levy is to be assessed in proportion to the income of the estate and it has a direct reference to that income. Mr. Das in the course of his argument referred to the following observations made by Lord Macnaghten in *London County Council v. Attorney-General* (13):

"Income-tax if I may be pardoned for saying so, is a tax on income. It is not meant to be tax on anything else. It is one tax, not a collection of taxes essentially distinct. There is no difference in kind between the duties of income-tax assessed under Sch. D and those assessed under Sch. A or any of the other schedules of charge. One man has fixed property, another lives by his wits; each contributes to the tax if his income is above the prescribed limit. The standard of assessment varies according to the nature of the source from which taxable income is derived. That is all."

According to Mr. Das this passage supports the view that an income-tax in the true sense of the term must bear no reference to the source from which the income is derived and the moment there is a reference to the source, it ceases to be an income-tax and because in the present case the source of the alleged income is land, so it is land tax. The argument is a novel one, to say the least about it, and I have to deal with it only in deference to Mr. Das and because he has asked us to record our opinion about it. In my judgment all that Lord Macnaghten wished to emphasise was that though income may be derived from different sources, the income-tax was one tax and not a collection of taxes in the sense that in every case you have to tax income only and nothing else which does not answer the description of income. He never meant to suggest that an Act which purports to tax income should not refer to the sources of income or as soon as there is a reference to the source the tax would cease to be an income-tax. In the Indian Income Tax Act no less than five definite sources of income are set out and agricultural income-tax is defined and expected. It will be fantastic to suggest that the tax levied under the Act is not an income-tax, because the sources of the income are indicated. As the Provincial Legislature has now been em-

powered to tax agricultural income may for the purpose of taxation be divided under two broad heads (1) agricultural income and (2) non-agricultural income is taxed by the Central Govt. whereas the agricultural may be taxed by the Provincial Govt. We have therefore first to have a clear notion as to what is the meaning of 'income' and then to find out whether the agricultural income-tax is a tax on income or otherwise. As to what is income, though the word is not defined in the Indian Income Tax Act we have the most authoritative pronouncement about its meaning in *Shaw Wallace [case Commissioner of Income-tax, Bengal v. Shaw Wallace & Co.]* (23) and "agricultural income" has been defined in the Indian Income Tax Act, that definition being also adopted by the Govt. of Indian Act. Thus all that we have to see is whether the income which the Bihar Act purports to tax comes within the definition of agricultural income as defined in the Indian Income Tax Act. If it does, then there can be no doubt that it can be taxed by the Provincial Legislature.

I have already indicated that in view of the observations made by the Privy Council in *Barua's case* (9). It is unnecessary to discuss what was exactly the status of the *zamindars* and the nature of the *jama* payable by him at the time of the Permanent Settlement but as Mr. Das persists in his contention that the present case is not covered by *Barua's case* (9) and asks us to record our views in regard to these two matters also, I shall as briefly as possible, summarise my conclusions in regard to them. As to the status of the *zamindar* I shall only quote an extract from a judgment delivered by Saunders, J. and myself in *Rani Sonabati Kumari v. Raja Krityanand Singh* (24). The passage occurs at pp. 110 and 112* of the report and runs thus:—

"In 1889, the E. I. Co., adopted an important measure which is known as the Decennial Settlement. Before this settlement was concluded an extensive enquiry was held as to, a month or other matters, the persons with whom the settlement should be made and the amount of assessment to be fixed on the land. A keen controversy then arose as to whether the *zamindars* had been treated as proprietors of the soil or not under the Moghul rule. Mr. Shore who subsequently became Lord Reigmoth quoted in his Minute of 1788, the common expression of the people, which according to him from its universality was pro-

(23) 59 C 1313; 136 Ind. Cas. 742; Ind. Rul. (1932) P C 156; 9 O W N 515; 36 C W N 653; A I R 1932 P C 138; (1932) M W N 618; 55 C L J 386; (1932) A L J 588; 34 Bom. L R 1033; 36 L W 63; 63 M L J 124; 59 I A 206 (P C).

(24) 14 Pat. 70; 157 Ind. Cas. 433; A I R 1935 Pat. 306; 8 R P 121; 1 B R 77.

* Pages of 14 Pat.—[Ed.]

verbal, 'that the land belongs to the *zamindar* and the rent to the King.' This view was supported by 2 Indian experts Ghulam Husain, the author of *Sairul-Mutakhirin* and Roy Royan in their answer to the questions put to them (see Harrington's Analysis, Vol. III page 328). The answer of the former to the Twentyninth question which asked why the King purchased lands since he was the lord of the country was. "The Emperor is proprietor of the revenue issuing out of the territory under his authority; but he is not the proprietor of the soil." On the other hand Mr. Grant maintained that it was the fundamental principle in all the native estates of Asia 'that the Sovereign is sole universal proprietary lord of the land; and the *ryots*, who are husbandmen or peasantry, hold directly of the prince, by immemorial usage, as perpetual tenants in capite: subject to the annual payment of a certain fixed portion of the gross produce of the soil in money or kind.....' (*ibid*, page 360). Colonel Wilks thought that the fact which settled the controversy was that the share of the produce which went to the proprietor was an infinitesimal one as compared with the share which went to the King and he expressed himself thus: 'It is absurd to distinguish as proprietor the person entitled to one-tenth' (Colonel Wilks subsequently attempted to show that the real share of the *zamindar* was one-twentieth) while the remaining nine-tenths are called a 'duty, a tax, a quit rent' (*ibid*, p. 377.) Confronted with these divergent views the Directors of the East India Company pronounced no decision on the historical question but dealt with the matter on grounds of expediency. We read in the fifth report Vol. I, p. 30 that 'Whatever might be the difference of opinion among those who were officially consulted on the critical question of proprietary right in the soil a general concurrence prevailed in favour of the settlement being made with the *zamindari*.' The report then goes to state (*ibid* p. 32.)

In the progress and conclusion of this improvement transaction, the Govt. appeared willing to recognise the proprietary right of the *zamindars* in the land; not so much from any proof of the existence of such right, discernible in his relative situation under the Moghul Govt. in its best form, as from the desire of improving their condition under the British Govt., as far as it might be done consistently with the permanency of the revenue and with the rights of the cultivators of the soil'. Whatever may have been the position of the *zamindar* in theory under the Moghul Govt., there is no doubt, that great dignity attached to his office by reason of his being in a sense a Govt. official having charge of the maintenance of peace and order in the area under his control as well as of the *zamindari*, and the practice of making successive settlements with the same person or his heirs fostered the growth of the conception of ownership. The East India Company for political reasons confirmed him in the position which he had already substantially attained by a formal recognition of his proprietary rights in the soil. So in the Regulations passed on September 18, and November 25, 1789, and February 10, 1790, 'It was notified to the proprietors of the land on behalf of whom the settlement might be concluded that the *jama* assessed upon the lands under these Regulations would be continued after the expiration of the tenures and remain unalterable for ever, provided such continuance should meet with the approbation of the Hon'ble Court of Directors for the affairs of the East India Company and not otherwise'."

In the same judgment I also quoted at p. 187* the following observations of Lord

Parker in *Ranjit Singh Bahadur v. Kali Dassi Debi* (25).

"Passing to the settlement of 1793 it appears to their Lordships to be beyond controversy that whatever doubts be entertained as to whether before the English occupation the *zamindars* had any proprietary interest in the lands comprised within their respective Districts, the settlement itself recognises and proceeds on the footing that they are the actual proprietors of the land for which they undertook to pay the Govt. revenue. The settlement is expressly made with *zamindars*, independent *taluqdars* and other actual proprietors of the soil"—see Regulation I, s. 3 and Regulation VIII, s. 4. It is clear that since the settlement the *zamindars* have at least a *prima facie* title to all lands for which they pay revenue such lands being commonly referred to as *malguzari* lands."

The above passage states very clearly the effect of the Permanent Settlement Regulation of 1793. But in the famous case of *Thakooranee Dasse v. Basheshur Mookerjee* (26) which was heard by fifteen Judges of the Calcutta High Court Trevor, J., expressed the opinion that though Regulation I of 1793 recognised the *zamindars* as proprietors of the soil, it never recognised them as being possessed of an absolute estate in their *zamindari*. The actual passage in his judgment in which this opinion is expressed runs as follows:—

"That, though recognised as actual proprietors of the soil, that is owners of their estates, still *zamindars* and others entitled to a settlement were not recognised as being possessed of an absolute estate in their several *zamindarees*; that there are other parties below them with rights and interests in the land, requiring protection just in the same way as the Govt. above them was declared to have a right and interest in it which it took care to protect by law: that the *zamindar* enjoys his estate subject to, and limited by, those rights and interests; and that the notion of an absolute estate in land is as alien from the Regulation law as it is from the old Hindu and Muhammadan Law of the country."

The view taken by Trevor, J., is confirmed to some extent by the fact that at the time of the Permanent Settlement the *zamindars* had to execute *kabuliyats* in favour of the governing authority in respect of the estates settled with them; but the matter need not be pursued any further because for the purpose of this case it is not necessary to qualify the statement made in the Permanent Settlement Regulation as to the *zamindars* being the proprietors of the soil.

There remains now the question as to the nature and origin of the payment which is called "*jama*" in the Regulations and "Govt. revenue" in the later documents. It was contended on behalf of the plaintiffs that the *jama* is nothing but a tax on the land of

(25) 44 C 841; 40 Ind. Cas. 981; 21 C W N 609; 32 M L J 565; 15 A L J 390; 25 C L J 499; 19 Bom. L R 462; (1917) M W N 459; 6 L W 101; 2 P L W. 1; 22 M L T 489; 44 I A 117 (P C).

(26) 3 W R 29.

each particular estate and this argument was supported by reference to certain despatches which passed between Lord Cornwallis and the Court of Directors prior to the enactment of the Permanent Settlement Regulation. In one of these despatches Lord Cornwallis is reported to have written as follows :—

"We think this is an appropriate opportunity to observe that if at any future period the public exigencies should require an addition to your resources, you must look for this addition in the increase of the general wealth, and commerce of the country and not in the augmentation of the tax of the land."

Similar expressions were used in regard to "*jama*" by the Court of Directors as well as other contemporary writers on the subject one of whom Colonel Wilks called it "a duty, tax or quit rent". It must also be conceded that the word "tax" would not be an inappropriate description of *jama*, if it is assumed that the *zamindar* was a proprietor of the soil. If he was a proprietor of the soil, he was entitled to retain the entire produce of the soil and if the Govt. took from him any part of the produce that was *prima facie* in the nature of tax. At the same time if one were to examine the matter historically, one might feel inclined to doubt whether 'tax' is an appropriate expression. The Moghul authorities quoted in Harrington's Analysis called it a tribute or rent and in *Freeman v. Fairlie* (11), the Lord Chancellor is reported to have said :—

"*Zamindars and Taluqdars* were owners of the soil, subject only to a tribute such as I have stated, to Govt. and it was the object of those regulations of the year 1793, to make that tribute which had been considered as dependent in its amount on the will of the governing power, fixed and permanent."

Again in Field's Regulation of the Bengal Code we find that *zamindari* tenure is described as follows :

"It is an absolute right of proprietorship in the soil subject to the payment of a fixed amount of revenue to the Govt. If this revenue falls into arrears, the estate may be put up to auction and sold to the highest bidder. The purchaser acquires the estate free from all encumbrances created since the time of the Permanent Settlement and obtains statutory title."

Such consequences are described above are seldom attached to the non-payment of a mere tax and I think it will not be incorrect to say that the *jama* is more like rent than a tax. It is, as Lord Russell has pointed out, a payment made by the landlord from ancient times to the sovereign authority as a condition for holding the land.

Now assuming that the *zamindar* is a proprietor of the soil and the *jama* is a land tax the question still remains whether the imposition of the agricultural income-tax amounts to an augmentation of the *jama*. It seems to me that though in both cases pay-

ment has to be made to the Crown, the two payments are historically and in essence of a different description and it will not be correct to say that the imposition of the agricultural income-tax is an augmentation of the Govt. revenue.

I will now assume for the sake of argument that the *jama* is a tax and the tax imposed under the Agri. Income Tax Act is essentially a tax of the same kind as the *jama*. I will also assume that the Agri. Income Tax Act, in so far as it affects the permanently settled estates, has the effect of repealing the Permanent Settlement Regulation. These assumptions, however, can be of no assistance to the plaintiffs, unless as was contended by Mr. Das, the Permanent Settlement Regulation I of 1793 is deemed to be an Act of Parliament and the case falls under s. 108 (2), read with s. 109 (1) (2), for otherwise the subsequent assent of the Governor is sufficient to validate the Act. The plaintiffs as I have already said, relied in this connection on ss. 108 (2) and 299 (3), and therefore if, as Mr. Das contends, the Permanent Settlement Regulation I of 1793 is to be regarded as an Act of Parliament, the Act should have been introduced into the Legislature with the previous sanction of the Governor-General or it should have at least received the assent of the Governor-General or His Majesty.

Now, I must frankly confess that I find it difficult to hold that Regulation I of 1793 was an Act of Parliament. This Regulation was never considered by the two Houses of Parliament nor did it receive the assent of His Majesty the King. It was enacted in India by the Governor-General, there being nothing in its preamble or any where else to show that it was enacted under any authority delegated to the Governor-General by the British Parliament. Mr. Das contends that it became an Act of Parliament, because it was enacted in obedience to Pitt's India Act of 1784, but in my opinion there is no warrant for such a conclusion. The Act of 1784 after reciting certain complaints made on behalf of a number of Rajas, *zamindars* etc., states that such complaints should be investigated and if founded in truth, should be redressed. It directed the Court of Directors of the East India Company :

"to adopt, take and pursue such methods for enquiring into the causes, foundation and truth of the said complaints, and for obtaining a full and perfect knowledge of the same and of all circumstances relating thereto as the said Court of Directors shall think best adopted for that purpose, and thereupon, according to the circumstances of the respective cases was of the said Rajas, *zamindars* etc., to give orders and instructions to the

several Govt., and Presidencies in India, for effectually redressing, in such manner as shall be consistent with justice and the laws and customs of the country, all injuries and wrongs which the Rajas, *zamindars* *polygars*, *talugdars*, and other native landholders, may have sustained unjustly in the manner aforesaid, and for the settling and establishing upon principles of moderation and justice according to the laws and constitution of India, the permanent rules by which their respective tributes, rents and services shall be in future rendered and paid to the said united Company."

This Act was passed in 1784 whereas the Regulation in question was enacted in 1793. The Act, as we have seen, gave a free hand to the Court of Directors and merely directed them to redress the grievances, if founded in truth. It is true that the Directors held an elaborate enquiry in pursuance of the Act but they exercised their own independent judgment in devising measures for the redress of such grievances as appeared to them to be legitimate. As a constitutional point it is difficult to say whether the Parliament exercised any sovereignty over Bihar and Orissa at the time the enactment was passed, but as by virtue of the grant of Diwani in 1765 the task of administering the land revenue of a part of India had devolved upon the East India Company, it seems that it could enact the regulation in question through the Governor-General even apart from any authority derived from British Parliament. How can the Regulation be regarded in these circumstances as an Act of Parliament it is difficult to understand. Mr. Das has referred us to many writers who have dealt with the constitutional history of India relating to the period during which the regulation was passed but none of the writers has said that it was an Act of Parliament. Mr. Das also relied on *Willingale v. Norria* (14) and *Powell v. Apollo Candle Co. Ltd.* (15) in support of his contention, but in my opinion these cases have very little bearing on the question before us. In the first of these cases it was held that where a statute gives power to an authority to make regulations, a breach of the regulations so made is an offence against the provisions of the statute. The point which arose in that case was this: Under s. 4 of the London Hackney Carriages Act, 1850, the then Commissioners of Police were authorised to make regulations in regard to the boundaries of standings for hackney carriages and the number of carriages to be allotted on a standing and certain other matters. They did make certain regulations in pursuance of the authority conferred upon them by the Act and one of these regulations being broken, it was held that the breach of regulations made under

the authority of the statute was a breach of the statute itself. In the second case it was held that certain duties levied by an order in Council issued under s. 133 of Customs Regulation Act of 1879 must be deemed to have been really levied under the authority of the Act under which the order was issued, because the Legislature had not parted with its perfect control over the Governor and had the power at any moment of withdrawing or altering the power which they had entrusted to him. These decisions are not applicable, because the Permanent Settlement Regulation did not consist of mere bye-laws or rules made under an Act of Parliament, but was an independent measure enacted in India by a *de facto* governing authority.

It was contended in this connection by the learned Advocate-General that even if it is assumed that Regulation I of 1793 is an Act of Parliament, s. 108 cl. (2) (a) does not apply to the present case, because it is not an Act of Parliament extending to British India. The expression "British India" has been defined in s. 311 of the Govt. of India Act as follows:—"British India" means all territories for the time being comprised within the Governor's Provinces and the Chief Commissioners' provinces." The learned Advocate-General emphasised the expression "all territories" in this definition and contended that British India means the whole of British India and not a part of British India. He also argued that where the Act contemplates any reference to a part of British India, it says so expressly as will appear from the language of s. 110 and certain other sections of the Act. Finally he argued that inasmuch as the Permanent Settlement Regulation related only to a part of British India, that is to say, the Provinces of Bengal, Bihar and Orissa, this Regulation cannot be said to be an Act of Parliament extending to British India and so s. 108 (2) (a) has no application to the present case. Now all I wish to say in regard to the argument is that *prima facie* the construction put by the learned Advocate-General appears to be rather narrow, but it is really unnecessary to decide whether the construction is correct or not because, as I have already stated, Regulation I of 1793 cannot by any stretch of reasoning be described as an Act of Parliament.

The last point urged by Mr. P. R. Das was that even if it be assumed that the Agri. Income Tax Act is not *ultra vires* of the Bihar Legislature yet if the Act is construed according to certain well recognised

principles, it must be held that it cannot affect the permanently settled areas. The principle of construction upon which Mr. Das relied is that if there is an earlier statute on a special subject and also a subsequent enactment of a general nature, the Court will not hold that the earlier and the special legislation has been indirectly repealed or altered merely by force of the general words used in the subsequent legislation without any indication of a particular intention to do so [see *Seward v. Vera Cruz* (16). at p. 69*] This principle was applied by Mr. Das to the present case in the following manner. According to Mr. Das, Regulation I of 1793 which was an earlier and special legislation contained a promise that there shall be no further tax on the income of estate of which the *jama* had been fixed (permanently settled estates). Then followed a subsequent general Act which purports to tax agricultural income. As this Act does not use specific words to show that the Permanent Settlement Regulation was intended to be repealed, the two statutes must be read together as if they were quite consistent with each other and the object of the Bihar Act must be taken to tax only such agricultural income as could be taxed consistently with the promise made in the Regulation of 1793. In other words, according to Mr. Das the Bihar Act, when properly construed, cannot be held to apply to agricultural income derived from permanently settled estates, though it may be applicable to similar income from *tenures*, *raiyyati* lands and the estate which are not permanently settled as for example temporarily settled estates within the Govt. *khas mahal*.

Now this question can arise for consideration only if it is held that the tax levied under the Bihar Act is a tax of the same kind as the *jama* and is in reality an addition to "the burden of the land" which was fixed in 1793 and which was to remain unalterable for ever. Such a view, however as I have already pointed out is not open to us to take in view of the decision of the Privy Council in *Barua's case* which as I have already stated should be taken to be the last word on the subject. Even, however, if we assume that such a view is open to us to take, it seems to me that the position is not quite so simple as Mr. Das suggests. It was not seriously disputed before us that in spite of the assurance given in Regulation I of 1793 it was within the power of the Indian Legislature to revoke the declaration contain-

ed in the Regulation. The earlier history of the income-tax law shows that notwithstanding the Permanent Settlement Regulation agricultural income has been taxed in the past. It was certainly taxed under the Income Tax Act, 1860, but the tax was given up in 1865. Again an income-tax was levied on all income including agricultural income-tax between 1869 and 1873-1874. In 1886 a regular Income Tax Act was passed but agricultural income was specifically exempted under that Act and the exemption is still in force. The reasons, however, for exempting agricultural income was, as has been pointed out by some writers, not that the landlords paid revenue to Govt. but that they paid a cess on land, whereas the other persons paying income tax had not to pay any such cess. As Mr. Sunderam has stated in his commentary on the Indian Income Tax Act, in those days when the Cess Act was passed and income-tax was levied on agricultural income the owners of permanently settled estates carried on a powerful agitation against these imposts on the ground that the new taxation constituted a breach of the Permanent Settlement, but the Government these complaints not be exempting permanently settled estates as such from income-tax but by exempting all agricultural income whether the lands were permanently settled or not.

From this brief history of the income-tax law it appears that the Central Govt. did tax agricultural income when it wanted to do so but for many years past for certain reasons of policy such income was exempted from taxation. Then came the Govt. of India Act which expressly authorised the province to tax agricultural income the authority so conferred being as unqualified as the exemption given in regard to agricultural income under the Indian Income Tax Act. Why should not then the Bihar Agri. Income Tax Act be taken to be a repeal of the earlier enactment, because the language which is used in this Act is universal and comprehensive. The Act purports to tax "the total agricultural income of every person" (s. 2) and s. 4 recites in express terms the Act shall apply to all agricultural income derived from land situated in the Province of Bihar. There is nothing in the Act to suggest that it was intended to apply to lands other than those comprised within the permanently settled estates, or so exclude the liability of so large a class of tax payers as are holder of permanently settled estates in Bihar. If these persons were intended to be excluded the Legislature would have

*Page of (1885) 10 A. C.—[Ed.]

used apt words to express its meaning. I think that I might usefully quote here the following observations of Hamilton, J. which were quoted by Rankin, J. in *Emperor v. Prokhat Chandra Barua* (19) at p. 520* :

"Can s. 33 in view of that history and of its subject-matter, be so read as to make it subject to an unexpressed exception in favour of the rights of Exeter under its charters?"

After quoting this, Rankin, J. added

"There is no rule which entitles Courts of Law to demand express words from the Legislature, or to refuse the office of interpreter in the absence of express words; but the point is that the Legislature dealing with a matter, as to which equality or uniformity may well have been thought a cardinal consideration, has used the plainest and the most express language. The head and front of most its offending is that the words are general, but *prima facie* they import a calculated universality."

If therefore the other arguments of Mr. Das fall and it is held that the Bihar Legislature was competent to pass the Agricultural Income Tax in the terms in which it has been passed, it might well be argued that the Act has repealed the provisions of an earlier enactment. It seems to me that the "calculated universality" of the language used in the Bihar Agri. Income Tax Act is sufficient to show that the permanently settled estates were not meant to be excluded. This, in my opinion, is sufficient to dispose of the last point raised by Mr. Das. But I must repeat once more that I have dealt with this point only in defence to Mr. Das's argument and on the assumption that the tax imposed by the Bihar Act is an augmentation of the *jama* which was fixed under the Permanent Settlement Regulation.

Thus the conclusions which I have arrived at may be summed up as follows: (1) the definition of the agricultural income as given in the Bihar Act seems to be somewhat defective but that does not invalidate the whole Act. On a careful examination of its language it appears that it goes beyond the terms of the definition given in the Govt. of India Act in regard to such revenue free estates as lie within the limits of a Municipality. We do not definitely know whether there are any such estates in Bihar and if there are, what is the total number of such estates; but assuming that such estates do exist, all that can be said is that such estates cannot be taxed and the Act is *ultra vires* in so far as it purports to tax them. (2) That there is no declaration or promise in the Permanent Settlement Regulation that the *zamindars* will not be liable to pay income-tax like the other receivers of income and accordingly the Bihar Act is neither repugnant to nor

purports to repeal the Permanent Settlement Regulation (3) That the Permanent Settlement Regulation is not an Act of Parliament and can be repealed by the Legislature of the province or provinces affected by it, provided that the procedure set out in the Govt. of India Act is followed. In the present case the Act cannot be questioned as the Governor has given his assent to it after it was passed. (4) That the Agri. Income Tax Act purports to tax all lands and estates permanently settled or otherwise and it will not be correct to hold that by this Act the income from permanently settled estates cannot be taxed. In my opinion the suit must fail and should be dismissed with costs.

Manohar Lall, J.—The plaintiffs who are *zamindars* holding permanently settled estates in the District of Patna in Bihar, have instituted this suit on October 7, 1939, for a declaration that the Provincial Legislature of Bihar has no jurisdiction to enact the Bihar Agri. Income Tax Act (VII of 1938) as amended by the Bihar Agri. Amendment Act (V of 1939) (hereinafter to be referred to as the act) imposing agricultural income tax on their estate which was settled under the Permanent Settlement Regulation (I of 1793) (hereinafter to be referred to as the Regulation) so long as the said regulation stands unrepealed, and for a further declaration that the issuing of and serving of the notice on the plaintiffs by the Agricultural Income Tax Officer under s. 17 (2) and 30 of the Act with a view to their proposed assessment for agricultural income tax was without jurisdiction, illegal, invalid and inoperative. The main defence to the action on behalf of the Province of Bihar was that the impugned Act was competently enacted and did not purport to alter the character of or infringe the conditions of, the Permanent Settlement under the Regulations so that the imposition of agricultural income tax is not invasion on the rights of the *zamindars* under the Permanent Settlement. It was also pleaded that the plaintiffs have no right to maintain the suit in that their only remedy was to raise their objection in the course of the assessment before the Agricultural Income Tax Officer the requirement of s. 80 of the Civil P. C., were also stated not to have been fulfilled. A number of issues were struck by the first Subordinate Judge of Patna which are to be found at p. 7 of the paper book. The suit was originally valued at Rs. 187-8-0 but upon the objection raised by the defendant the valuation was increased to Rs. 10,001 and

* Page of 51 C.—[Ed.]

the requisite court-fee has been paid thereon. By an order of this Court on hearing the parties and with their consent, this suit has been transferred and for trial to this Court as it involves a decision of important and difficult questions concerning the whole province.

When the hearing of this case began on February 26, 1941, the learned Advocate for both sides agreed that the relevant facts, which are necessary to decide the suit, are not denied by either side including the facts relating to the validity of the notice under s. 80 of Civil P. C. and that the only issue which required to be decided was issue No. 8 namely, whether the notices and the assessment under the impugned Acts are legal, operative and binding on the plaintiffs? Issue Nos. 1, 3, 4, 6, 7, and 9 are merely matters of argument. Issue No. 5 was given up on behalf of the defence. The plaintiffs then, being *zamindars* holding their estate permanently settled with their predecessor or under the provision of regulation, challenge the validity of the Act upon three grounds, firstly, that the Act has not been validly enacted under the provisions of the Govt. of India Act, 1937 (hereinafter to be referred to as the India Act), secondly, that if it is held to be validly enacted it cannot apply upon its true construction to a permanently settled estate and lastly, that if the Act can be construed to operate as a repeal of the legislative provisions of the Regulation, this involves a direct breach of the promise given under the Regulation. It will be convenient in the first instance to examine the scope of the Act in order to find out the nature of the imposition so that it may be decided to what extent the imposition is inconsistent with the provisions of the Regulation.

The Act which received the assent of the Governor on October 12, 1938, states in the preamble that this is "an Act to provide for the imposition of a tax on agricultural income" and contains the preamble that

"whereas it is expedient to impose a tax on agricultural income arising from lands situated in the Province of Bihar, it is hereby enacted as follows."

Agricultural income is defined by s. 2 (a). The rest of the Act is divided into six chapters of which only Chap. II is relevant for the present purpose. That chapter is entitled "charge of agricultural income-tax" and consists of 13 sections. Section 3 is so framed as to charge agricultural income-tax at the rate which may be specified from time to time; the tax is stated to be charge

"on the total agricultural income of the previous year of every person" and by s. 4 it is enacted that the Act shall apply to "all agricultural income derived from land situated in the Province of Bihar" save as income hereinafter provided. The limits of the taxable income are fixed by s. 5, and the mode of its determination is enacted in ss. 6 and 7. Charitable or religious trusts and *wagfs* are exempted by ss. 8 and 9. The other provisions in this chapter are not relevant for the present enquiry but it may be stated that s. 5 agricultural income-tax is only payable, if the total agricultural income of the previous year exceeds Rs. 5,000 and that no tax is payable by a person who received agricultural income as defined in s. 2 (a) (1) or by those who are in cultivating possession of less than 200 acres of land. It will be noticed, therefore, that the act imposes a taxation on agricultural income arising from all lands situated in the Province of Bihar subject to the stated exceptions briefly narrated above and does not exempt the agricultural income of *zamindars* which they receive from permanently settled estates and applied to all persons who receive agricultural income *e. g.* *raiyats* under-*raiyats* tenure-holders, lessees, temporary or permanent, and *zamindars*.

Such being the ambit of this Act it is now pertinent to consider the question whether the imposition of agricultural income-tax in respect of agricultural income derived by a *zamindar* from his permanently settled estate is to any, and if so to what, extent inconsistent with the provisions of the Regulation. Fortunately so far as this Court is concerned there is an authoritative decision of their Lordships of the Judicial Committee in the celebrated case of *Probbhat Chandra Barua v. King-Emperor* (9), which must guide in deciding this question. This Court must accept the pronouncement given by Lord Russell of Killowen while delivering the judgment of their Lordships and must reject an attempt to distinguish that decision upon the ground which will be indicated hereafter. His Lordship after, examining all the relevant provisions in the various Bengal Regulations of 1793 came to the conclusion that the Regulation was a master Regulation and then proceeded to examine its terms and specially Art. 6 which was relied by counsel before their Lordships (as it has been mainly relied upon by counsel for the plaintiffs before this Court) and held that their Lordships

"are unable to find in the Regulation any statement or assurance that a *zamindar* will never be liable to

taxation in respect of the income derived from his *zamindari*, or (to put the matter from another point of view) that a *zamindar* will, as to so much of his property as consists of income derive from his *zamindari*, be exempt from schemes of taxation applicable generally to the incomes of the inhabitants of British India."

His Lordship then gives a most valuable paraphrase of Art. 6 which may be usefully quoted here :

"You have in the past been liable to have the amount of the *jama* increased according as the actual produce of the estate increased ; to enable the Govt. to obtain this you have been subjected to frequent investigations to ascertain the actual produce and you have even been deprived of the management of the estate. All this shall cease. You shall have fixity of payment and fixity of tenure. If you improve the revenue of your *zamindari* you shall enjoy the fruits of your improvement without fear of the Govt. claiming that because the revenue produced by the estate has increased, the payment you make to Govt. as a condition of holding that estate shall be increased also,"

and a few lines later

"In their Lordships' opinion, while the Regulation contain assurances against any claim to an increase of the *jama*, based on an increase of the *zamindari* income they contain no promise that a *zamindar* shall in respect of the income which he derives from his *zamindari* be exempt from liability to any future general scheme of property taxation, or that the income of a *zamindari* shall not be subjected with other income to any future general taxation of incomes."

I have already shown that the Act imposes a general tax on all agricultural incomes and as the Regulations never promised that the income of a *zamindar* shall not be subject to any future general taxation of incomes (as laid down in *Barua's case* the Act cannot be held to be a breach of that promise.

But it was strongly contended that the words of Lord Russel quoted above cannot be brought into aid by the defendant because the Act is not an Act to tax all incomes but to tax agricultural income only. The argument was that whereas an Income Tax Act is a general tax in all income irrespective of the sources and can be imposed upon agricultural and non-agricultural incomes of permanently settled *zamindaris* the tax being a tax on agricultural incomes only and with reference to a particular source it cannot be validly imposed even according to the decision in *Barua's case*. I do not understand this distinction. If the Indian Income Tax Act can validly tax all incomes including agricultural and non-agricultural incomes, I do not see why the same taxation cannot be imposed by two competent bodies the one taxing non-agricultural income and the other taxing agricultural income of the *zamindar* assessees. This is exactly what has been provided by the present India Act. But for the exception given in s. 4 (3) of the Indian Income Tax Act it would be payable upon agricultural

income also. That tax can now be imposed by the provincial legislature by giving it that power by inserting it as Item No. 41 in List II, Sch. VII. The argument that income tax is a tax on income without any reference to a source loses sight of the sections in the Indian Income Tax Act which specifically mention the sources *e. g.* s. 4, s. 6 and s. 12.

It is proper that I should state here the other grounds upon which the decision in *Barua's case* was sought to be distinguished. It was urged by Sir Sultan Ahmad, who gave a forcible reply on behalf of the plaintiff, that that case only decided the taxability of the non-agricultural income arising from the estate of the assessee and that, therefore the observations of Lord Russel should be taken to mean only that there was no promise that non-agricultural income will not be assessed by any future general scheme of property taxation but that either it must be held that the promise under the Regulation was to exempt agricultural income from further taxation or that the point was never decided and remains open to argument. I am unable to accept this contention as sound. At the top of p. 7 the argument of the appellant before the Privy Council has been stated to be in these words.

"He (that is to say, the *zamindar* assessee appellant) alleges that the *jama* was a tax and not a rent or rent-charge, and that by the Regulations a legislative assurance of guarantee was given that no tax beyond the amount of the fixed *jama* would be imposed upon the income of the permanently settled estate."

This income of the permanently settled estate, in my opinion, means both agricultural and non-agricultural income and it is not permissible to argue that the income of the permanently settled estate means in that judgment only the non-agricultural income of the permanently settled estate. This argument was also developed in this way:—The Govt. land revenue is a tax on agricultural income, the limit of that tax was fixed by the Regulation and, therefore, the proposed tax by the Act on agricultural income is a breach of that promise which ensured to the *zamindars* that all fruits of their own good management and industry will be exclusively enjoyed by them and that the present or any future Govt. will never ask for an augmentation of the tax on agricultural income in consequence of the improvement of their respective estates. An analogy was also sought to be drawn between the Indian revenue system and the English tax land system. It is true as pointed out by Viscount Dunedin while delivering the judgment of the Board in *Wadia v. Secretary of*

State for India in Council (27) at p. 60 that

"the root idea of British rule in India is that he who has the soil must pay, not in kind like a proper tithe, but in money, a certain proportion of what he gets from cultivation, and this money payment can be raised from time to time so as to maintain the proportion to the fruits of cultivation which have increased."

But the observation of Lord Porter while delivering the judgment of the Board in *Raja Bhagwan Bakhsh Singh v. Secretary of State* (28) at p. 206 are useful to show that "in considering the way in which land revenue is regarded in India no comparison with tenures in England is of such (if any) assistance. Its universality, its quantum, and the tendency of the Indian outlook to regard the Govt. as a sharer in all the produce of the land are matter of importance."

That was a case in which the question arose as to whether land revenue must be deducted in calculating the gross annual profit of a property and it was pointed out that it must be so deducted (these two cases did not concern permanently settled estates).

It is also true that

"whatever doubts be entertained as to whether before the British occupation the *zamindars* had any proprietary interest in the lands comprised within their respective districts, it is now established by high authorities that the Permanent Settlement itself recognises and proceeds on the footing that they are the actual proprietors of the land for which they undertake to pay the Govt. revenue." Per Sir George Lowndes in *Gobinda Narayan Singh v. Shamlal Singh* (29) at p. 132 approving the well known passage from the judgment of Lord Parker in *Ranjit Singh v. Kali Dasi Debi* (25) at p. 122*.

But the assessee, the plaintiff, ignores the position of *zamindars* which is expressly provided by Arts. 3, 4 and 5 of the Regulation, that is to say, the *zamindars* are "allowed to hold their estates at such assessment for ever."

In *Haradas Achargya Chowdhuri v. Secretary of State for India* (12) Lord Buckmaster while considering the question as to how the external boundaries of a permanently settled estate should be decided made these observations at p. 91† :

"Pushed to its extreme it would result in this : that whenever a *zamindari* had been the subject of permanent settlement and there was any dispute as to its

(27) 56 I A 51 (60); 114 Ind. Cas. 1; A I R 1929 P C 34; 33 C W N 293; 49 C L J 179; 31 Bom. L R 256; 53 B 230; (1929) A L J 47; Ind. Rul. (1929) P C 41 (P C).

(28) 67 I A 193 (206); 187 Ind. Cas. 646; A I R 1940 P C 82; 12 R P C 169; 1940 O W N 431; 6 B R 594; (1940) A L J 333; 1940 O L R 292; (1940) Kar. (P C) 160 Sup; 44 C W N 765; 52 L W 50; (1940) 2 M L J 205; 72 C L J 1; 1 L R (1940) All. 432 (P C).

(29) 58 I A 125 (132); 131 Ind. Cas. 753; A I R 1931 P C 89; 53 C L J 333; 35 C W N 521; (1931) M W N 435; Ind. Rul. (1931) P C 145; 33 L W 707; 33 Bom. L R 885; 61 M L J 9; 58 C 1187 (P C).

* Page of 44 I A.—[Ed.]

† Page of A I R 1917 P C.—[Ed.]

external boundaries the *zamindars* would never be able to establish title to any portion of it if it happened to be traversed by a navigable river, of variable course, unless they could show what were the exact boundaries of that course at the date of the permanent settlement. Such a conclusion their Lordships wholly reject. The object of the permanent settlement was to confirm the *zamindars* in their holdings at a fixed and immovable rent, and, if assumption are made, one way or the other, they ought to proceed upon an attempt to do justice to the title rather than to render it insecure."

In the case of *Raja Suttosurrun Ghosal v. Mahesh Chandar Mitra* (30) their Lordships of the Judicial Committee observed at p. 13* that the general principle upon which all legislations subsequent to 1793 have proceeded in India was that of putting a purchaser at a sale for arrear of revenue in the position of the party with whom the perpetual settlement of the estate was made. This has been the accepted view as to the rights of a purchaser who purchased a *zamindari* sale for arrears of land revenue and this was clearly enacted in s. 37 of the Ben. Land Revenue Sales Act (Act XI of 1859). Incidentally attention may be drawn to s. 2 of this Act which makes reference to the *kist* or instalment of land revenue which is payable by the proprietor of a permanently settled estate. That section shows that the *kist* or instalment is to be paid in accordance with the original settlement and *kistbandi* of the *mahal*. These *kabuliats* are kept in the office of the Collector to which reference is made from time to time in cases arising under the Land Revenue Sales Act of 1859. In the *Barua's case* Lord Russel in the paraphrase of Art. 6 which I have already quoted expressly used the words

"that a *zamindar* shall have fixity of payment and fixity of tenure and rejected the argument advanced on behalf of the assessee as unsound that the *jama* was a tax, not a rent or rent charge."

In my opinion these quotations from these high authorities are quite sufficient to confirm me in the view which I take that all that the *zamindar* has been promised is a right to remain in quiet possession of his permanently settled estate provided he pays regularly the amount which he agreed to pay by the engagement endorsed by the *kabuliat* executed in pursuance of the Regulation. It should be stated here that after the promulgation of the Regulation the *zamindars* were called upon to enter into *kabuliat* with the Govt. of India through the Collector and in these *kabuliats* they expressly applied that the estates of which they were in possession as *zamindars* should be settled with them. But the actual settlements were made with the

(30) 11 W R P C 10.

* Page of 11 W R.—[Ed.]

zamindars in possession only if they agreed to pay the assessment fixed after an elaborate investigation by the Officers and if they did not agree to pay the amount of the proposed assessment the estate was settled with other persons who agreed to make that payment. This conclusively shows that the payment which is being made was made in pursuance of the Permanent Settlement of the estate which could be made and was made in many cases, not with the old proprietors but with anybody who on agreeing to pay the *jama* was placed in possession of the estate with a promise that if he or his lawful successors would go on paying the assessment which they have engaged to pay they will be allowed to hold the estate at such assessment for ever. (In the *Pachete case* (*Secretary of State v. Jyoti Prasad Singh Deo*) (31) the *kabuliat* will be found quoted in the judgment of Lord Pillimore at p. 108*.)

Upon the view which I take of the applicability of the *Barua's case* it is unnecessary for me to consider the elaborate argument which was advanced as to the intention and historical origin of Art. 6 of the Regulation. We were taken at great length through many historical documents before the Permanent Settlement including the character of the East India Company, various Statutes of George III, William IV and Queen Victoria, Field's Regulations of the Bengal Code, Phillips' Land Tenures of Lower Bengal and the various minutes of Sir John Shore, of Warren Hastings and of Lord Cornwallis. But in my opinion no useful purpose can be served by examining these materials after the decision of their Lordships in the *Barua's case*. I, therefore, conclude that the Act does apply to permanently settled estate and does not involve a direct breach of the promise given under the Regulation.

I now proceed to consider the next argument that the Act has not been validly enacted under the provisions of the Govt. of India Act. This argument may be conveniently examined under various heads:—(i) The act is *ultra vires* because the definition of agricultural income given in s. 2 is different from that contained in the India Act; (ii) The sanction of the Governor-General ought to have been taken because the Act repeals an Act of Parliament extending to British India, and (iii) By the Instrument of In-

structions the Governor of Bihar should not have assented in the name of His Majesty to the Bill which alters the character of the Permanent Settlement.

Firstly as to the effect of the definition in the Act. Section 311 (2) Govt. of India Act, defines agricultural income to mean "agricultural income as defined for the purpose of the enactments relating to income tax". By s. 2 of Act XI of 1922 (Indian Income Tax Act) agricultural income has been defined. The Act by s. 2 has also defined agricultural income. It will be observed that the whole of sub-cl. (c) which is found in the Indian Income Tax Act definition has been omitted from the definition in the Act and sub-s. (i) of sub-cl. (a) has been altered changing the words "assessed to land revenue in British India" to "assessed to land revenue in Bihar" and by changing the words "subject to the local rate assessed and collected by Officers of the Crown as such" to "subject to the local cess or rate assessed and collected under any Bengal Act or under any Bihar and Orissa Act or under any Bihar Act." It was, therefore argued that by the analogy of s. 141 Govt. of India Act the Provincial Legislature has no power to vary the meaning of the expression "agricultural income" and the whole Act is *ultra vires*. But s. 141 does not seem to be of much assistance as it provides that

"no bill or amendment which imposes or varies any tax or duty in which Provinces are interested, on which varies the meaning of the expression 'agricultural income' as defined for the purposes of the enactments relating to Indian income-tax etc. etc., shall be introduced or moved in either Chamber of the Federal Legislature".

The Act was not passed by the Federal Legislature. But the important question to consider is whether the power of the Provincial Legislature to impose tax agricultural income is Item No. 41 in list II of the Seventh Schedule includes the power to impose tax on agricultural income beyond what is defined in the Indian Income Tax Act. In other words has the definition in the Act substantially varied the definition of the agricultural income in the Indian Income Tax Act? I do not think by the changing of the words "British India" to "Bihar" any variation has been made. The Provincial Legislature having power to impose a tax only in Bihar must have the power to mould the definition so as to suit the provincial condition. Nor does the omission of (c) help the argument of the plaintiff; the omission narrows the definition but does not enlarge the scope. I am also not impressed by the argument that

(31) 53 I A 100; 94 Ind. Cas. 974; A I R 1926 P C 41; 30 C W N 745; 24 A L J 761; 53 C 533 (P C).

*Page of 53 I. A.—[Ed.]

a substantial change has been made because the Bihar Act uses the word income and not revenue in the opening lines of s. 2 (a) (1). Revenue derived from land connotes in the subject under consideration the same meaning as income derived from land. The serious objection, however, is that the words "local rate assessed and collected by Officer of the Crown as such" have been completely altered. This argument has to be examined in some detail.

The Indian Income Tax Act speaks of a local rate, assessed and collected by Officers of the Crown as such. The local rate has been amplified in the Bihar Act as a local cess or rate. I do not think this is any substantive variation. The Bihar Act has merely used the words "assessed and collected under any Bengal Act or under any Bihar and Orissa Act or under any Bihar Act". The critical question to consider is whether the local cess or rate assessed and collected under these Acts is assessed and collected by Officers of the Crown as such. To begin with it is clear to me that if a local cess or rate is assessed and collected under these Acts not by Officers of the Crown as such then agricultural income on those lands which are subject to such cess or rate cannot be brought within the taxation of the Bihar Act. This was conceded by the learned Advocate-General who appeared for the defendant and in my opinion rightly.

It was argued at great length that the cess which is imposed and collected under the Cess Act (Bengal Act IX of 1880) is not assessed and collected by Officers of the Crown as such. But a perusal of the provisions of Part II makes it clear that the valuation of the land is made under the orders of the Board of Revenue by the Collector of the District who is defined to be the officer in charge of the revenue administration of a District and includes any person specially invested with the powers of a Collector for the purposes of this Act. Sections 14, 16 and 17 describe the procedure which must be adopted by the Collector requiring the holders of an estate or tenure of a certain description to lodge at his office return of all the lands comprised therein. By s. 18 the omission to furnish a return involves the liability to pay a daily fine until the valuation of the lands has been ascertained and determined by the Collector. By s. 22 the Collector is empowered, if he is not satisfied as to the correctness of the return, to fix an annual value of the lands by making independent enquiry. These provisions show that the assessment is made by a Collector who is an Officer of the Crown.

The rate at which the cess is to be assessed

on the annual value of the land determined under Chap. II is fixed in the manner provided in Chaps. I and II. The collection of the cess is provided in s. 41 which enjoins every holder of an estate to pay to the Collector annually the entire amount of local cess and by s. 45 it is provided that if the instalment of the local cess or a part thereof payable to the Collector is not made within the time fixed the amount of such instalment may be recovered with interest thereon at $6\frac{1}{2}$ per cent. per annum. It seems to me, therefore that this local cess is assessed and collected under the Cess Act by the Collector, an Officer of the Crown. But it was argued that as the proceeds of the local cess in each district and all sums levied or recovered as interest or otherwise in respect thereof is to be paid under s. 9 into the district fund of the district, the collection is made on behalf of the District Board. In my opinion this argument is not sound because the destination of the amount of cess collected has nothing to do with the capacity in which the cess is collected.

Attention, however, was drawn to the provisions of Chap. IX which empower the District Committee to determine the rate of the cess for the year in order to prepare an estimate of the income and expenditure of the Committee for the year then next ensuing. It is true that the Committee by s. 148 is required to determine the rate at which it will be necessary to levy the local cess for the year, but s. 150 directs that every such estimate by the Committee under s. 146 shall be forwarded through the Collector of the District to the Commissioner and what is more important is that "the Commissioner may approve and estimate and the rate determined by the Committee." It seems to me, therefore, that these provisions are based upon the view that it is expedient to take advantage of the local knowledge of the District Committee in order to see what should be the proper rate at which cess should be levied. The final authority it will be noticed, is not the Committee but the Commissioner. Section 152 also provides that the Commissioner when re-considering the estimates submitting to him under s. 151 may either sanction the estimate and rate as determined by the Committee or may submit such estimate together with the reasons recorded by the Committee for adhering to the original view to the Lieutenant Governor, and by s. 153 the Lieutenant Governor finally decides the rate and the estimate which should be published so that by s. 156 the rate which is thus published in the *Gazette* becomes leviable in the

district for the year. These provisions strengthen me in the view which I take that the local cess is assessed and collected under the Cess Act by the Officers of the Crown as such.

It was then urged that the Collector under the Cess Act cannot be styled as an Officer of the Crown as such because so it was argued, there is no bar to any private person being specially invested with the powers of a Collector for the purposes of Cess Act. This argument, though attractive, loses sight of the fact that the Collector or the Collector of the District as defined under the Cess Act becomes an Officer of the Crown the moment he is invested with the powers of the Collector for the purpose of the Cess Act. The Collector is also most invariably a member of the Indian Civil Service, and the Provincial Civil Service. It was then argued that as the definition admittedly embraces lands which may be subject to a local cess or rate like the Bihar Municipal Act which is neither assessed nor collected by an Officer of the Crown as such, the whole definition becomes *ultra vires* as it is not permissible to dissect it so as to make it applicable to those lands which are subject to local cess and rate assessed and collected by Officers of the Crown as such. A sufficient answer to this argument is afforded by the case of *Macleod v. Attorney-General for New South Wales* (3). In that case the question for consideration was the extent of the definition of s. 54, of the Criminal Law Amendment Act, 1883 (45 Vic. c. 17). That section enacted that: "whosoever being married marries another person during the life of the former husband or wife whosoever such second marriage takes place shall be liable to penal servitude for seven years."

It was held by their Lordships in the judgment delivered by Lord Halsbury, L. C. that these words must be intended to apply to those actually within the jurisdiction of the Legislature and, therefore, there was no jurisdiction in the colony to try the appellant accused for the offence of bigamy alleged to have been committed in the United States of America. Now it will be observed that the word, "whosoever" is of such width that in its proper meaning it must comprehend all persons all over the world, natives of whatever country. Similarly there is no limit to the applicability of the word 'whosoever' which is equally universal in its application. Notwithstanding the universal application of these two words according to one construction their Lordships construed the words so as to make the enactment within the jurisdiction of the colony to enact it. The

words of Lord Halsbury at p. 458* may be usefully quoted here :

"Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so as to include those insisted on at the bar, it would have been beyond the jurisdiction of the colony to enact such a law. Their jurisdiction is confined within their own territories, and the maxim which has been more than once quoted '*extra territorium jurisdictio impune non paratur*' would be applicable to such a case. Lord Wensleydale, when Baron Parke, advising the House of Lords in *Jefferys v. Boosey* (32), expresses the same proposition in very terse language..... It appears to their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than Her Majesty's subjects; more than any persons who may be within the jurisdiction of the colony by any means whatsoever and that, therefore, if that construction were given to the statute, it would follow as a necessary result that the statute was *ultra vires* of the Colonial Legislature to pass. Their Lordships are far from suggesting that the Legislature of the Colony did mean to give to themselves so wide a jurisdiction. The more reasonable theory to adopt is that the language was used, subject to the well-known and well considered limitation, that they were only legislating for those who were actually within their jurisdiction, and within the limits of the colony."

It has not been shown to us that the Bihar Legislature had meant to exercise so wide a jurisdiction that they intended to impose a tax on agricultural income from those lands which could not be reached by India Act definition. The more reasonable theory to adopt is that the language was used *bona fide* believing that they were legislating only for those lands which were actually within their jurisdiction. But reliance was placed upon the observation of the late Sir Shah Mohammad Sulaiman, in the Federal Court judgment in *Subrahmanyam Chettiar v. Muthuswami Goundan* (6) at p. 183† :

"But I am not aware of any case in which the same section containing similar provisions for contract as for the decree based on it has been considered to be severable so as to make the latter valid, while the former is invalid,"

and, therefore, it was argued that it is not permissible to dissect the definition of agricultural income in the Act in order to find out that some portion is invalid and the rest is valid. I do not agree with this argument because as pointed out by Varadachariar, J. in the same case at p. 196† :

"any objection based on the wide scope of the Act may be obviated by so interpreting the general terms used in the Act as to limit them to cases with which alone the Legislature was competent to deal."

Sulaiman, J. in the passages relied upon was only pointing out that a part of an Act can be held valid and another part invalid

(32) (1854) 4 H. L. 615; 3 C. L. R. 625; 24 L. J. Ex. 81; 1 Jur. (N. S.) 165; 94 R. R. 339.

* Page of (1891) A. C.—[Ed.]

† Pages of 3 F. L. J.—[Ed.]

if they are severable and that if the offending provisions are so interwoven into the scheme that they are not severable, the whole is *ultra vires*. Indeed in *Shyamkant Lal v. Rambhajan Singh* (7), at p. 201*, he himself pointed out that:

"It is a well established principle that if the invalid part of an Act is really separate in its operation from the other parts, and the rest are not inseparably connected with it, then only such part is invalid, unless of course, the whole object of the Act would be frustrated by the partial exclusion. If the subject which is beyond the Legislative power is perfectly distinct from that which is within such power, the Act can be *ultra vires* in the former while *intra vires* in the latter."

and then he makes the observation which has been relied upon. In the present case it is within the Province of Bihar Legislature to tax agricultural income provided the agricultural income is as defined in the Govt. of India Act. If the definition unwittingly extends beyond the limit prescribed by the definition of the India Act the whole Act cannot be held to be *ultra vires* because the subject which is beyond its legislative power is perfectly distinguishable from that which is within its power. I do not propose to deal with the argument as to severability at any length because this has been sufficiently dealt with in the Federal Court judgment from which I have just been quoting. But I may usefully draw attention to the judgment of their Lordships of the Privy Council in *Attorney General for Canada v. Attorney-General for British Columbia* (33) where Lord Tomlin who delivered the judgment of the Board laid down four propositions which he deducted from the decisions of the Judicial Committee in deciding questions of conflict between the jurisdiction applying those propositions I reach the same conclusion.

Lastly it may be pointed out that it will be quite permissible to adopt the definition of agricultural income as given in the Indian Income Tax Act (which is the definition under the India Act) in order to find out whether the land, the agricultural income whereof is sought to be taxed, satisfied the requirements of that definition. In other words the definition given in the Act may be either be ignored or construed so as to make it apply to the subjects within the ambit of the definition given in the Indian Income Tax Act. Perhaps this question is not of importance in this case because it is not shown that the land of the plaintiff from which agricultural income is derived,

(33) (1930) A C 111; 99 L J P C 20; 142 L T 73; 46 T L R 1.

which is proposed to be taxed, is not subject to land revenue, nor has it been shown to be the subject of local cess or rate which is not collected and assessed by the Officer of the Crown as such. If there is such a land the agricultural income from that land will, as stated above, not be liable to taxation under the Act. Secondly as to the want of the sanction of the Governor-General. The argument advanced was based upon the terms of s. 108 (2) (a) of the India Act which provide that

"unless the Governor-General in his discretion thinks fit to give his previous sanction, there shall not be introduced into, or moved in a Chamber of a Provincial Legislature, any bill or amendment which repeals, amends or is repugnant to any provisions of any Act of Parliament extending to British India."

It was argued that the Act conflicts with the Regulation, which is an Act of Parliament, extending to British India. The learned Advocate-General on the other hand argued that the Regulation does not extend to British India because it applied only to a part of British India, namely Bengal, Bihar and the other permanently settled estates in some of the Provinces whereas British India has been defined by s. 311 of the India Act to mean "all territories for the time being comprised within the Governor's Provinces and the Chief Commissioners' Province". He also pointed out that the India Act itself has drawn in distinction between British India and part thereof and referred to s. 110 (a) and 110 (b). He argues in the second place that the Regulation is not an Act of Parliament. I do not see any escape from the conclusion that the India Act has deliberately drawn a distinction between British India and a part of British India. It appears also that the Governor-General is required to exercise his discretion only where the Provincial Legislature proposes to introduce a Bill which is repugnant to any Act of Parliament extending to the whole of British India and where the Bill is not repugnant to any provision of an Act of Parliament extending to the whole of British India but is repugnant to an Act of Parliament which extends to a particular province only the Legislature and the Governor of that Province may well be left with the discretion to deal with the condition of their own province. But be that as it may as the India Act itself has drawn a distinction between British India and a part of British India in various sections of the Act. I must accept the argument advanced on behalf of the defendant that the Regulation is not an Act of Parliament extending to the whole of British India. Is the Regulation an

Act of Parliament? An elaborate argument was advanced before us to ascertain the position of the East India Company at the time when the Regulation was promulgated. It was argued that at that time the only legislative power was in the Parliament and had not been conferred either upon the East India Company or upon the Governor-General in Council and, therefore the Regulation was an Act of Parliament. It is true that the position of the East India Company was somewhat anomalous and it is impossible to discover the precise date when the Company exchanged the character of subject for that of sovereign and obtained for the Crown the rights of sovereignty. But for the purposes of this case it is sufficient to make reference to the following observations made by Sir Arthur Wilson while delivering the judgment of the Board in *Hemchand Devchand v. Azam Sarkarlal Chhottamal* (34) the passage is at p. 15:

"The time under consideration divide itself naturally into two periods, that of the Govt. of British India by the E. I. Co., down to 1858, and that of direct Govt. by the Crown after that date. The legal and constitutional position of the company during the former of these periods was established in a series of judicial decisions and was finally and fully defined in the *Secretary of State in Council v. Kamchee Boyee Sahaba* (35). The company exercised a delegated sovereignty over the territories under the Govt. with all the powers in connection with the external of those territories incidental to the exercise of that sovereignty subject, of course, to such restrictions as were imposed by other or by statute. It is obvious that the sovereign power thus delegated to the company could be exercised by it in India only through its agents and officers in the country. Before the Regulating Act of 1773 (13 Geo. III, c. 63) the three Presidencies in India were wholly independent of one another; in the Govt. of each and in the dealings of each with the native States in its neighbourhood, the company acted through its officers charged with the administration of that Presidency. By the Regulating Act the Govts. of Madras and Bombay were placed under the superintendence and control of the Governor-General of Bengal (since become Governor-General of India) and his Council, and close restrictions were placed upon their power of making war or concluding treaties without the approval of the general Central Govt. Subsequent statutes expressed with greater clearness the subordination of the lesser Govts. and repeated the restriction upon the exercise by them of various sovereign powers. But subject to that subordination and to those restrictions, those statutes never took away those powers, but, on the contrary, repeatedly recognised their existence. And accordingly in the *East India Company v. Syed Ali* (36), this Board held that a treaty entered into by the Govt. of Madras, after compliance with the statutory condition, was a

valid exercise of sovereignty. By the Govt. of India Act, 1858, the delegation of sovereign power to the company was determined, and it has since been exercised directly on behalf of the Crown, in India (speaking generally) through the same authorities as before in England through the Secretary of State. Under the sovereign power thus delegated for so long to the company and since 1858, exercised directly on behalf of the Crown, the British Empire in India has been built up."

If the Regulation was promulgated by the East India Company or by its Officers, namely the Governor-General of Bengal the Regulation was promulgated by a body to whom sovereign power has been delegated. This was pointed out by Lord Sebourne in the celebrated case of *Queen v. Burah* (37) at p. 193 that the

"Indian Legislature has power expressly limited by the Act of the Imperial Parliament which created it, and it can of course do nothing beyond the limits which circumscribe these powers. But, when acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself."

But if on the other hand the East India Company or the Governor-General of Bengal had not power to make this legislation then how can it be held that it was an Act of Parliament?

Mr. P. R. Dass, who argued the case as an *amicus curiae* on behalf of the plaintiff, with his usual ability and ingenuity, argued that s. 36 of the Regulation Act of 1773 is the only section under which the Governor General was given the power to legislate for the East India Company and that upon a true construction of this section it must be held that the power to legislate was only confined to the City of Calcutta. He, therefore, argued that the regulation was a piece of legislation which must be attributed to the Parliament and, therefore, was an Act of Parliament. In the first place I do not agree that s. 36 did not give the power to the Governor-General to legislate for the territories of the company beyond the city of Calcutta. The words, "for the territories subordinate thereto" are quite comprehensive to include the territories which were for the time being *de facto*, though not *de jure*, under the delegated sovereign power of the East India Company. But even if the argument of Mr. Das is accepted that the Governor-General had no power to legislate for the territories beyond the City of Calcutta in 1773 it does not follow that the Regulation was an act of Parliament, because no Act of Parliament is shown to have promulgated or approved the

(37) 5 I A 178; 4 O 172; 3 C L R 197; 3 Sar. 834; 3 Suther 556; 2 Shome L R 63; 2 Ind. Jur. 618 (P C).

(34) 33 I A 1; 33 C 219; 10 C W N 361; 8 Bom. L R 129; 3 A L J 250; 3 C L J 395; 16 M L J 115 (P C).

(35) 7 M I A 476; 4 W R P C 42; 1 Suther 373; 1 Sar. 684; 13 Moo. P C 22 (P C).

(36) 7 M I A 555; 1 Sar. 567 (P C).

promulgation of this Act. All that is pointed out is that the Parliament desired that the Court of Directors should order its officers, namely the Officers of the East India Company, to remove the abuses which had been brought to the notice of the Parliament relating to the recovery of rent, taxes and other impositions from the *zamin-dars* and that if these complaints be found to be based on truth they should be speedily removed. It will be observed that the Court of Directors was the sole judge as to whether the abuses complained of actually existed and ought to be or have been removed. The truth of the matter is that the East India Company was a trading company from 1600 to 1764 it obtained a permanent lease of the Dewani in 1765 from the Moghuls and therefore, the Parliament could not legislate as a *de jure* sovereign of the territories which were placed under the Dewani and the Nizamat of the East India Company by a permanent lease from the sovereign of India."

For these reasons I am of opinion that the Regulation was not an Act of Parliament and that it did not extend to the whole of British India. It follows that the Act is not illegal on these grounds which I have examined.

Thirdly as to the disregard of the provisions in the Instrument of Instructions. By cl. 18 of the Instrument of Instructions to the Governor it is provided that

"our Governor shall not assent in our name to, but shall reserve for the consideration of our Governor-General, any Bill of any of the classes herein specified, that it is to say:—(a) any bill the provisions of which would repeal or be repugnant to provisions of any Act of Parliament extending to British India; (c) any Bill which would alter the character of the Permanent Settlement."

The argument is that the provisions of sub-cl. (c) of this clause have been violated and, therefore the assent given by the Governor to the Act on October 12, 1938 was a disregard of these express instructions. Section 13 of the India Act contains provisions as to the Instrument of Instructions which is issued to the Governor-General and s. 53 contains provisions as to the Instrument of Instructions which is issued to the Governor of a Province. But by the second sub-clause to s. 53 it is distinctly provided that the validity of anything done by the Governor of a Province shall not be called in question on the ground that it was done otherwise than in accordance with any Instrument of Instructions issued to him. It follows that the violation of the provisions of cl. 18 (c) of the Instrument of Instructions

to the Governor of Bihar cannot be called in question as expressly provided in the Indian Act. But it may also be observed that notwithstanding the provisions in cl. 18 (a) of the Instrument of Instructions provisions have been made in s. 108 (2) (a) that no Bill shall be introduced in a Provincial Legislature if it is repugnant to the provisions of any Act of Parliament extending to British India. This shows that wherever the intention was that the proceedings would be invalid if these are contrary to any direction in the Instrument of Instructions a provision has been made directly in the Act itself.

Having thus carefully considered the interesting argument under all the three heads I am unable to hold that the Act has not been validly enacted under the provisions of the India Act. For these reasons I would dismiss the suit with costs.

s.-c.

Suit dismissed.

SIND JUDICIAL COMMISSIONER'S COURT

Criminal Revision Application No. 169 of 1940

September 3, 1940

DAVIS, C. J. AND WESTON, J.

LILOMAL MANUMAL—APPLICANT
versus

EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), s. 294-A, Second part—Large number of lottery tickets found in shop of accused—Name of accused on counterfoils in space provided for name of seller to ultimate purchaser—Printed forms containing name of accused in capitals and proposal to purchasers to buy shares in lots also recovered—Proposal and sale, if established within meaning of s. 294-A—Publication, by reason of document having been printed in press.

A large number of lottery tickets were found in the shop of the accused. The name of the accused had been entered in the counterfoils, in space provided for the name not of the purchaser of the ticket but of the seller of the ticket to the ultimate purchaser. A printed document headed by the name of the accused in large capitals containing a proposal to purchasers to buy shares each amounting to 1/72nd in lots of twelve tickets of the Irish Free State Hospital Sweepstake, and reciting that the holder of the document was entitled to 1/73rd share of any prize won by any one of the twelve tickets was also found:

Held, that proposal and sale had been established within the meaning of s. 294-A, I. P. C.

Held, also that publication was established by the very fact that the proposal forms had been printed in press; *Dew v. Director of Public Prosecutions*, relied on.

Cr. R. App. to revise the conviction and sentence passed by the Resident Magistrate, Larkana, dated October 31, 1939.

Mr. Kishinchand J. Bijlani, for the Applicant.

Mr. Partabrai D. Punwani, Advocate-General, for the Crown.

Weston, J.—This is a revision application and the applicant was tried by the Resident Magistrate, Larkana, on a charge under both parts of s. 294-A, I. P. C., that is to say, both for keeping a place for the purpose of drawing a lottery and for publication of a proposal to pay in respect of a lottery. He was convicted under both parts of the section and sentenced to pay a fine of Rs. 200 under the first part and to a fine of Rs. 100 under the second part. He appealed to the Sessions Court, Larkana, and the learned Sessions Judge set aside the conviction under the first part, holding that there was no evidence that the accused, who was a petty shop-keeper, kept his shop for the purpose of drawing a lottery. But in view of the large number of tickets of various lotteries and other documents which were found in the shop, he held that the conviction under the second part was correct and dismissed the appeal, and it is against the second part of the order of the learned Sessions Judge that the applicant now comes to us in revision.

When this matter was being argued for admission it was stated that there was no evidence of any publication by the accused of any proposal or sale, and it is also now argued that the learned Sessions Judge has conceded that there is no direct evidence that the accused ever sold lottery tickets. But in view of the documents seized from his shop, we think there is direct evidence of both the proposal and of the sale of tickets. It is impossible to believe that the accused had the large number of tickets found for any purpose other than that of sale. We find that on certain of the tickets exhibited, the name of the accused has been entered in the counterfoils, in the space provided by the persons issuing the tickets for the name not of the purchaser of the ticket but for the seller of the ticket to the ultimate purchaser. Exhibit 8 in the case is a printed document headed by the name of the accused in large capitals and it contains a proposal to purchasers to buy shares each amounting to 1/72nd in lots of twelve tickets of the Irish Free State Hospital Sweepstake, and it recites that the holder of the coupon Ex. 8 is entitled to 1/73rd share of any prize won by any one of the twelve tickets. A compositor

of the Sind News Press at Larkana was examined as a witness and he stated that the coupon Ex. 8 had been printed in the press at which he works, and on the question of publication, in the words of the Chief Justice of England in *Dew v. Director of Public Prosecutions* (1):

"Once it is established.....that the appellant* was responsible for sending the circular to the printing company to be printed, and that it was printed, there is an end to his appeal, for it is inconceivable that none of the printers read the circular."

We can see therefore no reason to interfere in revision. We do not accept the argument that the sentence is excessive and on the contrary we are inclined to hold that it is lenient.

D. Application dismissed.

(1) (1920) 89 L J K B 1166; 37 T L R 22.

ALLAHABAD HIGH COURT

Second Appeal No. 791 of 1938

December 4, 1940

COLLISTER, J.

RADHEY SHIAM—DEFENDANT—

APPELLANT

versus

NAZIR HUSAIN AND OTHERS—PLAINTIFFS

AND ANOTHER—DEFENDANTS—

RESPONDENTS

Custom (U. P.)—Haq-i-chaharum—Custom to recover haq-i-chaharum, extends also to cases of auction sales of houses—Right can be enforced against vendee.

The custom entitling a zamindar to recover one-fourth of the sale price as *haq-i-chaharum* in the case of sales of houses is not limited to a private sale alone but extends to a case of auction sale also.

The right to *haq-i-chaharum* can be enforced against the vendee.

[Case-law relied on.]

S. A. from the decision of the Civil Judge, Allahabad, dated April 27, 1938.

Mr. Shabd Saran, for the Appellant.

Messrs. Mushtaq Ahmad and Ghalib Ali, for the Respondents.

Judgment.—This is a defendant's second appeal. The suit was for a declaration that the plaintiffs own the site of a house which has been sold at auction in a decree against defendant No. 2 and has been purchased by defendant No. 1 and that they are entitled to receive one-fourth of the sale price as *zar-i-chaharum*. The suit was contested by defendant No. 1; it proceeded *ex parte* against defendant No. 2. The contesting defendant denied the plaintiffs' ownership of the site. He also denied the alleged custom generally and as regards auction sales in particular.

The Courts below have found for the plaintiffs and have decreed the suit. The question before me is whether the right to *zar-i-chaharum* is established. The learned Judge of the lower Appellate Court says :

"Thus there are numerous agreements on record commencing from 1873 to show that one-fourth price has always been paid to *zamindars*. The documentary evidence is so abundant that it is unnecessary to deal with each document. In all of them the plaintiffs have been recognized as owners of the site and one-fourth sale consideration has always been left for them."

As I was left in ignorance as to what the learned Judge meant by "abundant documents," whether he meant five or five-hundred, I asked learned Counsel for the plaintiffs-respondents, when the appeal was first before me, how many such documents there are and he informed me that there are about a dozen documents in which the right of the *zamindar* to one-fourth of the purchase price was recognized. The learned Judge also finds that on two occasions, once in 1901 and again in 1903, the right of the plaintiff's predecessor to one-fourth of the money paid at auction was upheld in execution proceedings. It does not appear that the alleged custom finds place in a *wajib-ul-arz*, but I think that there are sufficient grounds for the finding of the Courts below that the custom of *zar-i-chaharum* is established. The main contest before me is as to whether it applies to auction sales. In High Court Reports, Full Bench, for the North Western Provinces for 1866, p. 63 *Heera Ram v. Hon'ble Sir Raja Deo Narain Singh* (1) at p. 66, it was held by this Court that where by custom the *zamindar* is entitled to a quarter share of the sale proceeds as his *haq zamindari*, he is entitled to recover it on the occasion of sales, either absolute or originally conditional but subsequently becoming absolute by foreclosure, from the vendor and the purchaser. The Court observed :

"We are of opinion that the *zamindar* is entitled to a decree against *Heera Ram*, the conditional purchaser, as well as against the vendors. The *zamindar's* customary due is payable on the transfer by sale of house property; and this equally (after the sale has become absolute) whether the sale was in its inception conditional or not. The *zamindar's* right is to a share of the purchase money; it is not merely a right to claim that share from the vendor. It is therefore incumbent on the purchaser, if he would acquit himself of all liability, to see that the *zamindar* is satisfied in respect of his due...."

In *Utri Din v. Munshi Prag Narain* (2), at p. 65, a Bench of the Oudh Chief Court observed :

"It cannot be doubted that, when a conditional sale has ripened into an absolute sale, there has been a sale within the meaning of the *wajib-ul-arz*."

(1) (1866) N W P H C R 63 (66) (F B).

(2) 11 O C 64 (65).

It was further held in that case that unless the right of the landlord is limited by the *wajib-ul-arz* to a right to claim *haq-i-chaharum* from the vendor, the right can be enforced against the vendee also. In *Raghu-nandan v. Krishan Dutt* (3), it was held that a custom of a grove-holder's liability to pay *haq-i-chaharum* which is recorded in the *fard-i-riwaj-baghat* is not limited to private sales alone; it extends to a case where there has been a foreclosure as the result of a compromise between the parties to the mortgage, on the basis of which the mortgagee's claim is decreed by the Court against the mortgagor. In *Manni Lal v. Gauri Shankar* (4), it was held by a learned Judge of this Court that a custom recorded in the *wajib-ul-arz* entitling the *lambardar* to *haq-i-chaharum* in the case of sales of houses is not limited to a private sale alone but extends to a case where there has been foreclosure.

I have not been referred to any authority relating to sales upon a simple mortgage, but I do not think that there is any difference in principle between a private sale and an auction sale, and in my opinion the plaintiffs are entitled to one-fourth of the sale price. It has been held in the first two cases to which I have already referred and also in *Dhandai Bibi v. Abdur Rahman* (5) and in *Kedar Nath v. Datta Prasad Singh* (6), that the right to *haq-i-chaharum* can be enforced against the vendee. In the last named case at p. 649* Sulaiman, J. observed :

"...if the right is based on custom, then it has been held that it is the duty of the vendee to see that *haq-i-chaharum* is paid to the *zamindar*. The vendee cannot get rid of his liability by merely proving that he has paid the whole consideration to the vendor. He ought to see that the one-fourth of the sale price actually goes to the *zamindar*. If the *zamindar* had not had his share, a joint decree should be passed against the vendor and the vendee, leaving the matter to be decided in a subsequent suit."

For the reasons given above I am of opinion that the view taken by the Court below is correct. This appeal therefore fails and is dismissed. I make no order as to the costs of this appeal. Permission to appeal under the Letters Patent is refused.

S.

Appeal dismissed.

(3) A I R 1933 Oudh 527; 148 Ind. Cas. 807; 9 Luck 207; 10 O W N 1146; 17 R D 1038; 6 R O 443.

(4) (1938) A L J 981; 178 Ind. Cas. 748; A I R 1938 All. 655; 1938 A L R 912; 11 R A 334; 1938 R D 815.

(5) 23 A 209; A W N 1901, 61.

(6) A I R 1922 All. 370; 69 Ind. Cas. 99; 44 A 739; 20 A L J 646.

MADRAS HIGH COURT

Appeal No. 8 of 1937 and Civil Miscellaneous
Petitions Nos. 484 and 500 of 1940

February 28, 1940

VENKATARAMANA RAO AND ABDUR

RAHMAN, JJ.

Sree Rajah VASIREDDI BALACHANDRA-
SEKHARA VARAPRASAD BAHADUR—

APPELLANT

versus

MALLELA LAKSHMINARASIMHAM

AND OTHERS—RESPONDENTS

Hindu Law—Alienation — Co-parcener — Father entitled to half share on date of mortgage by him—Mortgagee's right to execute decree against father's share—After born son, if acquires right in property alienated by father—Alienation of family property—Only co-parceners alive at date of alienation can challenge it — After born co-parcener has no such right — Limitation Act (IX of 1908), s. 20—Money sent by debtor to his friend for payment to creditor—Friend sending same to creditor through messenger with letter that money was sent by debtor for payment to him — Payment, if amounts to acknowledgment.

Where at the date of the mortgage executed by the father, the father is entitled to a half share in the joint family property that interest which is vested in him would pass to the mortgagee. The property which is effectively carried away from the family is only a half and the other half would still be the joint family property and it is only in that half and in the equity of redemption in the other half, the afterborn son would be entitled to participate with the other son. This is in strict consonance with the principles of Hindu Law that in a Mitakshara family a member acquires right by birth only in the property which was then in existence and not in the property which has been effectively carried away from the family. [p. 711, col. 1.]

[Case-law discussed.]

Obiter.—The right to challenge alienations of family property is confined to the co-parceners alive at the date of the alienation. Such a right is denied to a co-parcener who though born subsequent to the alienation acquires an interest in the co-parcenary property before the death of the objecting or non-alienating co-parceners. 91 Ind. Cas. 471 (5), explained and relied on. 20 Ind. Cas. 958 (6), explained. 163 Ind. Cas. 712 (8), approved. 135 Ind. Cas. 367 (3), not approved. [p. 709, col. 1.]

Money was sent by a debtor to his friend for making payment to the creditor as part of the principal. The money however, was not actually paid by the friend himself but was sent to the creditor through a messenger with a letter that the amount had been sent to him by the debtor for payment and that it may be credited in the debtor's account.

Held, that the friend was debtor's agent within the meaning of s. 20, Lim. Act, and the payment operated as an acknowledgment of the debt. 94 Ind. Cas. 657 (1), approved.

A. and C. Misc. Petns. against the decree of the District Court, Kistna, dated October 31, 1936.

Mr. V. Govindarajachari, for the Appellant.

Messrs. P. Somasundaram and P. Suryanarayana, for the Respondents.

Venkataramana Rao, J.—This is an appeal from the judgment and decree of the learned District Judge of Kistna in a suit upon a mortgage dated September 19, 1929 executed by defendant No. 1 for himself and as guardian of his son, defendant No. 2, in favour of the plaintiff. Defendant No. 3 is another son of defendant No. 1 born subsequent to the date of the mortgage. The mortgage was for a sum of Rs. 2,500 payable with compound interest at Re. 0-14-6 per cent. per month. The plaintiff alleged that there was payment of Rs. 600 on November 9, 1930 and that the said payment was made by one Kasibotla Suryanarayana-murti on behalf of the defendants. The defendants denied that the said sum of Rs. 600 was paid as alleged in the plaint and defendant No. 1 pleaded that he was not personally liable on the ground that the personal remedy was barred by limitation, the suit having been instituted on March 16, 1936 more than six years from the date of the mortgage. Defendants Nos. 2 and 3 denied the truth and validity of the mortgage. Their case was that the amount was not borrowed for any family necessity or for payment of any antecedent debt but for conducting a business newly started by defendant No. 1 himself. Another point taken was that even assuming the mortgage to be true, it was binding only on the mortgagor's share which must be deemed to be one-third, and defendant No. 3 though born subsequent to the date of the mortgage would be entitled also to a third share in the property mortgaged.

The learned District Judge found the mortgage to be true but held that it was not binding on defendants Nos. 2 and 3 on the ground that the amount borrowed was for the purpose of a business started by the father and not for any antecedent debt or family necessity. He also found that Rs. 600 was paid by the said Suryanarayana-murti but he was not an agent duly authorized within the meaning of s. 20, Lim. Act, and therefore the said payment would not save the bar of limitation in respect of the personal liability of defendant No. 1. He therefore held that defendant No. 1 was not personally liable for the debt. In regard to the interest of defendant No. 1 in the property he held that he was entitled to half a share in the suit property and that defendant No. 3 cannot repudiate the alienation made before his birth. The plaintiff has preferred this appeal in so far as the decree is against him, that is, in so far as it negated the personal liability of defendant No. 1. Defendants Nos. 2 and 3 have preferred a memorandum

of objections raising the contention that the lower Court should have passed a decree only for a third share of the property and not for a half share.

Two questions therefore fall to be decided, namely (1) whether defendant No. 1 is personally liable for the debt and (2) what is the share of defendant No. 1 in the property mortgaged which the plaintiff is entitled to sell in execution of the decree in his favour. The first question turns on the determination of the issue whether the payment of Rs. 600 operates as an acknowledgment of debt within the meaning of s. 20, Lim. Act. The payment of Rs. 600 was apparently made towards the principal and was so treated by the plaintiff. In order that a part-payment of a principal can be relied on for saving the bar of limitation within the meaning of s. 20, Lim. Act, it must fulfil three requisites: (1) the payment must be made by the debtor or his agent; (2) the agent must have been empowered specifically to make the said payment; and (3) there must be an acknowledgment of the said payment in the handwriting of or in a writing signed by the debtor or his agent, that is, if the payment was made by the debtor, in the handwriting of or in a writing signed by the debtor or if the payment was made by the agent, in the handwriting of or in a writing signed by the agent. The question is whether the view of the learned District Judge that K. Suryanarayanamurti (P. W. No. 4) in making the payment was not the duly authorized agent of the defendants within the meaning of s. 20 is correct. P. W. No. 4 admits that he paid Rs. 600 in part-payment of the debt. He acknowledges the fact of payment in a letter Ex. B signed by him and delivered to the plaintiff, which runs thus:

"Irusalnamah submitted by Kasibotla Ramayya Garu's son Suryanarayanamurti, resident of Challapall, Divi taluq:

Out of the amount due under the hypothecation deed executed on September 19, 1929, in your favour by Mallela Venkatapayya Garu's adopted son Lakshmi Narasimham, resident of Godugupeta, Bandar, a sum of Rs. 600 (in words, six hundred) has been sent to me to be credited towards the said deed and so I have sent the same to you. I shall get the said amount credited towards the said deed by the said Lakshmi Narasimham.

(Sd.) Kasibotla Suryanarayanamurti,
November 9, 1930."

Mr. Somasundaram on behalf of defendants Nos. 2 and 3 does not dispute the fact of payment but contends that P. W. No. 4 was not an agent within the meaning of the section but only a mere messenger who made the payment and that Ex. B therefore cannot save limitation. On the evidence on record, we are clearly of the opinion that P. W.

No. 4 in making the payment was the duly authorized agent of the defendants within the meaning of the section. P. W. No. 4 is a close relation of defendant No. 1. It was P. W. No. 4 that arranged for the loan. Exhibit B clearly says that the sum of Rs. 600 was sent to him for the express purpose of making the payment on his behalf and crediting the same towards the deed. No doubt P. W. No. 4 says in his evidence before the Court that the money was not sent by defendant No. 1 but he had the money belonging to one Venkata Ramanamma and inasmuch as the plaintiff pressed for the payment of the debt he paid the same on behalf of defendant No. 1. This story cannot possibly be believed in the face of the express recital in Ex. B. P. W. No. 4 says that he told defendant No. 1 that he made the payment of a sum of Rs. 600 to the plaintiff and that defendant No. 1 told him that he would settle later. Though defendant No. 1 as D. W. No. 1 denies P. W. No. 4 having told him that such a payment was made, we cannot accept this denial as true. Four months before the plaintiff filed the suit the plaintiff sent a registered letter Ex. D dated March 3, 1936 to defendant No. 1 wherein the fact of payment of Rs. 600 on his behalf by Suryanarayanamurti was mentioned and no reply was sent thereto. Therefore the recital in Ex. B that Rs. 600 was sent by defendant No. 1 must be true and there is no reason to think that P. W. No. 4 was making a false recital. It is very likely that that sum was sent to P. W. No. 4 as he was the person who arranged for the loan. The decision in *Ramkumar Sewchand v. Nanuram Poddar* (1) on which Mr. Somasundaram relies does not support him, on the other hand, as in this case, the payment was made by a friend of the debtor acting as his agent but he did not actually pay the money to the creditor but sent it through a messenger with a letter which was similar in terms to Ex. B. It was held that that was a valid acknowledgment within the meaning of s. 20, Lim. Act.

The next question is whether the decree of the learned District Judge directing a sale of a half share of defendant No. 1 is right. The contention of Mr. Somasundaram is that an after-born son is entitled to question the alienation made by a father without any legal necessity when on the date of the alienation there were other sons living who could object to the said alienation and as in this case, on the date of the alienation defendant No. 2 was born and in existence, it therefore fol-

(1) 53 C 163; 94 Ind. Cas. 657; A I R 1926 Cal. 510.

lows from this that defendant No. 3 would be entitled to a third share and what would pass to the alienee would only be a third share of the father and therefore the decree ought to have directed only a sale of the one-third share of the father in the property mortgaged. In support of his contention Mr. Somasundaram relies on the decisions reported in *Amirthalinga Thevan v. Arumuga Ambalagan* (2), *Chandramani v. Jambeswara* (3) and *Muthu Kumara Sathapathiar v. Sivanarayana Pillai* (4). Though in *Chandramani v. Jambeswara* (3) it is stated as settled law that if a son was born after the alienation of the family property by his father, if there were other members who had not consented to and validated the alienation, it can be questioned by an after-born son, the proposition would seem to require reconsideration in view of the decision of the Privy Council in *Lal Bahadur v. Ambika Prasad* (5). The learned Editor of Mayne's book on Hindu Law comments on that decision on pp. 511 and 512 thus :

"An observation of the Privy Council in *Lal Bahadur v. Ambika Prasad* (5) would seem to confine the right to challenge alienations of family property to the co-parceners alive at the date of the alienation and to deny such a right to a co-parcener who though born subsequent to the alienation acquires an interest in the co-parcenary property before the death of the objecting or non-alienating co-parceners. The point was not considered and it may not be right to regard the observation as a decision on the question. It would be against the whole current of Indian authorities which were neither referred to nor considered and cannot therefore be deemed to be overruled. If however the observation means that co-parceners born in the family subsequent to an alienation before the death of the other co-parceners who could challenge it, have no right to the property and consequently no right to challenge the alienation it would conflict with what was said by the Board in *Ramkrishna Kedarnath v. Jainarayan* (6) as well as with the cardinal principle of Hindu Law."

With great respect to the learned editor we are not inclined to agree with these remarks. We are inclined to think that the decision of the Privy Council is a direct decision on the question. In that case the facts were as follows: Ram Din and his

(2) 28 L W 634; 112 Ind. Cas. 553; A I R 1928 Mad. 986; (1928) M W N 602.

(3) 34 L W 598; 135 Ind. Cas. 367; A I R 1931 Mad. 550; (1931) M W N 263; Ind. Rul. (1932) Mad. 111.

(4) 56 M 534; 141 Ind. Cas. 122; A I R 1933 Mad. 158; 64 M L J 66; Ind. Rul. (1933) Mad. 73; 37 L W 19; (1933) M W N 199.

(5) 47 A 795; 91 Ind. Cas. 471; A I R 1925 P C 264; 52 I A 443; 28 O C 371; 2 O W N 913; (1925) M W N 852; 12 O L J 649; 23 L W 220; 30 C W N 701 (P C).

(6) 40 I A 213; 20 Ind. Cas. 958; 40 C 966; 18 C L J 237; 17 C W N 1189; (1913) M W N 661; 14 M L T 163; 15 Bom. L R 867; 11 A L J 865; 25 M L J 512; 10 N L R 1 (P C).

brother Pateshwari were two brothers. On August 6, 1895 as managers of the family they mortgaged certain family property. They executed two mortgages, one simple and the other usufructuary. On the date of the mortgage Ram Din had two sons, Awadh Behari and Jantri Prasad, both of them minors. Long subsequent to the date of the mortgages the plaintiffs were born to Awadh Behari. On September 12, 1904 Pateshwari and Ram Din sold the property to the usufructuary mortgagee in part satisfaction of his mortgage and for cash received for payment of the other debts. The suit was brought in 1919 to set aside the sale when the plaintiff's father was alive and his right to set it aside was barred by limitation. Dealing with the right of the plaintiffs to question the mortgages their Lordships observed as follows :

"The respondents, plaintiffs in the suit, are sons of Awadh Behari. In 1895 they were still unborn. This, as will later appear, is one of the most important facts in the case. It follows from it that these two mortgage deeds have always been binding on the respondents. The only joint family estate to an interest in which they succeeded was an estate which to the extent of these two mortgages had already been alienated."

These observations of their Lordships seem to be clear and there seems to be no ambiguity about them. If the matter had rested there, one might have said that they were in the nature of an *obiter*. The learned Judicial Commissioner of Oudh has rested his decision on the ground that on the date of the sale the mortgages must be deemed to be antecedent debts and therefore the sale was justified. But their Lordships were not inclined to rest their decision on this ground but expressly put it on the ground that the plaintiffs were not born on the date of the mortgage. This is how they deal with the question at p. 801* :

"The effect of that explanation (the explanation of Sahu Ram's case in *Brij Narain v. Mangla Prasad* (7) in their Lordships' judgment is to show that in the circumstances of this case both of this mortgages of 1895 were 'antecedent debts' which would justify for their liquidation a sale of family property not otherwise improper. In the present case however it is not in their Lordships' judgment, necessary to invoke any such doctrine in order to counter the objection to the sale now being dealt with. Both mortgages, as their Lordships observe once more, were binding upon the respondents. A sale of family property otherwise unobjectionable, which resulted in the removal from what remained of it of the burden *pro tanto* of these encumbrances, cannot be successfully attacked by those so bound."

(7) 46 A 95; 77 Ind. Cas. 689; A I R 1924 P C 50; 51 I A 129; 21 A L J 934; 46 M L J 23; 5 P L T 1; 28 C W N 253; (1924) M W N 68; 19 L W 72; 2 Pat. L R 41; 10 O & A L R 82; 33 M L T 457; 26 Bom. L R 500; 11 O L J 107; 1 O W N 48 (P C).

This decision is therefore a direct decision on the question whether an after-born son is entitled to impeach an alienation made before his birth. And the case in *Ramkrishore Kedarnath v. Jainarayan* (6) does not enunciate any principle in conflict with this decision. In that case the facts were as follows: The plaintiffs were the four sons of one Kedarnath who in October 1898 made a disposition of a part of the family property by way of partition to Jainarayan who was alleged to be an adopted son of his undivided brother's widow. The suit was instituted on December 20, 1907 to set aside the said alienation. Plaintiff No. 1 was born on December 20, 1886. The other plaintiffs were born between 1892 and 1894. The learned Judicial Commissioner held that as plaintiff No. 1 instituted the suit within three years of attaining the age of 21, he was entitled to the benefit of s. 7, Lim. Act of 1877, and the suit was not barred as against him, but he held that it was barred as against his younger brothers, who were born after the commencement of what he regarded as the adverse possession of the defendant Jainarayan. Their Lordships dispose of the correctness of this view thus:

"It was however conceded before this Board, and as their Lordships think, rightly conceded, that if plaintiff No. 1 succeeds in the suit his younger brothers born before a partition of the estate will be entitled to share in the relief."

This does not lend countenance to the view that the younger sons are entitled to impeach the alienation. What was meant by their Lordships was that if the elder son recovers the estate the younger son would be entitled to share in it being joint family property recovered for the family. Apparently in *Visweswara Rao v. Suryt Rao* (8) their Lordships Madhavan Nair and Stone, J.J. were not inclined to agree with the view expressed in *Chandramani v. Jambeswara* (3) as settled law—*vide* observations at p. 687*—because in that page the learned Judges after a review of the case-law remarked thus:

"Whether or not an after-born son can effectively join with existing sons to attack or resist an alienation, the cause of action or the right to defend is a cause or right that was in those members of the family that were alive at the time of the alienation and were not consenting."

They express an opinion that if before the after-born son is born, the sons in existence were to die, the right is lost to the after-born son, though the right to set aside an aliena-

tion may be within the time from the date when the cause of action accrued to the sons in existence. This seems to be in conflict with the view expressed in Mayne's book at p. 513 where it is stated that it is a right in every member of co-parcenary for the time being and as long as that right in the co-parcenary exists it would be immaterial whether he was alive on the date of the alienation or born subsequently. Much may be said in favour of either view and it may be that the view expressed in Mayne's book is sounder. The scope and effect of the Privy Council decision in *Lal Bahadur v. Ambica Prasad* (5), may require consideration. But we think that in the view we are taking of the share which the father is entitled to, it is not necessary to decide the point. The question to what share he is entitled is quite distinct from the question whether an after-born son is entitled to question the alienation or not. We will assume he can and deal with the question of the father's share on that footing. So far as our Presidency is concerned, it is accepted law that a co-parcener is entitled to alienate his share for value. What the alienee gets by virtue of such an alienation is not a bare right to partition but a vested interest, the extent of which will have to be ascertained by a suit for partition. The Full Bench decision of our High Court in *Chinnu Pillai v. Kalimuthu Chetti* (9), has ruled that the interest which an alienee would get would be the share to which the alienor would be entitled at the time of the alienation undiminished by any births or deaths in the family subsequent to the date of the alienation. The rule is thus stated by White, C. J. in delivering the judgment of the Full Bench:

"As pointed out by the Privy Council in *Suraj Bansi Koer v. Sheo Persad Singh* (10), an alienation by a co-parcener of his joint interest in family property is inconsistent with the strict theory of a joint and undivided Hindu family. But the doctrine recognizing this right is well established in the presidency, and it seems to me to be only the logical development of this doctrine that, for the purpose of ascertaining the quantum of interest, alienated; the test to apply should be the state of the family as regards the number of co-parceners, at the time the alienation is made, and not the state of the family when the owner of the interest seeks to reduce his interest into possession."

The learned Judges in *Chinnu Pillai v. Kalimuthu Chetti* (9), expressly dissented from the decision of the Full Bench in *Rangaswami v. Krishnayyan* (11), which took the view that the interest of the alienor would

(8) 59 M. 667; 163 Ind. Cas. 712; A I R 1936 Mad. 440; 70 M L J 360; (1936) M W N 163; 43 L W 349; 9 R M 46.

* Page of 59 M.—[Ed.]

(9) 35 M. 47; 9 Ind. Cas. 596; 21 M L J 246; (1911) M W N 238; 9 M L T 389.

(10) 5 C 148; 6 I A 88; 4 C L R 226; 4 Sar. 1 (P O).

(11) 14 M 408; 1 M L J 603 (F B).

be diminished by births of subsequent members of the family. They in effect followed the view expressed by Bhashyam Ayyangar, J. in *Ayyagiri Venkataramayya v. Ayyagiri Ramayya* (12), where the learned Judge took the view that the matter was concluded by the decision of the Privy Council. The learned Judge at p. 718* observes as follows:

"A co-parcener may profess to alienate either his undivided share in the whole of the family property or his undivided share in some specified portion of the family property or the whole of a specified portion of the family property.....The same thing may take place in the case of involuntary sales, also. In all these cases the sale operates upon the interest and share of the transferor as the same existed at the date of the transfer and the transferee must work out the transfer by bringing a suit for ascertaining what the share and interest of the transferor was at the date of the transfer.....When the transfer is of an undivided interest in the whole of the family property, the transferee will get whatever may be allotted to the transferor's share in a suit for partition. But if the transfer relates to any specified portion of the family property, there is the risk that it may turn out that in a partition of the whole property it is impracticable or inequitable to allocate either the whole or a part of such specified portion of the share of the transferor."

In giving expression to this view his Lordship was only following the decision of the Privy Council in *Suraj Bansi Koer v. Sheo Prasad Singh* (10). In that case the mortgage was executed by the father Adit Shahai and on the date of the mortgage he was entitled to a third share. The question was what passed to the purchaser at the execution sale. In dealing with this contention their Lordships of the Judicial Committee observed thus:

"On the other hand, if the law of the Presidency of Fort William were identical with that of Madras, the mortgage executed by Adit Sahai in his lifetime as a security for the debt, might operate after his death as a valid charge upon *Mauza* Bussumbhurpore to the extent of his own then share."

In the present case at the date of the alienation the father was entitled to a half share in the joint family property and that interest which was vested in him would pass to the mortgagee. The property which has been effectively carried away from the family was only a half and the other half would still be the joint family property and it is only in that half and in the equity of redemption in the other half, the alienation being a mortgage, the afterborn son would be entitled to participate with the other son. This is in strict consonance with the principles of Hindu Law that in a Mitakshara family a member acquires right by birth only in the property which was then in exist-

ence and not in the property which has been effectively carried away from the family. In so far as the alienation of the father's interest is concerned, it must be deemed to have been effectively carried away because he is entitled to alienate it for value. If the view indicated in *Chinnu Pillai v. Kalimuthu Chetti* (9), namely, that the alienee gets the interest which the father was entitled to on the date of the alienation is to be followed, the view taken by the learned District Judge in this case that the father was entitled to a half share and the mortgagee is entitled to sell that share in execution of his decree is correct.

There is only one reported decision which directly deals with this matter and that is a decision of our learned brother Pandrang Row, J. reported in *Kasi Visweswara Rao v. Varahanarasimham* (13). In that case the father sold the property in 1919. On that date there was only one son in existence and subsequently two sons were born. The alienation was not found to be such as to be binding on the sons. On the date of the suit there were the father and three sons. The question was to what share the alienee would be entitled. The learned Subordinate Judge in that case following *Muthu Kumara Sathapathiar v. Sivanarayana Pillai* (4), held that the father would only be entitled to a fourth and the alienee would only get a fourth share. Pandrang Row, J. following *Chinnu Pillai v. Kalimuthu Chetti* (9), held that the share which the father would get would be the share which he would be entitled to on the date of the alienation which would be half and therefore he gave a decree for a half share. The learned Judge declined to follow *Muthu Kumara Sathapathiar v. Sivanarayana Pillai* (4) and if we may say so with respect, rightly.

The Full Bench in *Chinnu Pillai v. Kalimuthu Chetti* (9), was constituted for the express purpose of considering the view expressed in *Rangaswami v. Krishnayyan* (11), that the share of the alienee should be determined not on the date of the alienation but on the date of suit and if subsequent to the date of alienation more members were born the alienee would get a reduced share. At the time when the Full Bench was constituted and the question was discussed there were five Judges but at the time when the judgment was about to be delivered one of them ceased to be a Judge of the High Court and the Full Bench was re-constituted with four Judges and the judgment was delivered.

(13) A I R 1937 Mad. 631; 172 Ind. Cas. 666; (1937) 1 M W N 696; 10 R M 478.

ed dissenting from the said view in *Ranga-swami v. Krishnayyan* (11). The judgment was delivered in 1912 and so far as we know, it was accepted as sound law both by the Bench and the Bar and followed till Jackson, J. struck a dissenting note in *Muthu Kumara Sathapathiar v. Sivanarayana Pillai* (4) and declined to follow the view expressed in *Chinnu Pillai v. Kalimuthu Chetti* (9). Our own view is that the view expressed in *Chinnu Pillai v. Kalimuthu Chetti* (9), is the sounder view. In *Amirthalinga Thevan v. Arumuga Ambalagaran* (2), though the question was not discussed it was the view that was taken in *Chinnu Pillai v. Kalimuthu Chetti* (9), that was followed. This is clear from the following observations of Tiruvengkatachari, J. in that case at p. 640* :

"The only remaining point to be considered is whether defendant No. 6 who was born after the alienation has any and if so what right in the plaint properties which would entitle him to contest the suit. Under the sale deed, Ex. A the plaintiff acquired only the one-third share of the father Mari Ambalagaran in the joint family properties. The remaining interest therein appertained to the joint family of the alienor ; and it so remained at the date of defendant No. 6's birth with the result that he also acquired an interest in it by his birth."

The view that the father's share was a third and it is only in the remaining interest, that is in the two-thirds the after-born son, defendant No. 6, could be held to have acquired an interest by birth is in strict conformity with the view expressed in *Chinnu Pillai v. Kalimuthu Chetti* (9). In *Chandramani v. Jambeswara* (3), the question of share was not considered at all. We are therefore of the opinion that the decree of the learned District Judge in directing a sale of a half-share of the father is correct.

In the result we modify the decree of the learned District Judge by declaring that the father is personally liable to pay any balance that might remain after the sale of his interest in the mortgaged property and the plaintiff will be entitled to apply for a decree for the said balance against the father personally and against the joint family properties in the hands of defendants Nos. 1 to 3. The appellant will have half the costs of the appeal but there will be no costs in the memorandum of objections. Two applications (C. M. P. Nos. 500 and 484 of 1940) have been put in under the Mad. Agri. Debt Relief Act IV of 1938, one by Mr. A. Venkatachalam on behalf of respondent No. 1 and the other by Mr. Somasundaram on behalf of respondents Nos. 2 and 3. The plaintiff will have leave to file a counter-

affidavit objecting to the reliefs sought in the said petitions. We direct these applications to be sent to the lower Court for adjudication on the merits. The decree that we pass herein will be subject to any relief which the applicants may get in those petitions.

N.-D.

Order accordingly.

BOMBAY HIGH COURT

Income-tax References Nos. 1 and 2 of 1940
October 8, 1940

BEAUMONT, C. J. AND KANIA, J.

In re PATIALA STATE BANK.

Government of India Act, 1935, (25 & 26 Geo. V Ch. 42), s. 65—Government Trading Taxation Act (III of 1926) is intra vires the Government of India—Government Trading Taxation Act (III of 1926), s. 2—Patiala State, if falls within "His Majesty's dominions"—Act, whether confined to business carried on in British India—Investment by Patiala State Bank in Government of India securities—Income from it, if taxable—Property in British India taken over by Patiala State Bank from its debtor, a subject of State, in part satisfaction of loan—Income arising from it, if assessable—Act legislates only in respect of Dominion Government's trading operations.

A tax on income accruing or arising or received in British India by a person resident outside British India is legislation relating to something, i. e., certain income, in British India, and therefore, it falls within the very wide and general words of s. 65, Govt. of India Act. Therefore the Govt. Trading Taxation Act of 1926 is *intra vires* the Govt. of India. [p. 714, col. 1.]

The Patiala State is a State under His Majesty's protection, and therefore comes within the expression "His Majesty's Dominions" in the Govt. Trading Taxation Act. That Act is therefore applicable to Patiala State Bank rendering it liable to taxation under the Income Tax Act. [p. 713, col. 2.]

The Govt Trading Taxation Act is not confined to business carried on in British India. The title, the Preamble and the operative part of s. 2 of the Act make it perfectly clear that it applies to every case in which the Dominion Govt. is carrying on a business, and when that happens, the Dominion Govt. is liable to Indian income-tax, as though it were a company. 127 Ind. Cas. 579 (1), dissented from. [*ibid.*]

The income from the investment by the Patiala State Bank of a part of its surplus funds in the Govt. of India securities are profits from the business of the bank received in British India, and as such taxable. [p. 714, col. 2.]

The property situated in British India taken over by the Patiala State Bank from its debtor, a subject of the Patiala State, in part satisfaction of a loan advanced to him, is not property occupied in British India for the purposes of its trade or business in British India within the meaning of s. 2, Govt. Trading Taxation Act, but all income arising from such property is liable to assessment by virtue of the provisions of the said Act. By enacting Govt. Trading Taxation Act, 1926 an attempt was made not to legislate generally in respect of the public property of a Dominion Govt. but in respect of its trading operations only. [p. 714, col. 2; p. 715, col. 1.]

Sir Jamshedji Kanga, for the Assessee.

Messrs. M.C. Setalvad (Advocate-General) and G. N. Joshi, for the Commissioner of Income-tax.

Beaumont, C. J.—This is a reference made by the Income-tax Commissioner under s. 66 (2), Income Tax Act, 1922, and the substantial question, which arises is whether the Patiala State Bank is liable to be assessed to income-tax under the Govt. Trading Taxation Act, III of 1926. The facts found are that the Patiala State Bank is owned wholly by the Patiala State and carries on banking business. It has no separate entity, and I take it that when the Commissioner says "it is owned wholly by the Patiala State," he means that it is owned and controlled by the Ruler of the Patiala State, that is, the Maharaja, who constitutes the Govt. of the State. The questions raised relate to the assessments for two years, 1935-36 and 1936-37, and in respect of each of those years I gather that a notice was sent to the principal officer of the Patiala State Bank, and he made a return on which the assessments are based. We are not therefore concerned to consider whether the Patiala State Bank was bound to comply with the notices, and to make the required returns, nor are we concerned to consider what would have happened, if the Patiala State Bank had adopted a different course. It is possible that in that event the machinery for taxing a foreign company through its agent would have been applicable, but that is not a matter which calls for our decision. The principal point, which has been argued, and the only question of substance is whether the Govt. Trading Taxation Act of 1926 is a valid Act. The argument of the assessee is that it is *ultra vires* the Govt. of India. Before determining whether or not it is *ultra vires* the Govt. of India, it is necessary to consider what the Act, actually means and purports to effect. The title is :

"An Act to determine the liability of certain Govts. to taxation in British India in respect of trading operation."

Then the Preamble is :

"Whereas it is expedient to determine the liability to taxation for the time being in force in British India of the Govt. of any part of His Majesty's Dominions, exclusive of British India, in respect of any trade or business carried on by or on behalf of such Govt."

Then in s. 2 it is enacted as follows :

"(1) Where a trade or business of any kind is carried on by or on behalf of the Govt. of any part of His Majesty's Dominions, exclusive of British India, that Govt. shall in respect of the trade or business and of all operations connected therewith, all property occupied in British India and all goods owned in British India for the purposes thereof, and all incomes arising in connection therewith be liable (a) to taxation under the Indian Income Tax Act, 1922, in the same manner and to the same extent as in the like case a company would be liable."

Sub-s. (2) provides :

"(2) For the purposes of the levy and collection of income-tax under the Indian Income Tax Act, 1922, in accordance with the provisions of sub-s. (1), any Govt. to which that sub-section applies shall be deemed to be a company within the meaning of that Act, and the provisions of that Act shall apply accordingly."

Then sub-s. (3) enacts that the expression "His Majesty's Dominions" includes any territory which is under His Majesty's protection. Having regard to the *sanads*, to which we have been referred, of 1815, 1847 and 1860, I feel no doubt that the Patiala State is a State under His Majesty's protection, and therefore comes within the expression "His Majesty's Dominions" in Act III of 1926. It is to be noticed that the Act applies where a Govt. of the nature specified in the Act, which for simplicity I will refer to as "Dominion Govt.," carries on a business anywhere. I can see no justification for the view, which appears to have prevailed in the only case to which we have been referred in which this Act has been considered by a High Court in India, namely *In the matter of Ram Prasad* (1), that the Act is confined to business carried on in British India. It seems to me that the title, the Preamble and the operative part of s. 2 make it perfectly clear that it applies to every case in which the Dominion Govt. is carrying on a business, and when that happens, the Dominion Govt. is liable to Indian income-tax, as though it were a company.

Turning to the Income Tax Act of 1922, which is the Act applicable in this case, 'company' is defined in s. 2 (6) as meaning a company as defined in the Companies Act, 1913, or formed in pursuance of an Act of Parliament or of Royal Charter or Letters Patent, or of an Act of the Legislature of a British possession, and includes any foreign association carrying on business in British India, and which is certified as therein mentioned. I think the effect of Act III of 1926 is to add to that definition so as to include a Dominion Govt. deemed to be a company under Act III of 1926. The effect of the charging sections, ss. 3 and 4, is to render the income, profits and gains of a company liable to British Indian Income Tax Act, if such income, profits and gains accrue or arise or are received in British India. So that Act III of 1926 comes to this : that where a Dominion Govt. is carrying on a business anywhere, it is liable to the British Indian Income Tax Act in respect of the income, profits and gains of that business which accrue or arise or are received in British India.

(1) 52 A 419; 127 Ind. Cas. 579; A I R 1930 All. 389; (1930) A L J 579; Ind. Rul. (1930) All. 931.

The Act was, I understand, passed in pursuance of reciprocal arrangements with Great Britain and Dominion Govts., and it is to be noticed that it is in very similar terms to s. 25, Finance Act of 1925, which applies to Great Britain.

The contention of the assessee is that this Act is *ultra vires* the Indian Legislature, since it does not fall within the legislative powers conferred by s. 65, Govt. of India Act, 1919. That section, so far as material, provides: "The Indian Legislature has power to make laws for all persons, for all Courts, and for all places and things, within British India." The words are expressed in the most general terms, and in effect enact that the power of the Indian Legislature is to be territorial and is to extend to all persons and things within British India. Now, the argument is that income-tax is a tax imposed on persons, and that the Ruler of the Patiala State cannot be regarded as a person within British India. The latter proposition is, no doubt, correct, and up to a point I agree with the contention of the assessee on the first proposition. I think that, properly considered, income-tax is a tax on a person in relation to his income. The tax is not imposed on income generally; it is imposed on the income of a person, natural or artificial, as defined in s. 3. The assessment has to be made against a person, and the tax has to be collected from the assessee. The tax is not made a charge on the income upon which it is levied, and I think, broadly speaking, it is accurate to say that income-tax is a tax imposed upon a person in relation to his income. But, in my opinion, that does not mean that legislation as to income-tax can never be regarded as legislation as to a thing in British India within the meaning of s. 65, Govt. of India Act. In my opinion, a tax on income accruing or arising or received in British India by a person resident outside British India is legislation relating to something, i. e., certain income, in British India, and, therefore, to my mind, it falls within the very wide and general words of s. 65. In my judgment, therefore, Act III of 1926 is *intra vires* the Govt. of India. That was so held in *In the matter of Ram Prasad* (1), to which I have referred, though, as I have indicated, I think that the learned Judges in that case were incorrect in treating this Act of 1926 as being confined to a business carried on in British India. If the Act is *intra vires*, that disposes of the principal question raised by the Commissioner, which is question (1):

"Whether the Govt. Trading Taxation Act (III

of 1926) is applicable to the Patiala State Bank rendering it liable to taxation under the Income Tax Act, 1922?

The answer must be in the affirmative.

Question No. (2) as:

"Whether investment by the Patiala State Bank of a part of its surplus funds on the Govt. of India securities constitute trading or business in British India within the meaning of s. 2, Govt. Trading Taxation Act?"

This question is inaccurately expressed. Section 2 does not mention trading or business in British India. We can only answer the question by saying that the income from the investments are profits from the business of the bank received in British India, and as such taxable. Question No. (3) is:

"Whether the property situate at Mussoorie taken over by the Patiala State Bank from its debtor, a subject of the Patiala State, in part satisfaction of a loan advanced to him, is property occupied in British India for the purposes of its trade or business in British India within the meaning of s. 2, Govt. Trading Taxation Act, and whether all income arising from such property is liable to assessment by virtue of the provisions of the said Act?"

Substantially I think the answer to this question must be in the affirmative, but I think that the property, which has been taken over in respect of a bad debt of the banking business, is not property occupied in British India for the purposes of the business, but the income derived from such payments is income arising in connection with such business, and in that sense falls to be taxed. Then question No. (4) is:

"Whether the sum of Rs. 66,720 received by the Patiala State Bank on the sale of its investments during the year 1934-35 being the excess realized by it over the cost price of such investments, which has been included under the heading of profits in the relative profits and loss accounts and balance sheet, is assessable to income-tax?"

That seems to be really a question of fact, and we must answer it in accordance with the facts found by the Commissioner. He has found that these profits on the sale of investments are part of the income of the Bank. It might be suggested that they are accretions to capital, but the Commissioner having found from the accounts of the Bank that they are profits of the Bank, I think we must answer the question in the affirmative. Question No. (5) seems to be covered by the answer to question No. (2). Question No. (6) does not arise. The answer to question No. (7) must be answered in the affirmative. We answer the questions accordingly and direct the assessee to pay costs. Costs to be recovered from the assets of the Patiala State Bank.

Kania, J.—The relevant facts and sections of Acts of the Indian Legislature have been referred to in the judgment just delivered by the learned Chief Justice. The important

question argued before us is in respect of the validity of Act III of 1926 described as "an Act to determine the liability of certain Govts. to taxation in British India in respect of trading operations." It was argued on behalf of the assessee that the Act was *ultra vires* the Govt. of India, whose powers to legislate were limited by s. 65, Govt. of India Act, 1919. It was secondly argued that the Patiala State was not one of His Majesty's Dominions, as stated in s. 2 (3) of Act III of 1926, and, therefore, it was not covered by the Act. It was next argued that the machinery to assess the State under s. 42 and/or s. 43, Income Tax Act, 1922, was not adopted. It was lastly contended that as the State is owned by the Ruler; it was not competent for the Govt. of India to legislate in respect of the Ruler.

The question, whether the Act was *ultra vires* the Govt. of India or not was raised and decided in *In the matter of Ram Prasad* (1), and the learned Judges there rejected the contention that it was *ultra vires*. The argument in substance is that Act III of 1926 makes a Dominion Govt. in respect of its trade or business; wherever carried on, liable to be taxed as a company. The words "in British India" are not used in connection with trade or business or income arising in connection therewith. Where the Legislature wanted to use those words in connection with property occupied in British India, and goods owned in British India, they expressly said so. From the omission of those words in connection with trade or business or income arising in connection therewith, it was contended that the legislative power of the Govt. of India had been exceeded.

In my opinion, that contention is unsound. The only object of the Act of 1926, in my opinion, was to legislate in respect of a particular use of the public property of a Dominion Govt. Under International Law the Legislature of a country does not enact laws which affect the public property of another country. By Act III of 1926 therefore the attempt was not to legislate generally in respect of the public property of a Dominion Govt. but in respect of its trading operations only. It appears that a mutual arrangement was made between the different Dominions of His Majesty by consent, and by s. 2 (3) the Act was made applicable equally to territories which were under His Majesty's protection or over which a mandate was being exercised by His Majesty's Govt. If such a Dominion Govt. carried on trade or business, the Govt. of

India enacted that it should be liable to tax under the Income Tax Act, in the same manner and to the same extent as in the like case a company would be liable.

In other words, the legislation was to state that a Dominion Govt. carrying on trade would, for the purpose of the Income Tax Act, be treated as a company in like circumstances. If the state carried on business within British India, its liability would be as defined by the Income Tax Act. If it carried on business wholly outside British India, it would not be affected by the Income Tax Act, because that Act only was in respect of income within British India, either actually accruing or deemed to accrue as defined by that Act. This piece of legislation is covered by the words of s. 65, Govt. of India Act, which permit the Govt. of India to legislate for all persons: for all Courts, and for all places and things, within British India. While it cannot be disputed that the liability to pay income-tax is on the individual, it is a tax on the income. In so far, therefore, as the liability of a Dominion Govt. was stated by Act III of 1926 to be in respect of its income covered by the Income Tax Act, there appears no reason to consider it *ultra vires*.

With respect, I am unable to agree with the line of reasoning adopted in *In the matter of Ram Prasad* (1), where the words "in British India" were attempted to be read as connected with "trade" in s. 2 of Act III of 1926. The words "in British India" have to be read in connexion with income by reason of the provisions of the Income Tax Act. But Act III of 1926 does not in terms state that the word "trade" or "business" or "income arising in connexion therewith" have to be in British India. I find no justification for including those words in s. 2 of Act III of 1926, in connexion with "trade," business or income arising in connexion therewith. As I have pointed out, by reason of sub-s. (3) of s. 2; however, the result is the same namely that the liability of the Dominion will be as if it were a company working under like circumstances under the Income Tax Act. The second contention, that the Patiala State was not under the protection of His Majesty, cannot be upheld in view of *Sanads* III and IV of 1815, which are found printed in Aitchison's "Treaties, Engagements and Sanads" Vol. 1, at pp. 158-159. It is there clearly provided that the Raja had the right of protection from the British Govt. The Patiala State is, therefore, a Dominion under the protection of His Majesty. The third contention that the

liability to tax has to be worked out under ss. 42 and 43, and there was no other method by which the State Bank could be assessed, discloses some misunderstanding. In *Whitney v. Inland Revenue Commissioners* (2), Lord Dunedin pointed out that there are three stages in the imposition of a tax as follows (p. 52*):

"....there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend upon assessment. That, *ex hypothesi*, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

The question of how the person whose liability to tax is determined has to be assessed is a matter of machinery. It is admitted here that the Patiala State Bank (assessee) when called upon sent a return to the Income-tax Officer. We are not therefore, at this stage concerned with the question what would have happened, if the assessee had refused to send a return. I do not propose to anticipate an argument on that point nor to express any opinion on it. The last question, whether the Ruler is liable to be assessed, also does not directly arise. The assessee in the case is the Patiala State Bank. On the facts mentioned in the reference, it is a department of the State. There is a difference between the private property of the Ruler of the State and the property of the State itself. In holding that it was competent to the Govt. of India to legislate in respect of trading operations of the State, I think it is also held that the State as such, and to the extent it is covered by s. 2 (1) of Act III of 1926, is liable to assessment: *Statham v. Statham and the Gaekwar of Baroda* (3), which was relied upon in this connexion, has in the circumstances no application. I, therefore, agree that the answer to questions Nos. (1) and (7) should be in the affirmative. As regards the other questions, they are questions of fact, and I agree that the answers should be in the affirmative also.

Income-tax Reference No. 2 of 1940

Per Curiam.—The answers in the second reference will be the same as in the first reference, and the same order as to costs. The assessee to pay costs, to be recovered from the assets of the Patiala State Bank.

s. *Answer accordingly.*

(2) (1926) A C 37; 95 L J K B 165; 134 L T 98; 10 Tax. Cas. 88; 42 T L R 58.

(3) (1912) L R P 92; 81 L J P 33; 105 L T 991; 28 T L R 180.

*Page of (1926) A. C.—[Ed.]

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Civil Appeal No. 173/41 of 1940

March 6, 1941

ALMOND, J. C., AND MIR AHMAD, J.
MAHMUD JAN MIR HAMZAH KHAN
—JUDGMENT-DEBTOR—APPELLANT

versus

FIRM GUTTA SINGH-AJAB SINGH—

PLAINTIFFS—RESPONDENTS

Civil Procedure Code (Act V of 1908), ss. 60 (1) (c), 60 (1), Proviso — Mortgage decree against house—House, if can be sold—Word "or" in Proviso—Scope of.

The house of an agriculturist cannot be sold even in execution of a mortgage decree passed against that property. 51 Ind. Cas. 553 (2), followed.

[Case-law discussed.]

The word 'or' is used in Proviso to s. 60 (1) to include decrees in which no attachment is necessary and mortgage decree is one of this class.

C. A. against the order of the Additional Judge, Peshawar, dated May 16, 1940.

Saiyed Mohd. Aurangzeb Khan, for the Appellant.

Sardar Anoop Singh, for the Respondents.

Mir Ahmad, J.—Mahmud Jan mortgaged a *hujra* (guest house) and seven houses to Gutta Singh-Ajab Singh. The latter instituted a suit for the recovery of the money. A compromise decree was passed in favour of firm Gutta Singh-Ajab Singh against Mahmud Jan for Rs. 2,100 in the following terms:

"Decree for Rs. 2,100 is hereby passed in favour of the plaintiff against the mortgaged and other property of the defendant in accordance with the terms of the compromise deed."

The compromise deed fixed instalments and on the failure of the defendant to pay two instalments made the whole amount payable in a lump sum. The decree-holder took out execution and attached the property against which the decree had been passed. The judgment-debtor pleaded that he was an agriculturist, and that his houses and *hujra* could not be attached and sold. The executing Judge found that he was an agriculturist but held that as it was in execution of mortgage decree that the property was being proceeded against the protection afforded by s. 60 (1) (c), Civil P. C., did not extend to it. An appeal was preferred by the judgment-debtor. The Court of appeal agreed with the view of the original Judge. The appeal was consequently dismissed. The judgment-debtor has come up on further Appeal to this Court. At the hearing, the learned Counsel for the judgment-debtor admitted that no appeal was competent and asked us to treat his appeal as a petition for revision. He urged that an important question of law was

involved and that a petition for revision was therefore entertainable. We agree with him. There seems to be a conflict of authority as regards the question whether s. 60 (1) (c), Civil P. C., governs the property sought to be sold under a mortgage decree. A Full Bench of three Judges of the Allahabad High Court considered it in the ruling reported as *Bhola v. Kishori*, 11 Ind. Cas. 646 (1). Two Judges were of opinion that s. 60 (1) (c) Civil P. C., did not apply to a mortgage decree. They were Richards, C. J. and Tudball, J. Bannerji, J. however dissented. The view of the majority was explained by Richards, C. J. and we could do no better than to quote his own words to show the reasons which made him form this opinion :

"In my judgment, the decisions of the Courts below were incorrect. *Prima facie*, a man is entitled to mortgage his property if he pleases; and if he can make a valid mortgage, the mortgagee is entitled to a mortgage decree entitling him to sell the property. The only aspect in which the decree of the Court below can be supported is on the ground that the proviso to s. 60 by implication enacts that the mortgage of a house of an agriculturist is illegal. Such a contention, in my opinion, cannot be sustained. The Civil P. C., is an Act which deals entirely with matters of procedure; and *prima facie* it is very improbable that the Legislature intended to deal with matters of substantive law. Where it was considered necessary for the protection of certain classes of tenants that their powers of transfer should be restricted, the Legislature by express provisions in the Ten. Act has so enacted. It seems to me also that it would be a very strained construction to give to s. 60 to hold that it applied to the execution of mortgage decrees. The section itself is headed "attachment." In the case of mortgage decrees no attachment is necessary and in practice no attachment is ever made. The section begins "The following property is liable to attachment and sale in execution of a decree." It seems quite clear that these words only apply to simple money decrees. Then follows the proviso, where it is true that the words are not "attachment and sale" but "attachment or sale." It must however be remembered that the proviso is a proviso to s. 60, cl (1) which deals with simple money decrees. The words 'such attachment or sale' also appear in the proviso, clearly showing that the proviso relates to what immediately precedes. It is argued that the word 'or' appearing in the proviso instead of the word 'and,' necessarily shows that the section relates to mortgage decrees. I do not agree with this argument. There are cases of simple money decrees in which it is not necessary that there should be an attachment, namely when there has been already an attachment prior to judgment or on foot of another decree."

Banerji, J.'s note of dissent is on the other hand in the following words :

"If the Legislature forbids the sale of such a house, a Court cannot by its decree order that a house of that description should be sold. In my opinion the law forbids the sale of such a house. Section 51 (b) provides that a Court may order execution of a decree by attachment and sale, or by sale without attachment of any property. Section 60 of the Code

specifies the different classes of property which are liable to attachment, where attachment is necessary, and to sale."

The proviso to the section is to the effect that certain particulars, among which are houses and other building belonging to and occupied by an agriculturist, shall not be liable to attachment or sale. At the commencement of the section the word "and" is used and in the proviso we find the word "or." The proviso, as I understand it forbids both attachment and sale; that is to say, where an attachment must precede a sale, it forbids attachment as well as sale; and where it is not necessary that an attachment should be a preliminary step to a sale, it forbids a sale. Therefore in my opinion s. 60 and the proviso to it take away from the Court power to order a sale of property of the description mentioned in the proviso.

The object of the Legislature is manifest. That object is that certain classes of debtors should be protected against their own improvidence. There can be no doubt that, in the case of a simple decree for money, the dwelling-house occupied by an agriculturist cannot be sold. The policy of the law is that he should not be deprived of his place of residence by a process of Court. I fail to see why if an unsecured creditor of an agriculturist cannot proceed against the debtor's dwelling-house, a secured creditor should be allowed to do so. The policy of the law equally applies to both the cases."

In *Niadar Singh v. Sabit Khan* (2), a Divisional Bench of the Allahabad High Court consisting of Banerji, J. who was the dissenting Judge in *Bhola v. Kishori* 11 Ind. Cas. 646 (1), and Rafiq, J. held that the house of an agriculturist was not liable to attachment and sale in execution of a decree obtained upon the mortgage of that house made by the agriculturist. *Bhola v. Kishori*, 11 Ind. Cas. 646 (1), was referred to. A Full Bench of the Allahabad High Court consisting of Walsh, Ryves and Mukerji JJ. again considered this question in the case which is reported in *Mubarak Husain v. Ahmad*, 84 Ind. Cas. 749 (3). Ryves, J. followed the line adopted by Banerji, J. and held that the house of an agriculturist could not be sold in execution of a mortgage decree passed against the house. The other two Judges however, followed the majority view taken in *Bhola v. Kishori*, 11 Ind. Cas. 646 (1). It was stressed by them that the chapter in which s. 60 occurs is headed "attachment and sale" and not only "sale." The pronouncement of the Lahore High Court on the point was made by a Division Bench in a case reported in *Chittar Mal v. Ram Devi* (4). It is a very short judgment. The reason given for refusing to extend the benefit of s. 60 to the property of an agriculturist, which is subject of a mortgage decree was that it would amount to making mortgages

(2) A I R 1919 All, 222; 51 Ind. Cas. 553.

(3) 84 Ind. Cas. 749; A I R 1924 All. 328; 46 A 489; 22 A L J 321 (F B).

(4) A I R 1935 Lah. 164.

(1) 11 Ind. Cas. 646; 8 A L J 1045.

by an agriculturist illegal. No authorities were referred to. *Ram Chand v. Co-operative Society, Kharar* (5), *Sita Ram v. Phusal Singh* (6), *Natha Singh v. Bhag Mal* (7), and *Khazanchi Shah v. Niaz Ali* (8), are all Single Judge rulings of the same Court which followed the Division Bench view reported in *Chittar Mal v. Ram Devi* (4). We will now proceed to give an interpretation of s. 60 (1) (c), Civil P. C. The relevant portion of s. 60 runs thus :

"60, (1) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money banknotes, cheques, bills of exchange, *hundis*, promissory notes, Govt. securities, bonds or other securities for money, debts, shares in a corporation and save as hereinafter mentioned, all other saleable property, movable or immovable, belonging to the judgment-debtor, or over which, or the profits of which he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf :

Provided that the following particulars shall not be liable to such attachment or sale, namely ;

(c) houses and other buildings (with the material and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him."

The underlines (here in italics) are ours. Section 51, Civil P. C., is in the following terms :

"Subject to such conditions and limitation as may be prescribed, the Court may on the application of the decree-holder, order execution of the decree ; (a) by delivery of any property specifically decreed ; (b) by attachment and sale or by sale *without attachment of any property* ; (c) by arrest and detention in prison ; (d) by appointing a Receiver ; or (e) in such other manner as the nature of the relief granted may require."

The underline (here in italics) is ours. It is obvious that s. 51 (b) contemplates that an execution of a decree may be carried out by attachment and sale or by sale only. This fact therefore takes away all the importance attached to the heading of the chapter which is "attachment and sale." The use of the word "or" in the beginning of the proviso is not an accident for, the Legislature does not use words by accident but by deliberation. This again shows that the Legislature did not mean that the chapter only dealt with cases in which "attachment and sale" took place and to no others. Rather the contrast is significant. In the beginning of the section permission for "attachment and sale"

(5) A I R 1936 Lah. 930; 166 Ind. Cas. 266; 38 P L R 691; 9 R L 356.

(6) A I R 1937 Lah. 939; 170 Ind. Cas. 896; 10 R L 152 (1).

(7) A I R 1939 Lah. 316; 42 P L R 398.

(8) A I R 1940 Lah. 126; 189 Ind. Cas. 782; 13 R L 113.

of property is given but where the proviso starts "attachment or sale" are prohibited. To us it is absolutely clear that the word "or" was used to include decrees in which no attachment is necessary and we know that mortgage decree is one of this class. At this point, we will advert to the fact that O. XXXIV, was made a part of Civil P. C., when the Civil P. C., of 1908 was enacted. It was a part of T. P. Act before. The draftsman therefore knew that there were such decrees as mortgage decrees and he would have excepted mortgage decrees from the operation of this section in so many words if it was the intention to do so. He would not have left the Courts to infer it from the cryptic heading "attachment and sale." It should be remembered that the words "a decree" have been used in the beginning of the section. The Courts have on the other hand read the word 'money' in between the 'a' and 'decree' when holding that mortgage decrees are beyond the purview of s. 60, Civil P. C. There is no warrant for this reading of the word 'money' into it. We think that the Legislature would have inserted the word if there was the idea to restrict the section to money decrees only.

Again as pointed out by Banerji, J it is undoubted that the Legislature was anxious to protect the property of the agriculturist from being sold. An agriculturist borrows money voluntarily and it does not make any difference whether he borrows on his personal security or on the security of his property. In either case he has the right to do so and we see no point why in one case the money should not be recovered from his property while in the other it should be done. To us it appears that the protection is absolutely independent of his own acts and has been deliberately provided so that he should not be without a roof over his head and without his tools and seed, etc. I would be quoting a truism if we were to say that the Legislature can make such exemptions and has made them. The Punjab Land Alienation Act is a case in point. We consequently disagree with the two Courts below and hold that the house of an agriculturist cannot be sold in execution of a mortgage-decree passed against that property. Although it has been admitted in this case that the petitioner is an agriculturist it has not been decided as to what house or houses are exempt under s. 60 (1) (c) and what are not. The learned Counsel for the respondent has urged that all the houses are not protected. We therefore accept the appeal, set aside the finding of the Courts below and remand the

case to the executing Judge with the direction that he should now decide as to which house or houses fall within the purview of s. 60 (1) (c), Civil P. C. The costs of this petition shall follow the event. Pleader's fee Rs. 32.

s.

Appeal allowed.

LAHORE HIGH COURT

Criminal Appeal No. 1232 of 1940

January 10, 1941

YOUNG, C. J. AND BLACKER, J.

MAGHAR SINGH NAHAR SINGH AND

ANOTHER—CONVICTS—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860); s. 302—Sentence—Youth of 17 committing murder in company with elder relative—Transportation for life held proper sentence.

Youth, undoubtedly, in some cases may be a very excellent ground for giving the lower sentence. It is a very rare thing for the High Court to sentence a youth of 17 or below to death. It would only be in a very exceptional case that this would be done. In fact the normal sentence for a youth of this age would be transportation for life. A very strong case, indeed, would have to be made out in order to justify the hanging of a youth of this age. When a youth of this age commits a murder in company with an elder relative that is another excellent reason for giving only transportation for life.

Cr. A. from the order of the Sessions Judge, Ludhiana, dated September 27, 1940.

Mian Abdul Aziz, for the Appellants.

Maghar Singh in person.

Mr. S. M. Sikri, for the Advocate-General, for the Crown.

Mr. Bhagat Singh, for the Complainant.

Young, C. J.—Ramji and Maghar were charged in the Court of the learned Sessions Judge of Ludhiana with the murder of Gajjan. The learned Sessions Judge found them both guilty, sentenced Maghar to death and Ramji to transportation for life. It appears that Ramji and Gajjan had a dispute over land; whether that dispute concerned one mortgage or another does not appear to us to matter, it is admitted that there was cause of enmity between the two parties. The prosecution has also attempted to prove that Bhan Singh, a relation of Gajjan, had an affair with Ramji's wife but that does not appear to us to be a motive for the murder of Gajjan by Ramji except that it might be added to the general irritation between the two families. On June 4, 1940, at about noon, Gajjan who had been in his fields working came back and prepared himself to have a bath at the well. He left his house only wearing his drawers. On emerging from

his house it is said that he was attacked by the two accused, that Ramji hit him on the head with a *gandasa* and Maghar speared him. Gajjan's wife, *Mst. Punjab Kaur*, on hearing an alarm, followed her husband from the house and fell on his body to protect him. She too received some injuries. Bhan Singh, a nephew of Gajjan, also appeared on the scene, attacked Ramji with a *takwa* but was himself injured. Gajjan was taken away to hospital and died two or three days later having made two dying declarations, both in the same terms, in the meanwhile in which he gave the motive and the names of his assailants.

The defence admitted that both the accused were present at the scene but set up a case that Gajjan and Bhan Singh attacked Ramji, that Ramji retreated to his house and that Maghar thereupon came out armed with a *gandali* and a quarrel took place between the parties and in that quarrel, Ramji and Maghar were injured and they, in their turn, caused injuries to the opposite party. With regard to this defence, it may be stated at once that the medical evidence contradicts the use of a *gandali*. It appears from the injuries that a *gandali* was not used but a *takwa*. In the second place, the accused in their written statements did not mention the presence of *Mst. Punjab Kaur* or the injuries to her. The same applies to the presence of Bhan Singh and his injuries. It is quite clear therefore that the defence cannot be relied upon. No defence evidence was called. The prosecution in this case depends on the evidence of *Mst. Punjab Kaur* and Bhan Singh who were eye-witnesses. There are also the two dying declarations. We have carefully examined the evidence of the two eye-witnesses. There is no doubt that *Mst. Punjab Kaur* was present at the spot as she was injured. There are one or two small discrepancies in her evidence but they are of no importance. A point was made by Counsel that she does not mention the injuries to Ramji but that is easily accounted for by the fact that she was lying on her husband's body. *Mst. Punjab Kaur* says in her evidence:

"I did not see Bhan Singh either receiving or giving any blows as I was trying to shield my husband."

Bhan Singh, however, does mention the injuries to Ramji and does mention that he gave them. The woman's evidence we must accept. With regard to Bhan Singh he may or may not have some liaison with Ramji's wife but he certainly was present at the spot as he was injured and we equally see no reason to disbelieve his evidence that it was:

Ramji and Maghar who attacked Gajjan. Counsel for the appellant here has argued that this was a fight between the two parties following abuse. We do not think, however, that there is anything in this contention as it would be unusual for Gajjan to take part in a fight practically naked as he undoubtedly was. We accept the prosecution version that Gajjan had only his drawers on and he was unarmed. In these circumstances we must agree with the lower Court that the conviction of Ramji and Maghar is justified. Maghar absconded for 14 days. The learned Sessions Judge has had, in our opinion, acted somewhat curiously with regard to the sentences. The motive undoubtedly was Ramji's. He brought with him to the attack his nephew Maghar. Maghar describes himself as 15 years of age and the medical evidence says that he is between 16 and 17. We have also seen him here in Court and we agree generally with the medical evidence. The learned Judge has given Ramji only transportation for life on the ground that he gave only one blow. Maghar, on the contrary, he has condemned to death. In our opinion, the sentences should have been reversed. The learned Sessions Judge also says that there are several decisions of this Court which say that youth alone is no ground for giving the lower penalty. This is stating the law much too broadly. Youth, undoubtedly, in some cases may be a very excellent ground for giving the lower sentence. It is a very rare thing for this Court to sentence a youth of 17 or below to death. It would only be in a very exceptional case that this would be done. In fact the normal sentence for a youth of this age would be transportation for life. A very strong case, indeed, would have to be made out in order to justify the hanging of a youth of this age. When a youth of this age commits a murder in company with an elder relative that is another excellent reason for giving only transportation for life. We must therefore accept the appeal of Maghar as regards his sentence. We set aside the sentence of death passed upon him and impose instead a sentence of transportation for life; otherwise the appeal is dismissed.

D.

*Order accordingly.***RANGOON HIGH COURT**Criminal Appeals Nos. 676 to 679 of 1940
September 11, 1940

DUNKLEY AND BLADGEN, JJ.

SHWE HLA U AND OTHERS—ACCUSED
versus

THE KING—OPPOSITE PARTY

Penal Code (Act XLV of 1860), s. 397 as amended by Burma Act (IV of 1940)—Offences committed before March 16, 1940—Amending Act IV of 1940 does not apply—Offence before March 16, 1940, but conviction after that date—S. 397 as it stood before amendment must be applied—Interpretation of Statutes—Retrospective effect, when to be given.

The provisions of Burma Act IV of 1940, have no application to offences which were committed before March 16, 1940. Consequently, the provisions of s. 397, I. P. C., as they existed prior to the amendment must be applied in a case where the accused committed the offence before March 16, 1940, but was convicted after that date, for, it is by reason of the commission of the offence that the offender incurs the punishment and not by reason of his conviction by a Criminal Court. The trial, ending in a conviction, is merely the means whereby a Court of criminal justice ascertains that the accused is the person who has incurred the punishment by having committed the offence. This is made clear by s. 5, General Clauses Act. Cr. A. No. 551 of 1940, **Overruled**, Cr. A. No. 441 of 1940, approved, *Ex parte Raison* (1), relied on.

No statute is retrospective unless the statute itself expressly states that it is to be so.

Cr. A. from an order of the Sub-Divisional Special Power Magistrate, Buthidaung, in Criminal Regular Trial No. 37 of 1940.

Mr. U Ni, Govt. Advocate, for the Crown.

Dunkley, J.—The four appellants were convicted by the Sub-Divisional Magistrate of Buthidaung of the offence of robbery, under s. 392, I. P. C. and in the case of three of the appellants the learned Sub-Divisional Magistrate held that s. 397 of the Code was applicable and therefore, the minimum sentence which could be passed on them was seven years' rigorous imprisonment. The remaining appellant was sentenced to two years' rigorous imprisonment. The robbery occurred on February 17. On that date the informant Abdul Motaleb and his friend Abdul Hussein went out to buy a cow. Abdul Motaleb had a sum of Rs. 15 with him for this purpose. They went to Bookay village and enquired of several persons whether there was a cow for sale, but they were unable to purchase one. Abdul Motaleb showed his money to these persons and there is no doubt that he had a sum of Rs. 15 on his person at that time. When the two were returning home, on the way they were attacked by robbers and Abdul Motaleb's coat was torn off his body and taken away by the robbers but was subsequently found, and it was then discovered that the three five-rupee

notes had been taken out of the pocket. Both Abdul Motaleb and Abdul Hussein made their report immediately to the headman, and there can be no doubt about the fact that Abdul Motaleb was robbed as they stated. In the report to the headman they said that they had recognized three of the robbers, namely, Shwe Hla U, Shwe Pru Aung and Shwe Tha Aung. Certain persons who came to their assistance said that they had seen the robbers running away and they also recognized these same appellants. Appellant No. 4 Kyaw Zan Hla was subsequently identified by Abdul Motaleb and Abdul Hussain at an identification parade. There was therefore ample evidence to support the convictions of these appellants. The appellants in their defence set up *alibis*, but the trial Magistrate has given full consideration to the defence evidence and has shown that all the appellants were unable to bring evidence to prove that they were in other places at the time when this robbery occurred. There can be no doubt that the appellants have been rightly convicted. The Magistrate held that the appellant Shwe Hla U was armed with a local made gun, that Shwe Pru Aung was armed with a dagger and that Kyaw Zan Hla was armed with a *dah*, and his findings in this respect are justified by the evidence.

These appeals have come before a Bench on a certificate of my brother Mackney. On March 16, 1940, Burma Act IV of 1940 came into force, and by this Act the words "uses any deadly weapon" were deleted from s. 379, I. P. C. My brother Mackney has taken the view that this Act is applicable to all offences, whether committed before or after March 16, the trial of which did not conclude until after March 16, and that therefore s. 397 had no application in the present case. His view is that the punishment for an offence under the I. P. C. is not incurred until conviction and a person incurs no punishment who is not convicted. My brother Mosely took the opposite view in Criminal Appeal No. 441 of 1940 and, with the greatest respect, his reasoning cannot be assailed. The matter is concluded by the provisions of s. 5, General Clauses Act of 1898. Section 5 says this:

"Where any Act repeals any enactment hitherto made or hereafter to be made, then unless a different intention appears the repeal shall not.....(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed."

In Criminal Appeal No. 551 of 1940, my brother Mackney, referring to Burma Act IV

of 1940, said this:

"There is nothing in this Act to suggest that the amendment shall not affect the law previously applying to offences already committed but not tried."

This observation is contrary to the fundamental principle of the interpretation of statutes, that no statute shall be deemed to have retrospective effect unless the statute itself expressly states that it is to be retrospective. The view which Mackney, J. is now expressing appears to be that the punishment for an offence is not incurred until the offender is convicted at a trial; but that view is, in my opinion, contrary to the plain meaning of almost any section of the I. P. C. Opening the I. P. C. at random, I happened to open it at s. 302, which says that whoever commits murder shall be punished with death or transportation for life and shall also be liable to fine. The same form of words will be found in any section of the I. P. C. which imposes a punishment. It is by reason of the commission of the offence that the offender incurs the punishment and not by reason of his conviction by a Criminal Court, and clearly that must be so, for it would be illogical to hold that an offender is liable to punishment only by reason of his conviction for the offence and not by reason of his commission of the offence. The trial, ending in a conviction, is merely the means whereby a Court of criminal justice ascertains that the accused is the person who has incurred the punishment by having committed the offence. In my opinion, the provisions of Burma Act IV of 1940 have no application to offences which were committed before March 16, 1940. Consequently, the provisions of s. 397, as they existed prior to the amendment, are applicable to the appellants Shwe Hla U, Shwe Pru Aung and Kyaw Zan Hla. The appellants have been rightly convicted. The sentences passed upon Shwe Hla U, Shwe Pru Aung and Kyaw Zan Hla were legally necessary and the sentence passed on Shwe Tha Aung erred, if at all, on the side of leniency. These appeals are therefore, dismissed.

Blagden, J.—On the merits, or rather demerits, of this appeal I agree with my Lord's judgment and have nothing to add. As to the effect of the partial repeal of s. 397, I. P. C. as from midnight of March 15/16, 1940 on the liability of those who at that moment were guilty but as yet unconvicted of offences under that section the judgment of my brother Mosely in *Maung Nge v. Regem* (Criminal Appeals, Nos. 441/442 of 1940) seems to me clearly right. Section 5, Burma General Clauses Act, 1898, omitting

words which are for this purpose immaterial provides as follows :

"When any Act repeals any enactment.....the repeal shall not.....affect any.....punishment incurred in respect of any offence committed against any enactment so repealed or.....any.....legal proceeding.....in respect of any such punishment.....and.....any such punishment may be imposed as if the repealing Act had not been passed."

In the view of Mackney, J. as I follow it, a criminal as such has not incurred a punishment unless and until he is sentenced. By committing a crime he has only "incurred" risk of punishment. But if this be right the last 16 words which I have read are absolute nonsense. A particular punishment for a particular crime can only be "imposed" once, and if a punishment be not "incurred" till it is "imposed" and had been "imposed" before the repealing Act it would be idle to provide that the same punishment might be "imposed" again after the repealing Act. Therefore, as I see it, the Legislature has clearly distinguished between the 'incurring' and the 'imposing' of a punishment. The language of the section makes it plain that they are two different things taking place at two different times. Obviously, the incurring of the punishment must precede its imposition, and granted that a punishment is "imposed" when sentence is passed, the only preceding events which could possibly be said to constitute its "inurrence" are (a) the making of the charge; or (b) the arrest of the accused or (c) the committing of the crime. A man does not incur a punishment merely by being arrested for or charge with a crime, for either event is quite consistent with his innocence. Moreover, if a punishment is "incurred" at the moment of arrest or charge before a repealing Act, though sentence is not passed till after it, what is the position if, between these two events, the culprit escapes and is at large at the moment the repealing Act comes into force? The only possible conclusion is that a punishment is "incurred" when a crime then involving that punishment is committed. This conclusion is in my opinion favoured by considerations alike of common sense and of English grammar and I am not surprised to find that there is authority for it.

Section 38 (2) of the English Interpretation Act, 1889 is in terms in all material respects identical with the section now under consideration. In *Ex parte Raison* (1) the applicant had been adjudged bankrupt under the Bankruptcy Act, 1883 shortly before the coming into force of the Bank-
(1) (1891) 60 L J Q B 206; 63 L T 709; 39 W R 271; 8 Morrell 11.

ruptcy Act, 1890. The latter repealed the provisions of s. 28 of the 1883 Act, relating to a bankrupt's discharge and substituted other provisions less favourable to bankrupts. Cave, J. held that the applicant's right to apply for his discharge was a right acquired at the moment he became bankrupt though it was not then immediately effective, and consequently, that the application fell to be decided under the repealed s. 28 of the 1883 Act and not under the new s. 8 of the 1890 Act. If a right is "acquired" when it vests, even though it may never become exercisable, a punishment is in my opinion "incurred" when a person becomes legally liable to that punishment even though he may escape detection, escape arrest, or escape conviction. I, therefore, share the opinion of Mosely, J. and of my Lord.

D.

Appeals dismissed.

MADRAS HIGH COURT

Letters Patent Appeal No. 82 of 1938
November 28, 1939

LEACH, C. J. AND KRISHNASWAMI

AYYANGAR, J.

MUNICIPAL COUNCIL, ADONI—

APPELLANT

versus

G. V. C. BABU NAIDU—RESPONDENT

Madras District Municipalities Act (V of 1920), s. 93 (1)—R licensed distiller owning distillery at B maintaining depots for sale of arrack at A through his agent—Agent at A contracting for sale of arrack on behalf of R—Held, that R must be deemed to be carrying on business at A within meaning of s. 93.

One R was a licensed distiller and owned an arrack distillery at B. Under the terms of his license he was required to maintain depots for the sale of arrack at various places in the District. One of these places was A. The depot at A was in charge of an agent of R and he used to sell arrack to licensed retail dealers. The price was fixed by the Govt. and the sales were restricted to licensed retail vendors. The money received in respect of arrack sold at the A depot was paid by R's agent into the treasury the same evening. R's agent in charge of A depot entered into contracts for the sale of arrack on behalf of his master who made profits on these transactions :

Held, that as a person who sells goods in a particular place must be deemed to be carrying on business in that place R must be deemed to be selling arrack at A. The fact that the prices which he charged were fixed by the Govt. did not make his transactions any the less sales; nor did the fact that the R's only customers at A were licensed retail dealers alter the character of his transactions. The fact that R's agent was required to pay into the treasury at the close of a day's business the moneys which he received for the arrack sold that day had no bearing on the question and the same could be said with regard to the keeping of accounts at B. R sold arrack at A and, therefore, was carrying on business at A within the meaning of s. 93 of the Mad. District Municipalities

Act. It would be a different matter if all contracts for the supply of arrack were made in B and goods were merely delivered in A through an agent. 181 Ind. Cas. 911, *reversed*, *Grainger and Son v. Gough* (1), 51 Ind. Cas. 692 (2), 5 Ind. Cas. 744 (3) and 144 Ind. Cas. 486 (4), distinguished.

L. P. A. against the judgment of Wadsworth, J., reported in 181 Ind. Cas. 911.

Mr. M. S. Ramachandra Rao, for the Appellant.

Mr. P. Chandra Reddy, for the Respondent.

Leach, C. J.—The appellant is entitled to succeed. The appeal arises out of a suit filed by the respondent in the Court of the District Munsif of Bellary for a declaration that the appellant Council had acted illegally in requiring him to pay profession tax in respect of the three half years ending with March 31, 1931, September 30, 1931 and March 31, 1932 and for an injunction restraining the appellant from levying the tax. The District Munsif held that the respondent was liable to the tax except in respect of the half-year which ended with March 31, 1931. He was of the opinion that the respondent was not liable in respect of that half-year because the notice of demand had not been given within the required period. The respondent appealed to the District Judge of Bellary in respect of the reliefs which had been refused him and the appellant filed a memorandum of objections challenging the correctness of the District Munsif's decision that the respondent was not liable to pay the tax in respect of the first of the three half years. The respondent's appeal failed and the appellant's memorandum of objections was accepted. The result was that the District Judge dismissed the suit with costs. The respondent then filed a second appeal which was heard by Wadsworth, J., who allowed it. The learned Judge held that the respondent was not liable for the payment of the profession tax because in his opinion the respondent was not carrying on business at Adoni.

The facts are these. The respondent is a licensed distiller and owns an arrack distillery at Bellary. Under the terms of his license he is required to maintain depots for the sale of arrack at various places in the Bellary District. One of these places is Adoni. The depot at Adoni is in charge of an agent of the respondent and he sells arrack to licensed retail dealers. The price is fixed by the Govt. and the sales are restricted to licensed retail vendors. The money received in respect of arrack sold at the Adoni depot is paid by the respondent's

agent into the treasury the same evening. The question which arises is whether in these circumstances the respondent transacts business in Adoni within the meaning of s. 93 (1), Mad. District Municipalities Act, 1920. The section gives a Municipal Council the right to levy profession tax on a person who transacts business within the municipality for not less than sixty days in any half year. Section 94-A says that if a person employs a servant or agent to represent him for the purpose of transacting business in a municipality the person shall be deemed to transact business there and the servant or agent shall be liable for the profession tax whether or not he has power to make binding contracts on behalf of his employer. Wadsworth, J. held that the respondent was not carrying on business within the municipal area of Adoni and his reasons may be gathered from the following passage in his judgment :

"It is true that the depot keeper at Adoni has authority to deliver goods in return for cash and I suppose that on the narrowest view it might be said that every time he delivered liquor in return for cash there is an executed contract of sale. But his control over the trade is in fact purely mechanical. The price is fixed elsewhere, the vendee must be only certain licensed persons the money is paid straight into an account in the treasury and all these accounts from which profits can be ascertained and with the help of which control can be exercised are maintained in Bellary."

The learned Judge here disregards the essential factor that the respondent's agent in charge of the Adoni depot enters into contracts for the sale of arrack on behalf of his master who makes profits on these transactions. A person who sells goods in a particular place must be deemed to be carrying on business in that place and the respondent sells arrack at Adoni. The fact that the prices which he charges are fixed by the Govt. does not make his transactions any the less sales; nor does the fact that the respondent's only customers at Adoni are licensed retail dealers alter the character of his transactions. The fact that the respondent's agent is required to pay into the treasury at the close of a day's business the moneys which he has received for the arrack sold that day has no bearing on the question and the same is to be said with regard to the keeping of accounts at Bellary. The respondent sells arrack at Adoni and therefore is carrying on business at Adoni within the meaning of s. 93 of the Act. It would be a different matter if all contracts for the supply of arrack were made in Bellary and goods were merely delivered in Adoni

through an agent, but that is not the position.

In the course of his judgment the learned Judge referred to *Grainger & Son v. Gough* (1), *Municipal Council of Cocanada v. 'Clan' Line Steamers Ltd.* (2), *Meera Rowther v. President of the Corporation of Madras* (3) and *Eastern Distilleries & Sugar Factories Ltd. v. Municipal Council, Negapatam* (4). None of these cases lends support to the opinion which he has expressed. The case in *Grainger & Son v. Gough* (1) had reference to a French firm which sold wine through a commission agent in London. The agent obtained orders from persons in England for the firm's wine which was sold to the customers as it lay in the firm's cellar at Reims. The customer paid the cost of packing and carriage and took all the risk. Therefore the delivery to him took place in France. The question was whether the French firm was exercising a trade in the United Kingdom and it was held that it was not. In *Municipal Council of Cocanada v. 'Clan' Line Steamers Ltd.* (2) the question was whether a shipping company which had an agent in Madras and a sub-agent at Cocanada was liable to be taxed at Cocanada as a firm transacting business there. The shipping company earned profits by carriage of goods by sea and in the course of its business loaded and unloaded goods at Cocanada. Its head office was at Glasgow, but its principal agent in the Madras Presidency had his office at Madras. The sub-agent at Cocanada had no power to enter into contracts with shippers. This could only be done by the agent at Madras. The company was assessed by the Municipality of Cocanada to tax under s. 53, District Municipalities Act (IV of 1884) for exercising its trade and carrying on business in Cocanada. It was held that the company was not liable for the tax as it was not transacting business in Cocanada. The difference between that case and the present case is that the sub-agent at Cocanada had no authority to enter into contracts on behalf of the company's clients and no contracts were entered into there. All the contracts were entered into in Madras. In the present case, the contracts are entered into in Adoni and the goods are supplied there: *Meera Rowther v. President of the Corporation of Madras*

(1) (1896) A C 325; 65 L J Q B 410; 74 L T 435; 44 W R 561; 60 J P 692.

(2) 42 M 455; 51 Ind. Cas. 492; A I R 1919 Mad. 209; 36 M L J 226; 10 L W 15; 25 M L T 192.

(3) 33 M 82; 5 Ind. Cas. 744.

(4) 38 L W 226; 144 Ind. Cas. 486; A I R 1933 Mad. 496; Ind. Rul. (1933) Mad. 416.

(3), was a similar case. A firm had its place of business in Tinnevely, but kept an agent in Madras for the purpose of purchasing piecegoods for despatch to Tinnevely where they were sold. It was held that the firm was not liable to profession tax in Madras. The case in *Eastern Distilleries & Sugar Factories Ltd. v. Municipal Council, Negapatam* (4), has no bearing at all on the question under discussion. The question there was whether the company had an office at Negapatam and the decision turned on the meaning to be attached to the word "office" in r. 16 of Sch. IV, Mad. Municipalities Act, 1920. That question does not arise here.

After we had intimated that we could not accept the decision of the learned Judge on the question whether the respondent was carrying on business in Adoni an attempt was made to support the judgment on the ground that there had been irregularities in the demands in respect of the three half-years. The alleged irregularities formed no part of the case set forth in the plaint and no issue was framed on the question. The District Munsif did allow the question of the validity of the demand for the first half-year to be raised, but the District Judge reversed his decision on the ground that this contention had not formed part of the respondent's case and the appellant had not had notice of it in time to meet it. It is said that if the Council had had notice, it would have been in a position to show that on the facts the contention could not be maintained. We consider that the District Judge adopted the right attitude in refusing to allow the matter to be raised. It follows that we are not prepared to allow it to be raised in this Letters Patent Appeal. The appeal will be allowed and the respondent's suit dismissed with costs here and in the Courts below.

N-S.

Appeal allowed.

NAGPUR HIGH COURT

First Appeal No. 70 of 1937

August 22, 1940

STONE, C. J. AND BOSE, J.

Mst. RADHABAI—PLAINTIFF—

APPELLANT

versus

PANDHARINATH BAPU AND OTHERS

—DEFENDANTS—RESPONDENTS

Hindu Law—Partition—Wife, when can sue for her share—Wife held did not acquiesce in partition but merely stood by and hence entitled to her share—

Wife taking ornaments because she wanted them—On re-opening partition on her suit for share, those ornaments must be taken into account—Wife's share should be so adjusted as to interfere with past transaction as little as possible.

A wife can sue for her share where there has been a partition and she has not been assigned any share and has not assented or waived her rights or acquiesced.

Nobody in the family was aware that the wife was entitled to a share. No provision was made for her in the partition. She was never asked to waive her right to her share. She was allowed to retain, and in fact she retained, certain ornaments. Though the wife used to remain present off and on at the time of the discussion between the parties during the partition she merely stood by and did nothing except claim certain ornaments not as share-holder but because she wanted them :

Held, that the wife did not acquiesce in the partition and consequently was entitled to a share. The fact that she suggested a division of the ornaments and actually got them weighed for the purpose did not involve any agreement or consent with regard to partition. 159 Ind. Cas. 1080 (2) and *Ganesh Dutt v. Jewach Thakoorain* (3), relied on.

Held, also that in settling the wife's share the value of the ornaments taken by her must be taken into account.

Held, further that on re-opening the partition the proper course in allocating the wife's share was to so re-arrange the property as to interfere with past transactions as little as possible.

F. A. from the decree of the Court of the Additional District Judge, Bhandara, dated February 27, 1937.

Mr. Y. V. Jakatdar for the Appellant.

Messrs. A. R. Kulkarni, J. V. Jakatdar, and M. R. Bobde with Mr. B. V. Pradhan, for the Respondents.

Judgment.—This is an appeal by the wife of the father of three sons who at one time were the members of a joint Hindu family and who in 1931 or thereabouts separated. The result in partitioning of the property was effected amicably and resulted in the family property being divided into four shares the plaintiff, wife of the father, being, as we think, allowed to retain certain ornaments. The question in this suit is whether the plaintiff is entitled to claim a share. The learned Editor of Mayne on Hindu Law and Usage (10th Edition) at p. 544 observes as follows :

"According to the Mitakshara Law, a wife is entitled on a partition between her husband and his sons to a share equal to that of a son; but she cannot enforce a partition. She may either be the mother or the step-mother of the sons."

That proposition as late as 1930 in *Partap Singh v. Dalip Singh* (1), was regarded as a proposition about which two opinions could be rationally expressed and it was there observed that it had been strongly argued by

an eminent lawyer that she had no such right. All doubt on the matter is, however, set at rest by the decision of the Privy Council in *Pratapmull Agarwalla v. Dhanabati Bibi* (2), where their Lordships point out that under the Mitakshara Law when the family estate is divided a wife or mother is entitled to a share but is not recognized as the owner of such share until the division of the property is actually made.

In this case, however, it is said that granted that a wife has a right to a share, this particular wife has lost her right to re-open this partition because she consented to it, she took part in it, she acquiesced in it, and therefore she is prevented by the doctrine of acquiescence from now challenging it and she must be regarded by her conduct as having waived her right to a share. It has already been held on a preliminary issue as follows in this very case :

"The weight of authority thus lies in favour of the view that a wife is entitled to sue for repartition and to get her share in it which share was not allotted to her in the partition when she did not acquiesce in the partition or did not waive her share."

We would express the matter somewhat differently, though doubtless it comes to very much the same thing. A wife can sue for her share where there has been a partition and she has not been assigned any share and has not assented or waived her rights or acquiesced. As their Lordships of the Privy Council state in *Ganesh Dutt v. Jewach Thakoorain* (3), "the mother [the same applies to the wife] is not bound by a partition to which it is not shown she ever assented". At p. 271* they observe as follows :

"The Judges of the High Court apparently considered that acquiescence on the part of the mother was established.....But their Lordships have not been referred to, nor have they been able to discover, any evidence of acquiescence, except a vague statement by the plaintiff that no share was assigned to the mother 'because she did not make any objection'."

We have no reason to think that in this branch of law acquiescence is anything other than it is in other branches of law, and acquiescence is, we think, a branch of the law of estoppel and before it begins to operate it has to have all the factors present that are indicated as necessary by the Lord

(2) 63 I A 33; 159 Ind. Cas. 1080; A I R 1936 P O 20; 1936 O L R 49; 1936 O W N 1; 1936 A L R 82; 8 R P O 124; (1936) M W N 5; 2 B R 198; 40 C W N 193; 17 P L T 45; 62 C L J 453; 19 N L J 1; 43 L W 177; (1936) A L J 89; 70 M L J 296; 38 Bom. L R 323 (P O).

(3) 31 C 262 (272); 31 I A 10; 8 C W N 146 (P O).

(1) 52 A 596; 125 Ind. Cas. 762; A I R 1930 All. 537; (1930) A L J 793; Ind. Rul. (1930) All. 746.

*Page of 31 Cal.—[Ed.]

Chancellor in *Ramsden v. Dyson* (4), referred to in *Collier v. Baron* (5), and, together with the case-law on this branch of law, by this Bench in *Kuwarji Madhao v. Bhurelal Ajitmal* (6).

In this present case the plaintiff has greatly weakened her position by alleging that she did not know of the partition at all. The learned Judge has found that she knew about the partition, and there is abundant evidence to justify that conclusion of fact, and we accept it. But it is equally plain, in our opinion, that nobody in this family was aware that the wife was entitled to a share. Of the contesting defendants, the two elder sons, only one has gone into the box, and he said: "We never asked her that she had a share in the partition of the property. We never knew that she had any share." It is apparent from other evidence that the only part she took in this partitioning was in connection with the household ornaments. On this plea a witness who strikes us as giving the most truthful evidence is again a witness for the contesting sons, 2 and 3 D. W. No. 4. He says:

"I never told the plaintiff that she had a share in the property and whether she required it or not, I simply asked her if she wanted anything and she simply said that she would be satisfied if she were given the gold which was with her. I told Laxman then and there not to demand the gold which was with her. Laxman agreed to it."

There is other evidence to the effect that that attitude was taken up because these sons were not merely claiming their share in the immovables and houses and money-lending but were claiming to take away from her her ornaments and she objected to that, and the matter was amicably settled by the neighbours saying that she ought to be left with her ornaments. Another witness (2 and 3 D. W. No. 2) says:

"On all these four occasions plaintiff was present. She did not raise any objection to any of the said divisions effected. On all these occasions she did not claim any share for herself in any of the properties except that she demanded the gold which she had with her."

Taking the evidence as a whole it seems to us to be reasonably plain that this is a case in which nobody knew that the wife had any right to a share. No provision was made for her. She was never asked to waive her right to her share. She was allowed to retain, and in fact she retained, certain ornaments, and according to the evi-

dence of the defendants she kept a substantial amount of gold ornaments. That sort of evidence seems to bring this case directly within the Privy Council decision of *Ganesh Dutt v. Jewach Thakoorain* (3), that is to say, a case where a woman stands by and does nothing at all except claim certain ornaments, and she claimed not as a shareholder but because she wanted them. They were being claimed in point of fact by the sons, and the sons were claiming them as of right and the neighbours came along and persuaded the sons to give up their rights and they gave up their rights for the sake of amity.

The defendants pleaded acquiescence based on her conduct and active part in the partition. They subsequently added further particulars: (1) that she suggested a division of the ornaments and had actually got her ornaments weighed for the purpose, and (2) she used to remain present off and on at the time of discussion between the parties during the partition. As to (2) that comes directly within their Lordships' observations. As to (1) we think that as above indicated that did not involve any agreement or consent with regard to partition but has resulted in an amicable settlement of the claim made by the sons to certain ornaments as theirs but which right they waived and allowed their step-mother to keep them.

Mr. Bobde for the respondents has strongly urged that to allow a partition to be re-opened many years after the event, after all sorts of payments have been made, suits filed by third parties or against third parties, involves immense dislocation. It is of course regrettable that dislocation is involved, but this woman filed this suit in 1933 a very short time after this partition was effected. But we think that the proper course to pursue in allocating her share would be so to re-arrange the property that it interferes with past transactions as little as may be. What she is asking for is a declaration that she is entitled to a fifth. That declaration, we think, she is entitled to. She is further asking for division either through the Collector or through Court according as the nature of the property. As to the working out of the partition we cannot of course say anything at this stage except this, that it is hardly disputed on the evidence already on record that the plaintiff has received gold and silver and that whatever she has so received will be taken into account in settling her share, and that as to what she has received will be

(4) (1865) 1 H L C 129; 12 Jur. (N S) 506; 14 W R 926 149 R R 543.

(5) 2 N L R 34 (40).

(6) A I R 1939 Nag. 163; 182 Ind. Cas. 527; 1939 N L J 136; 12 R N 9.

determined by evidence after an issue has been framed.

Costs out of the estate.

D.

Appeal allowed.

CALCUTTA HIGH COURT

Suit No. 1227 of 1937

May 31, 1940

McNair, J.

MAMRAJ MANIRAM—PLAINTIFF

versus

Sheikh MUHAMMAD HASHIM AND OTHERS

—DEFENDANTS

Muhammadian Law—Decree against all heirs of deceased Muhammadan for debts due by deceased—Heirs in joint possession of property—Decree-holder held should be allowed to execute decree against property as a whole without interfering with extent of liability of heirs inter se—Limitation Act (IX of 1908), Art. 52—Single contract of commission agency held not contract for goods sold and delivered.

Where a decree was obtained against all the heirs of a deceased Muhammadan for debts due by the deceased but the estate was not distributed among the heirs who were in joint possession of the estate:

Held, that there should be decree against the heirs which would enable the decree-holder to execute it against the property as a whole without interfering with the extent of liability of heirs *inter se*.

A certain firm agreed to act as commission agent for the another firm. There was a single contract, *viz.*, a contract of agency. The commission agent firm submitted accounts annually and the amount due at the end of each year was added to the account for the following year. The former firm sued to recover certain sum found due on adjustment of accounts or alternatively for an account and decree for the amount found due.

Held, that this was not a contract for goods sold and delivered. Consequently Art 52, Lim. Act, had no application.

Mr. J. C. Sett, for the Plaintiff.

Mr. S. Dutt, for the Defendants.

Judgment.—In this case the plaintiff firm has sued the defendants according to the concise statement in the plaint to recover the sum of Rs. 4,736-10-6 found due on adjustment of accounts, or alternatively for an account and decree for the amount found due. The plaintiff firm in March 1933, entered into business dealings with Muhammad Raffique in his firm of Muhammad Raffique and Muhammad Hashim. Those terms have been set out in the plaint and evidence was also given in support of the statements in the plaint. It is quite clear that the agreement that was entered into between the plaintiff firm and Muhammad Raffique in March 1933, was an agreement by which the plaintiff firm was to act as commission agent on behalf of Muhammad Raffique. There

are several clauses in which details as to the discount, commission and brokerage payable are set out. The business continued until 1935 when there was a considerable amount due to the plaintiff firm. The last dealings were on February 10, 1935. The suit was filed on July 15, 1937. The plaintiff company has given evidence of the goods supplied and the manner in which the liability arose. Learned Counsel for defendant No. 3, *Mst. Sayada Bibi*, the widow of Muhammad Raffique, has put forward two contentions. In the first place, he contends that although the suit purports to be a suit for an account or an adjusted account, it is in fact a suit for goods sold and delivered, and he claims that any action for goods delivered after July 14, 1934, is barred by limitation. He relies on Art. 52, Lim. Act.

This contention cannot prevail. In the first place, it is quite clear from the nature of the suit that this is not a claim for goods sold and delivered; it is a claim based on a contract by which the plaintiff firm agreed to act as commission agent for the defendants. There was a single contract, namely, a contract of agency which must be distinguished from the series of contracts which may be entered into each time a sale or purchase takes place. As I have said, this is a contract of agency and should not be confused with a mere contract with a tradesman for the supply of goods on credit. Furthermore, it appears from the evidence that the plaintiff firm submitted its accounts annually, and the defendant in several letters wrote to the plaintiff firm saying "Please credit the amount remitted to my account." The amount due at the end of each year was added to the account for the following year, and after the dealings between the parties had closed and the final accounts had been submitted the defendants continued on various dates during 1935 and 1936 to send remittance to be placed to the credit of their account. In my view, this was not a contract for goods sold and delivered. The cases relied on by learned Counsel do not seem to me to be apposite. Particular reliance is placed on the case of *Atmaram Vinayik v. Lalji Lakhamsi* (1).

The other question which has been argued by learned Counsel for the defendants is that since the defendants are the heirs and legal representatives of Muhammad Raffique who died about five years ago, the decree in favour of the plaintiff firm should be confined as to each defendant to the extent

(1) 42 Bom. L. R 227; 188 Ind. Cas. 300; A I R 1940 Bom. 158; I L R (1940) Bom. 127; 12 R B 500.

only of his share of the debt proportionate to his share of the estate. In support of this argument, he has relied on s. 33 of Sir Dinshaw Mulla's book on Muhammadan Law and also on s. 36 of that book. In s. 33 the learned author merely sets out the extent of the liability of heirs for debts and he states there that each heir is liable for the debts of the deceased to the extent only of his share of the debts proportionate to his share of the estate. In s. 36 he discusses the question as to the remedies of a creditor when only some of the heirs of the deceased have been sued, or for a decree passed against him. In this case the suit is against all the heirs of the deceased, and s. 36 of Sir Dinshaw Mulla's book does not appear to me to be applicable. The question really is whether the decree-holder should be forced to execute his decree against each defendant separately, even though the parties are in joint possession. Had the estate been distributed the position might be otherwise, but the estate has not been distributed and the parties are in joint possession. In the circumstances, there should be a decree against the defendants which will enable the decree-holder to execute against the property as a whole without interfering with the extent of the liability of the heirs *inter se*. There will be a decree for Rs. 4,736-10-6. The contesting defendants must pay the costs of the suit. Interest on decree 6 per cent.

D.

*Suit decreed.***MADRAS HIGH COURT**

Appeal No. 90 of 1937

November 16, 1939

VENKATARAMANA RAO AND KUNHI

RAMAN, JJ.

OFFICIAL ASSIGNEE, MADRAS
REPRESENTING THE ESTATE OF S. N.
FIRM—APPELLANT*versus*

NATESAM PILLAI—RESPONDENT

Banker and customer—Fiduciary relation between—When arises—Amount credited in suspense account awaiting directions of creditor—No pass or cheque books issued nor contract as to interest entered into—Relation between parties is fiduciary—Creditor is entitled to preferential claim.

The mere fact that a person had no prior banking transaction with the Bank will not by itself be sufficient to exclude the possibility of the person's having become a customer of the Bank when he paid in the amounts. Again the mere fact that a customer gives directions to a banker to apply in a particular manner moneys standing to his credit will not necessarily make the relationship between the parties fiduciary. *Commissioner of Taxation v. English Scottish and Austrian Bank Ltd.* (4) and *Dharmambal Ammal v. James Voice Pirrie* (6), relied on.

Where the account books of the parties show that the amounts were credited in *anamath* or suspense account to await the instructions of the creditor as regards their disposal and the usual procedure of giving pass books and cheque books was not followed and no agreement was entered into regarding the interest payable on the deposits, the amounts must be deemed to have been received by the Bank in a fiduciary capacity and not as between a Bank and its customer. Consequently such a creditor is entitled to preferential claim over other customers of the Bank. *In re Brown, Ex parte Platt* (1), *Burdwick v. Garick* (2), 6 Ind. Cas. 383 (8) and 1 Ind. Cas. 712 (10), relied on.

A. against a decree of the Sub-Judge, Trichinopoly, dated December 12, 1936.

Mr. K. P. Ramakrishna Aiyar, for the Appellant.

Messrs. B. Sitarama Rao and A. V. Narayanaswamy Aiyar, for the Respondent.

Kunhi Raman, J.—The Official Assignee of Madras who was impleaded as defendant No. 17 in O. S. No. 64 of 1935 on the file of the Subordinate Judge's Court of Trichinopoly is the appellant. He was brought on record as representing the estate of defendants Nos. 1 to 7 who were adjudicated insolvents in I. P. No. 345 of 1935 on September 6, 1935. They were members of a joint Hindu family which was carrying on banking business under the name and style of the S. N. Firm which suspended business on April 30, 1935. Between March 25, 1935 and April 17, 1935 the plaintiff-respondent had paid this firm a total sum of Rs. 6,950 at Trichinopoly in the following circumstances. The plaintiff had arranged to purchase certain lands in the village of Thiruvarambur from one S. V. Nallasivam Pillai of Tuticorin. When the plaintiff told defendant No. 3 of this plan the latter suggested that the transaction could be arranged through the defendant's branch at Tuticorin which he said was close to Nallaperumal Pillai's shop of that place. The plaintiff's case was that the payment referred to above was made by him under an arrangement that the firm of defendants Nos. 1 to 7 should keep the total amount in trust for him until he decided how it should be disposed of. The plaintiff had no prior banking transactions with the defendants' firm. The plaintiff's case was that the amount was not deposited by him with the firm and that when he made the payment, no relationship of banker and customer arose between him and the firm. On the other hand the defendants' firm received the amount in a fiduciary capacity. He, therefore, wanted to recover the full amount from the assets of

the firm and not merely in the shape of dividends declared from time to time by the Official Assignee.

The claim was resisted in the Court below, on the ground that the plaintiff was not entitled to any preferential treatment in respect of the total amount paid by him, because it was paid by him as a deposit which was to carry interest at 5 annas per cent. per annum in the ordinary course of the banking business of the firm. This contention of the defendants was negatived by the trial Court which has found on the evidence that the amount was paid by plaintiff on *anamath* account on the understanding that the total amount should be paid back to him when he intended to go to Tuticorin or that a draft should be given to him for the total amount to be paid at Tuticorin by the defendant's branch there. The defendants suspended payment before the plaintiff had made up his mind as to what course he should adopt. The learned Subordinate Judge states in his judgment, and quite correctly too that had the plaintiff adopted the second course and had he taken a draft on the defendants' branch at Tuticorin the position taken up by the plaintiff at the trial might have been untenable. It might then have been assumed that the transaction was an ordinary banking transaction between the plaintiff and the firm which would have relegated the plaintiff to the position of an ordinary customer of the Bank who would have had to take his turn with the other customers of the Bank for obtaining satisfaction. On the ground, therefore, that the Bank held the plaintiff's money in a fiduciary capacity as the result of which the property in the amount did not vest in the Official Assignee, the Court below has recognized the plaintiff's claim to preferential treatment along with such other persons as may be similarly situated. The plaintiff's suit has accordingly been decreed and it is against this decree that the present appeal is preferred.

The learned Advocate for the appellant contends that the money was paid to the Bank to be held "at call," that is to say to be paid back to plaintiff whenever he demanded payment. He points out that this shows that in fact it was paid into a current account to the credit of the plaintiff and that, therefore, the plaintiff must be regarded as an ordinary customer of the Bank and not as a person who had entrusted money to the Bank to be held in a fiduciary capacity.

The learned Advocate for the respondent on the other hand stresses the fact that the

plaintiff did not at any time have a banking account with the firm. The amount was paid by the plaintiff at the invitation of defendant No. 3. No cheque book or pass book was given to the plaintiff by the firm. No entry was made of the payment in the current account or fixed deposit register of the Bank. The firm did not produce its fair day book at the trial. No ledger was opened crediting plaintiff with the amount until at any rate April 30, 1935, by which time the Bank had already suspended payment. He, therefore, argues that the payment was made to the firm as bailee or agent and that consequently the view taken by the lower Court is correct.

It must be stated at the outset that the appellant's case that the amount was paid into plaintiff's current account and that it was to carry interest at five annas per cent, had not been substantiated. It seems to us that the test for ascertaining whether there was any fiduciary relationship or only the relationship of banker and customer between the parties is put succinctly in Hart on Banking, Vol. I (Edn. 5) at p. 582, where the decision in *In re Brown; Ex parte Plitt* (1), is considered. In that case Jullus Plitt handed a cheque to Alexandar Brown, a Banker, with whom he had no banking account, and obtained a receipt to the effect that the cheque was given for collection. Brown was adjudicated bankrupt after he had collected the amount of the cheque and before he had paid the whole of it to Plitt. The trustee claimed the balance of the proceeds of the cheque. Cave, J., observed in the course of the argument:

"Where the debtor is to collect and remit, there is confidence and trust. Where the debtor is to use and repay on demand, there is no trust."

It was held in that case that the relation between the parties was not the ordinary relation of banker and customer. Plitt had handed the cheque to Brown

"for Brown to receive and hold it for him. If so, it is not the ordinary case of banker and customer."

In *Burdwick v. Garick* (2) at p. 240, Lord Hatherley, L. C., says as follows:

"I apprehend that the true rule applicable to these cases is to be found in *Foley v. Hill* (3) at p. 35 where it is clearly stated by Lord Cottenham who distinguishes between the confidence reposed in a factor or agent and the confidence reposed in a person who is merely in the position of a banker. A mere banker who takes charge of his customer's money is not in any fiduciary relation whatever to him with respect to the particular coins or notes deposited because it is the ordinary course of trade to make use

(1) (1889) 60 L.T. 397; 6 Morrell 81; 37 W.R. 463.

(2) (1870) 5 Ch. A. 233 (240); 39 L.J. Ch. 369; 18 W.R. 387.

(3) (1844-48) 2 H.L.C. 28 (35).

of them for his own profit. He does make use of them and he invests money deposited with him, and his customer does not require from him those very coins or exchequer bills which he deposited with him. But in the present case we have an agent who is intrusted with those funds, not for the purpose of being remitted when received to the principal, but for the purpose of being employed in a particular manner in the purchase of land or stock, and which moneys the factor or agent is bound to keep totally distinct and separate from his own money; and in no way whatever to deal with or make use of them. How a person who is intrusted with funds under such circumstances differs from one in an ordinary fiduciary position I am unable to see."

The mere fact that the plaintiff had no prior banking transaction with the defendant's firm will not of course by itself be sufficient to exclude the possibility of the plaintiff having become a customer of the Bank when he paid in the amounts. This is made clear in the judgment of the Privy Council in *Commissioner of Taxation v. English Scottish and Australian Bank Ltd.* (4). On p. 687, occur the following sentences:

"Their Lordships are of opinion that the word 'customer' signifies a relationship in which the duration is not of essence. A person whose money has been accepted by a Bank on the footing that they undertake to honour cheques up to the amount standing to his credit is, in the view of their Lordships, a customer of the Bank in the sense of the statute, irrespective of whether his connection is of short or long standing. The contrast is not between an habitue and a new comer, but between a person for whom the Bank performs a casual service, such as for instance cashing a cheque for a person introduced by one of their customers, and a person who has no account of his own at the Bank."

See also the opinion of Lord Davey in *Great Western Railway Co. v. London and County Banking Co. Ltd.* (5) at p. 420. Again the mere fact that a customer gives direction to a banker to apply in a particular manner moneys standing to his credit will not necessarily make the relationship between the parties fiduciary. This was made clear in the decision reported in *Dharmambal Ammal v. James Vice Pirrie* (6), where money was invested in a Bank's Savings Bank Account and a standing order was given that out of this account payment must be made towards certain recurring chit subscriptions payable by the depositor. The scope of the decision in *Farley v. Turner* (7) is explained in the judgment in that case, and it was held that the depositor was a customer of the Bank and not a person entitled to preferential treatment since no

(4) (1920) A C 683 (687); A I R 1920 P C 88; 89 L J P C 181; 123 L T 34; 36 P L R 305.

(5) (1901) A C 414 (420).

(6) (1939) M W N 1063; 50 L W 939; A I R 1940 Mad. 98.

(7) (1897) 26 L J Ch. 710; 3 Jur. (N s) 532; 5 W R 666.

trust was created. The decisions of this Court reported in *Official Assignee of Madras v. Rajah Iyer* (8), *Official Assignee of Madras v. Mellapparan Kanoor Sarvajana Sahaya Nidhi* (9) and *Official Assignee of Madras v. Smith* (10) do not lay down any principles opposed to the rulings quoted above.

The account books of the parties in the present case show that the amounts were credited in *anamath* or suspense account to await the instructions of the plaintiff as regards their disposal. The defendants' oral evidence shows that when amounts were paid to the Bank in current account or fixed deposit generally pass books and cheque books used to be given and usually agreements used to be entered into regarding the interest payable on the deposits. This procedure was not followed when the plaintiff's moneys were received. Applying the principles of law laid down in the authorities quoted above, we hold that the amounts were received by the Bank in a fiduciary capacity and not as between a Bank and its customer and that consequently the view taken by the lower Court is correct. The appeal therefore fails and must be dismissed with costs payable out of the estate.

N.-S.

Appeal dismissed.

(8) 36 M 499; 6 Ind. Cas. 383; (1910) M W N 451.

(9) 34 M 125; 6 Ind. Cas. 427; (1910) M W N 421; 7 M L T 402.

(10) 32 M 68; 1 Ind. Cas. 712; 5 M L T 164.

CALCUTTA HIGH COURT

Application in Suit No. 222 of 1940

June 4, 1940

MCNAIR, J.

HANSRAJ BHUTERIA AND ANOTHER—

PETITIONERS

versus

ASKARAN BHUTERIA AND ANOTHER—

RESPONDENTS

Administration—Application in administration suit to spend money on marriage expenses of minor plaintiff—Marriage against the provisions of Child Marriage Restraint Act (XIX of 1929)—Parties to marriage domiciled in Bikanir—Marriage to be performed in Bikanir—Source of income in British India—Application held could not be granted.

In an administration suit an application was made for liberty to spend out of the estate certain sum to meet the marriage expenses of the plaintiff who was a minor and had not reached the age of 16. Both the bridegroom and the bride were domiciled in Bikanir where the marriage ceremony was to be performed. The source of income was, however, in Calcutta:

Held, that the Court should not facilitate conduct which the Legislature in British India had made penal under the provisions of the Child Marriage Act, even

if such marriage was not punishable according to law of Bikanir. 170 Ind. Cas. 309 (1), relied on.

Mr. B. C. Ghosh, for the Petitioners.

Mr. S. R. Das, for the Respondents.

Order.—This is an application by the plaintiffs for liberty to spend out of the estate, which is being administered by this Court, a sum of Rs. 25,000 to meet the marriage expenses of the plaintiff, Hansraj Bhuteria. The plaintiff is a minor who has not yet reached the age of 16 years. Apparently both the plaintiff Hansraj and his prospective bride are domiciled in Bikanir. The *sagai* ceremony has taken place in Bikanir, and the marriage ceremony is due to take place at Sujangarh in Bikanir on June 12, 1940. The application is opposed by the executors to the estate. They point out that the marriage would not be valid in India owing to the provisions of the Child Marriage Restraint Act. They also point out that even under the Bikanir Hindu Marriage Act, 1928, the plaintiff will be a minor under the definition contained in s. 2 of that Act, in that he will not have completed his 16th year until June 29, 1940, and the marriage is to be performed on June 12, 1940.

The question whether the Court should allow money to be withdrawn for purposes of a marriage, which the Legislature in British India has made penal, has been considered by this Court in *Panmull Lodha v. Gadhmull Lodha* (1). The facts there were somewhat different because there were no materials in that case to show whether the members of the family were subjects of an Indian State or whether they were domiciled in an Indian State. In the present instance it seems quite clear that the parties are subjects of and domiciled in the State of Bikanir. On the other hand, the business, which is the main source of income and which comprises most of the assets, is carried on in Howrah and Calcutta. The parties are ordinarily resident in Howrah, and the suit in which this application is made is an administration suit which has been brought in this Court. In the concluding portion of his judgment in *Panmull Lodha v. Gadhmull Lodha* (1) at p. 1155* Panckridge, J., said:

"Even assuming that the parties to the intended marriage are not British subjects and are domiciled out of British India, it would surely be wrong in principle for the Court to facilitate conduct which the Legislature has made penal as being socially injurious, on the ground that the promotion

(1) 63 C 1153; 170 Ind. Cas. 309; A I R 1937 Cal. 257; 10 R C 147.

*Page of 63 C.—[Ed.]

of the contemplated marriage is not punishable by the law of the place where it is proposed to celebrate it."

It is argued that that statement by the learned Judge was not essential for the decision in the case before him, because it was not established that the parties to the intended marriage were subjects of an Indian State. The principle however remains. In the present instance this application should in my opinion be dismissed. Even on the applicant's own showing the plaintiff, for whose marriage the money is sought, will not have completed his 16th year at the time the marriage is due to be celebrated, and the contemplated marriage would therefore be a penal offence under the Bikanir Hindu Marriage Act. Learned Counsel for the applicant states that he is willing to give an undertaking that the marriage will not be performed until the plaintiff had completed his 16th year. Even in that event, considering the facts which I have mentioned, namely the ages of the parties, the boy being not quite 16 and the girl being only 12, the parties being ordinarily resident in British India, and the property being entirely in British India, the principle referred to by Panckridge, J., in *Panmull Lodha v. Gadhmull Lodha* (1) seems to me to be applicable, and the Court should not facilitate conduct which the Legislature in British India has made penal. The application is dismissed. Costs of all parties as between attorney and client to come out of the estate. Certified for Counsel.

D. Application dismissed.

NAGPUR HIGH COURT

Miscellaneous Appeal No. 218 of 1940.

September 10, 1940

BOSE, J.

MORESHWAR PARASHRAM DAMLE.

—AND OTHERS—APPELLANTS

versus

THE COMMISSIONER, CHHATTISGARH
DIVISION, RAIPUR—RESPONDENT

C. P. Local Fund Audit Act (IX of 1933), s. 14—
Application under—Appeal to High Court—Court-
fee payable—Court Fees Act (VII of 1870), Sch. I,
Art. 1, s. 4—Schedules if confer right to impose court-
fee.

The District Judge acting under s. 14, C. P. Local Fund Audit Act is not intended to act as a Court but as a special tribunal, in much the same way as it does under the Workmen's Compensation Act. The appeal from his decision to High Court is not from a Court but from a Special Tribunal. Moreover the jurisdiction which s. 14 confers is not revisional, nor can the "appeal" to the High Court be called a "reference." S. 4, Court Fees Act, therefore does not apply nor does.

Art. 1 of Sch. I. No *ad valorem* court-fee can therefore be demanded on the memorandum of appeal to High Court arising out of application under s. 14.

The schedules to the Court Fees Act only determine the method of assessment and do not confer right to impose and collect court-fee.

Misc. A. against the order of the District Judge, Nagpur, dated March 15, 1940.

Mr. C. B. Parakh, for the Appellants.

Mr. W. R. Puranik, Advocate-General, for the Respondent.

Judgment.—This appeal arises out of an application made under s. 14 of the C. P. Local Fund Audit Act (IX of 1933) and the question is whether court-fees on appeal should be paid *ad valorem* on the amount by which the appeal seeks to reduce the decree of the District Judge.

The scheme of the Act is that the Examiner of Local Fund Accounts is empowered to charge such sums as he considers fit under s. 10 of the Act against the persons mentioned there and to certify such charge. What happens thereafter is not clear. This is another of the local Acts which the Courts find so difficult to understand and construe.

Section 14 provides that any person aggrieved by any charge made under s. 10 may either apply to the District Judge or to the Local Govt. to have such charge modified, altered or set aside. If he applies to the Local Govt. that body can, after hearing the applicant, pass such orders thereon as it thinks fit. The word used for the decision of the Local Govt. is "orders". If, however, the application is made to the District Judge, then the District Judge is empowered to confirm, modify or remit the charge, and to pass such decree as he thinks fit. The word used there is "decree".

Then follows the proviso to s. 14. That provides that

"the aggrieved person shall have a right to file one appeal in accordance with the provisions of the Civil P. C."

The term used here is "appeal" and it evidently refers to an "appeal" from the "decree" of the District Judge.

Section 13 deals with the matter of recovery and divides all possible cases under the Act into two categories. The first relates to cases in which "no appeal has been preferred under s. 14" and the second to cases in which an appeal has been preferred. In the former case the sum stated in the certificate of the Examiner has to be recovered by the Deputy Commissioner as if it were an arrear of land revenue, and in the latter case "the sum stated in the order of the appellate author-

ity." What is the position of the District Judge in all this.

It will be seen that he has empowered to pass a decree and not to make an order. It will also be seen that the person aggrieved has been empowered to apply (not appeal) to the District Judge and that the only appeal contemplated by s. 14 is the appeal from the "decree" of the District Judge. What the decision of the appellate authority is intended to be I do not know. As the appeal is to be in accordance with the provisions of the Civil P. C. from a "decree" of the District Judge I would have thought that the decision of the appellate authority would have ended in a "decree" in accordance with the provisions of the Code. But s. 13 speaks of the decision of the appellate authority as an "order".

However, reading all these provisions together, I think it is clear that the District Judge is not intended to act as a Court but as a special tribunal, in much the same way as it does under the Workmen's Compensation Act. Many considerations lead me to this view.

In the first place, the appeal or the application, whichever it is, is to the District Judge and not the District Court. In the next place we have the two alternative tribunals of appeal, the High Court and the Local Govt.; and in the third place, we have an astonishingly loose use of the expressions "apply", "appeal", "decree" and "order", terms which have well-known technical meanings when one is dealing with Courts.

The charging section in the Court Fees Act so far as the High Court is concerned, is s. 4. It authorises the levy of court-fees when the Court is exercising the following jurisdictions,

- (1) its extraordinary original civil jurisdiction,
- (2) its extraordinary original criminal jurisdiction,
- (3) its appellate jurisdiction under the Letters Patent, and
- (4) its jurisdiction as regards appeals from the Courts subject to its superintendence; or in the exercise of its jurisdiction as a Court of reference or revision.

The memorandum in question clearly does not relate to the first three jurisdictions, and as regards the fourth, the appeal is not, on the view taken above, from a Court but from a special tribunal. As to the difference between the two see a recent decision of the Division Bench in *Secretary of State*

for *India in Council v. Geeta* (1), where it was held that an award by a District Judge acting as a Commissioner under the Workmen's Compensation Act is not a "judgment" within the meaning of the Letters Patent because the District Judge is not a Court when acting in that capacity. That this is also the position in respect of orders of the District Judge acting under the Land Acquisition Act is implicit in the Court Fees Act itself. Section 8 deals specially with these cases: In my opinion this section would be unnecessary if the District Judge's awards were "judgments" in the ordinary sense because then exactly the same result in respect of the fee payable would be reached by the application of Art. 1, Sch. I. It is only on the assumption that this article does not apply that s. 8 becomes necessary. There is no similar special provision in respect of the kind of appeal contemplated by s. 14 of the Local Fund Audit Act.

The next type of jurisdiction which s. 4 of the Court Fees Act legislates for is when the High Court acts as a Court of reference or revision. The jurisdiction which s. 14 of the Local Fund Audit Act confers is not revisional, nor in my opinion can the "appeal" to the High Court be called a "reference." A reference can only be made by a Court or some person in authority. Here what is contemplated is an appeal by an aggrieved party. In the circumstances I do not see how any Court at all can be demanded. Article 1 to Sch. I though general cannot apply unless the right to collect is conferred in the body of the Act. The schedules only determine the method of assessment and do not confer a right to impose and collect Court-fees.

D. Order accordingly.

(1) I L R (1939) Nag. 124; 182 Ind. Cas. 970; A I R 1939 Nag. 122; 1939 N L J 63; 12 R N 37.

MADRAS HIGH COURT

Special Bench

Original Petition No. 220 of 1937

February 23, 1940

LEACH C. J., KING AND KRISHNASWAMI

AYYANGAR, JJ.

COMMISSIONER OF INCOME-TAX,
MADRAS—PETITIONER

versus

V. NADIMUTHU PILLAI—ASSESSEE—
RESPONDENT

Income Tax Act (XI of 1922), s. 4 (2)—Resident in British India owning immovable property in Indo China—Account in Bank in Indo China—Right to overdraw to certain limit—Payment of net income

in account with Bank and reduction of amount of overdraft—In the year of account, withdrawal of certain sum less than net income and remittance to British India—Remittance, if remittance of profit within the meaning of s. 4 (2)—Assessee, if should receive profits in India in exact form in which they were made—Available profits more than sufficient to cover remittance—Remittance, if presumed to be out of profits.

A resident of Tanjore District owned some immovable property in Saigon in Indo-China, from which he derived income in the shape of rent. He had kept an account in a Bank in Saigon and had a right to overdraw it to a certain limit. In the year of account he paid out of his net income into his account and reduced his overdraft to certain extent. While the overdraft was still at that figure he withdrew certain sum which was less than the net income and remitted it to British India:

Held, that the remittance could not be treated merely as remittance of the proceeds of a loan. The remittance could be properly assessed to income-tax under s. 4 (2) as a receipt of foreign income in British India.

[Case-law discussed.]

A person who has income accruing to him in a foreign country is at perfect liberty to keep it there, or to spend or utilize it in that or any other country in any way he thinks fit. His liability to tax arises not because he makes the profits but because he brings or receives them into British India. It is not necessary that he should receive those profits in the exact form in which they were made, but he must receive them into British India substantially as profits. If the remittance is traceable, and is traced to the assessee's foreign profits there would be ground for holding that the Act is attracted. [p. 736, col. 2.]

If there are available profits more than sufficient to cover the remittance, the presumption to start with is that the remittances came out of the profits, though ultimately the question to a large extent is one of fact. *Kneen v. Martin* (4), relied on. [p. 737, col. 2.]

O. P. reference by the Commissioner of Income-tax, Madras.

Mr. K. V. Sesha Iyengar, for the Petitioner.

Messrs. T. R. Venkatarama Sastriar and M. Subbaraya Iyer, for the Respondent.

Leach, C. J.—The assessee derives income from immovable property, trade in cloth, money lending and other sources existing within the jurisdiction of the Income-tax Officer, Tanjore Circle. He is also the owner of considerable house property in Saigon in Indo China. For some years he has kept an account with the Saigon branch of the Banque Franco-Chinoise and has the right to overdraw it to the limit of \$50,000. On April 1, 1935, his overdraft amounted to \$20,149. It is unnecessary to embark on an inquiry into the purposes for which the \$20,149 was used, but it is common ground that it was used in part for paying for repairs to the assessee's properties in Saigon and meeting taxes levied thereon. The period of account was the year from April 1, 1935, to March 31, 1936, and the

assessee's net income from his Saigon properties during that year was \$18,414. As the result of payments into his account of the income from these properties he had reduced his overdraft to \$12,165 by November 30, 1935. On December 7, 1935, while the overdraft still stood at that figure, he withdrew from the account a further sum of \$5,719, the equivalent of Rs. 10,000. The \$5,719 represented a remittance which he made to British India, and the question which the Court is called upon to decide is whether this remittance represents a remittance of profits derived from his Saigon properties. After making the remittance the assessee continued to draw on the account the various purposes and to make payments in from the rents he received in Saigon. The payments into the account from December 7, 1935, to the end of the financial year amounted to \$11,570 and the year closed with his overdraft standing at the figure of \$9,441. It is conceded by the assessee that the \$11,570 has been rightly treated as being net income.

The assessee says, however, that the payments into his banking account both before and after December 7, 1935, should be treated as payments in reduction of the overdraft. He contends that inasmuch as throughout the year he was still overdrawn, in spite of his payments into the account from the income from his properties, the income-tax authorities are bound to treat the remittance of \$5,719 on December 7, 1935, as being a remittance of borrowed money. In the course of his argument Mr. Venkatarama Sastriar admitted that if the overdraft had been completely discharged by payments in of further profits after the new financial year commenced, the position would have been different but the overdraft had not been paid off. On the other hand, the income-tax authorities say that the true position cannot be gathered by treating the payments into the account and the withdrawals as being entirely separate transactions. They maintain that the net result of the assessee's payments in and his withdrawals from the account is that he has reduced his overdraft by \$12,695 and has remitted the balance of his total profits (\$18,414 less \$12,695) to British India.

I am unable to accept as being correct the contention of the assessee that payments into the account from his profits must be treated as separate transactions and regarded *in toto* as payments in reduction of the overdraft. I consider that the income-tax authorities are right in saying that the

account must be examined as a whole and that when this is done the remittance cannot be treated merely as a remittance of the proceeds of a loan. The principles which govern this case are in my opinion to be found in the decisions in *V. V. R. Firm v. Commissioner of Income-tax Madras* (1); *Commissioner of Income-tax Madras v. Meyyappa Chettiar* (2) and *Fellowes Gordon v. Commissioners of Inland Revenue* (3). In *V. V. R. Firm v. Commissioner of Income-tax, Madras* (1) a Bench of three Judges of this Court considered the case of a Nattukottai Chetty firm which was carrying on a banking business in Rangoon and Saigon with headquarters at Karaikudi in the Madras Presidency. The assessee firm received in Rangoon, which was then in British India, a sum of Rs. 1,00,000 from its agent in Saigon. The agent had been instructed by the office at headquarters to borrow and remit that amount to the Rangoon branch. The remitted sum was made up of borrowings amounting to \$59,000 and the realization of outstanding loans. The question was whether the \$59,000 represented a remittance of foreign profits. It was found that the Saigon branch had accumulated profits which were more than sufficient to cover the remittance and that it had repaid the whole of the borrowed amount within 28 days. It was held that the \$59,000 represented in these circumstances a remittance from profits and not from capital. In *Commissioner of Income-tax, Madras v. Meyyappa Chettiar* (2), this Court applied the same principle.

The facts in *Fellowes Gordon v. Commissioners of Inland Revenue* (3), are very similar to the facts in the present case. The assessee there had plantation in Ceylon, and during each of the years ending April 5, 1928 and April 5, 1931, was for more than six months resident within the United Kingdom. In the year ending April 5, 1928, he received from his agents in Ceylon for the credit of his account with the National Bank of India, Limited, in London, a total sum of £2,200, and in the year ending April 5 1931, a total sum of £1,400. His income from his plantations in Ceylon during these two years was more than sufficient to meet the cost of the remittances. During the whole of the time when the remittances were taking

(1) 6 I T C 54; 139 Ind. Cas. 173; A I R 1932 Mad. 573; 63 M L J 227; 36 L W 165; (1932) N W N 902; Ind. Rul. (1932) Mad. 630 (F. B.).

(2) 8 I T R 20; 188 Ind. Cas. 395; 51 L W 362; (1940) M W N 277; (1940) 1 M L J 543; A I R 1940 Mad. 416; 13 R M 12 (F. B.).

(3) 19 Tax Cas. 683.

place the assessee was indebted to his agents in Ceylon with whom he had an account. The account started with a debit balance of some Rs. 35,000 and ended with a debit balance of some Rs. 7,000. In the interval between the commencement and the end of the account there were very great variations, some upwards and some downwards, but at all material times the assessee had an overdraft with his agents. There were other transactions which affected the amount of the balance from time to time, but in so far as the balance was reduced, the reductions were due to no other cause than the payment into the account of income from the assessee's possessions in Ceylon. The case was decided by the Court of Session in Scotland and the Lord President (Lord Normand) stated that he was unable to understand on what principle the assessee was to escape income-tax.

"upon the income arising from his Ceylon possession on the full amount of the actual sums being remittances received by him in this country and ultimately traceable to his income."

The Lord President went on to observe :

"It is suggested that the mere existence of an overdraft precludes his liability to tax on the ground that any money paid out of an overdraft and remitted to this country is the money of the lender and not of the recipient. Learned Counsel for the appellant did not hesitate to say that that would apply although there was a very large income in Ceylon, and an overdraft was specially arranged for the purpose of bringing this alleged principle into play. I am quite unable to accept that proposition. A man may have an income in Ceylon and may receive remittances of that income in this country through an account in which he is debtor during the whole period in which the remittances are made. There is no difference between income arising from Ceylon and income arising from this country in that respect. A man may have an income and still be in debt, and the amount of his income may be remitted to him through the hands of his creditor. I can see nothing in *Kneen v. Martin* (4), which is in any way inconsistent with what I have just said. It is perfectly true that it may not be sufficient to say that you had an income in Ceylon and you have received remittances of less amount than that income in this country. But here the reasonable inference is that what was received in this country was not derived from some realization of capital or from some capital account, but was in truth derived from the income arising from possessions in Ceylon, and I think that the Commissioners, on the facts of the case, were entitled to arrive at the conclusion at which they did arrive, and that the appeal should be dismissed."

As in that case the assessee in the present case had a debit balance with his bankers at the beginning of the period and a debit balance of lesser extent at the end of the period and it is not suggested, nor can it be, that the inference may here be drawn that the remittance was from the realization of capital. The assessee had

made profits in Saigon far in excess of his remittance to British India. By merely increasing his overdraft to pay for the remittance does not mean that the remittance was in substance remittance of borrowed money. Having made the remittance the assessee paid into the account out of his profits from his properties in Saigon for more than was necessary to meet the cost of the remittance. The Court must look at the substance of the transaction, and if it does that, I consider the proper conclusion to be drawn is that there was here a remittance of profits. If the assessee's contention was to be accepted it would mean that by manipulating an overdraft account kept abroad and keeping it permanently in debt an assessee would be able to escape taxation of his remittance of profits. The test is from where did the money for the remittance come and in the words of Lord Normand it must be ultimately traceable to his income in Saigon. I can see no difference in principle between the two cases. I would answer the question referred by saying that on the facts of this case the remittance was properly assessed under s. 4 (2), Income Tax Act, 1922 as a receipt of foreign income in British India and I would award the income-tax authorities the usual costs granted by this Court in such case, namely Rs. 25.

King, J.—I agree.

Krishnaswami Ayyangar, J.—The question that has been referred for our decision is:

"Whether on the facts of this case the sum of Rs. 10,000 was properly assessed under s. 4 (2) as a receipt of foreign income in British India."

The amount mentioned represents a sum of money remitted to the assessee in British India from Saigon in French Cochin China on December 7, 1935, a date which fell within the year of account 1935-36. The income-tax authorities have included this remittance in the assessable income of the assessee, on the ground that it represented foreign profits received in British India within the meaning of s. 4 (2), Income Tax Act, 1922. The assessee objected that the remittance was not of income liable to be taxed under the section but came out of capital, being the proceeds of a loan borrowed in Saigon; and he therefore claimed that it should be excluded in the calculation of his assessable income. This contention has been negatived by the Department, but at the request of the assessee, the Commissioner of Income-tax has referred

(4) (1935) 19 Tax Cas. 33; (1935) 1 K. B. 499; 104 L. J. K. B. 361; 152 L. T. 337; 79 S. J. 31.

the question set out above for the opinion of this Court. The Commissioner's conclusion that the remittance was made out of profits available to the assessee in Saigon is obviously in the nature of an inference drawn from facts proved, rather than a finding on a pure question of fact. There is no direct proof adduced to establish a connection between the profits available to the assessee in Saigon and the remittance in question, in the sense that it was wholly or in part identifiable with those profits. But such identification is not necessary, if in substance the remittance is shown to have come out of the profits, and is traceable to that source. The only question, which is of course a question of law is whether the inference drawn can be said legitimately to follow from the facts found.

The facts found are these: The assessee, a resident of the Tanjore District in this Province, owns extensive immovable properties in Saigon, in French Cochin China, from which he derives income in the shape of rents. In connection with these properties, he has to incur expenses, for taxes, repairs, etc. It also appears from the statement furnished by the Commissioner in response to the requisition contained in our order dated November 14, 1938 that the assessee also lends and borrows moneys in Saigon. His monetary transactions are carried on through the agency of the Banque Franco Chinoise at Saigon which has allowed him an overdraft at first limited to \$ 15,000 but subsequently increased to \$ 50,000. Into his account with this Bank his receipts by way of income from his immovable properties are paid from time to time. Whenever the need arose he drew on the Bank, utilizing the money drawn mostly in Saigon but occasionally for remittance to this country for his use here. In the beginning of December 1935, the assessee's account with the Bank shows that he had overdrawn his account by \$ 12,165.23. The remittance in question was as I have said, made by the Bank on December 7, 1935, and appears as a debit in the account of \$ 5,719.33 which is the equivalent of the Rs. 10,000. By reason of the remittance the overdraft swelled to \$ 17,884. Further credits and debits followed according as the assessee paid in or withdrew moneys, and the account shows that there was at the end of the account year, that is on March 31, 1936, a debit balance of \$ 9,441.70 against the assessee.

It has been found as a fact that the net income of the assessee from his Saigon properties during the account year amounted up till the date of remittance to \$ 10,184, the

total income at the end of the year being \$ 18,184, so that whichever date is taken, there was an available income far in excess of the amount remitted. But from this circumstance alone however, it is not right to infer that what the assessee received was income and not capital. The decision in *Fel-lowers Gordon v. Commissioner of Inland Revenue* (3), most relied on by learned Counsel for the Income-tax Commissioner, concedes this position. The Lord President has said in that case:

"It is perfectly true that it may not be sufficient to say that you had income in Ceylon and you have received remittance of less amount than that income in this country."

Any other view would inevitably result in consequences which the Statute could never have intended. A person who has income accruing to him in a foreign country is at perfect liberty to keep it there, or to spend or utilize it in that or any other country in any way he thinks fit. His liability to tax arises not because he makes the profits but because he brings or receives them here. It is not necessary that he should receive those profits in the exact form in which they were made, but he must receive them here substantially as profits. If the remittance is traceable, and is traced to the assessee's foreign profits there would be ground for holding that the Act is attracted though even here it is necessary to exercise caution so as to avoid the error pointed out by the Privy Council in *Income Tax Commissioner, Bombay v. Ahmedabad Advance Mills, Ltd.* (5), where machinery purchased in a foreign country with profits made in that country and imported into British India was held not to give rise to a case of profits received within the meaning of s. 4 (2) of the Act. The illustrations given in the last paragraph of their Lordships' judgment are instructive, and indicate the danger of regarding traceability by itself as a conclusive circumstance. On the other hand, it is equally clear that the mere existence of an overdraft cannot save foreign income from liability to taxation as money paid out of the overdraft and remitted to this country is not necessarily the money of the lender, and may be that of the recipient. It is easy to imagine cases, where under cover of an overdraft, income might in truth be remitted and received as such. A man might so manipulate his dealings with

(5) (1940) 8 I T R 95; 185 Ind. Cas. 821; A I R 1940 P C 36; 67 I A 115; 51 L W 61; (1940) A L J 63; 6 B R 334; 12 R P C 124; 1940 O L R 98; (1940) 1 M L J 137; (1940) M W N 115; 44 C W N 379; 21 P L T 177; 42 Bom. L R 318; 71 C L J 156; (1940) Kar. (P C) 97 Sup. (P C).

a bank, as to leave a permanent debit balance against himself, and yet be held liable to be taxed on his remittances, if it appears that he took advantage of a banking facility as a convenient shield to conceal a receipt of profits. The position is not altered by the absence of deliberate intent, if the true nature and effect of the payments and withdrawals is such as to bring about the same result. There is no abstract rule of law to be applied generally to cases of this kind, and I do not understand the Court of Session to have laid down any such rule in the case cited. The question in each case is, what is the correct inference to be drawn and the Court is entitled to get behind appearances in order to discover the truth.

A man with profits available in a foreign country and wanting to bring them into this country may find it necessary as a measure of convenience to obtain a temporary overdraft, or resort to a temporary borrowing which he proceeds to make good immediately out of his profits. In such a case, the remittance though *in forma specifica* is a remittance of capital, it is in truth a remittance of profits, and is taxable as such. The loan or the overdraft as the case may be and its repayment by the assessee out of profits may be so connected together by proximity of time or otherwise, as to lead to the reasonable inference that the remittance was in substance a remittance of profits though to start with, it might appear or is made to appear as if it came out of a capital source. The decision of this Court in *V. V. P. Firm v. Commissioner of Income Tax, Madras* (1), and *Commissioner of Income Tax, Madras v. Meyyappa Chettiar* (2), are illustrations in point. Granting that ordinarily a remittance of borrowed money is not to be deemed a remittance of profits, Beasley, C. J. in the former case held that the facts there present, namely, the existence of available profits, the fact of the money being borrowed and remitted on the instructions of the assessee, and its repayment within 28 days out of profits collected, justified the finding that it was a remittance not of capital but of profits.

In this connection it may be mentioned that learned Counsel for the assessee fairly conceded that a remittance out of borrowed money beginning in a capital source, would be turned into a remittance of profit, the moment profits were realized and applied to the discharge of the loan. Otherwise, it would become possible for an assessee to evade forever the payment of tax on his foreign income again and again brought into

this country by adopting the expedient every time of first borrowing and then utilizing his income for the repayment of the loan borrowed. The presumption underlying the decision in *Scottish Provident Institution v. Allan* (6), would come to the rescue of the Department in such a case to prevent the Crown being cheated out of its revenue. If there are available profits more than sufficient to cover the remittance, the presumption to start with is that the remittance came out of the profits, though ultimately the question to a large extent is one of fact: *Kneen v. Martin* (4). If I followed Mr. Venkatarama Sastriar afloat, his only point was that the conversion of what was originally a capital remittance into a remittance of profits takes place not when the remittance is made, but when the profits are applied to the discharge of the loan borrowed and remitted. In my judgment it is the proposition conceded, which I think was rightly conceded, that furnishes the true ground of decision in this case.

If we are to confine attention to the transactions of the assessee with the Banque Franco-Chinoise during the year of account only, the answer to the reference should in my view be in favour of the assessee. It should be mentioned at the outset that there is no suggestion in this case that the transactions with the bank were other than what they purport on their face to be. There is no reason to think that the assessee has adopted a device or invented a scheme through the instrumentality of his banking account to find a way of escape from legitimate taxation. If an inference is to be drawn against him, it must be on a proper consideration of the transactions as disclosed in the account. That his ownership of the Saigon properties and his other affairs in that place rendered it genuinely necessary or expedient for him to spend or invest his money there is beyond question. As already mentioned he has had to incur expenses for repairs, taxes, etc., and has also lent and borrowed money in the foreign country. These are facts which have not been disputed, and indeed they plainly appear from the evidence before the income-tax authorities. For these transactions he had drawn from his banking account in which all the withdrawals appear as debits against him. The debits amounted on December 7, 1935, the date of the remittance, to the sum of \$12,165. The whole of the assessee's income during the year, as found by the Commis-

(6) (1903) A C 129; 4 Tax Cas. 591; 72 L. J. P. C. 70; 88 L. T. 478; 19 P. L. R. 432.

sioner, being less than this sum, why is it to be presumed or inferred that the profits did not go in reduction of the overdraft, but were in part remitted to this country?

I can see at least two reasons against such an inference being drawn, but none in its favour. It was perfectly open to the assessee to apply his income to the discharge of his debts to the Bank on his overdrawn account, with the double advantage of saving himself from the payment of interest to the bank, and income-tax to the Crown. In the absence of evidence to the contrary, a man must be presumed to have done that which was to his advantage, rather than that would result in a detriment. In the second place, and again in the absence of anything to the contrary, when there are debits and credits in an account, the credits should be appropriated towards the discharge of the earlier debits serially in the order of dates. This is the rule of appropriation laid down in *Clayton's case* (7) and embodied in ss. 59 to 61, Contract Act; and, if this rule is applied to the assessee's account with the Bank, there would still remain a debit balance even after appropriating the whole of the year's income towards the debits prior to the remittance. On this footing there would be a total absence of profits from which the remittance could be deemed to have come.

With very great respect, I am unable to agree that *Fellowes Gordon v. Commissioner of Inland Revenue* (3), furnishes a parallel governing the decision of the present case. It was proved and found in that case, as in this, that the assessee had derived profits in Ceylon in the years there in question to an amount in excess of the remittances. The account produced there unlike in the present case was of a fragmentary character, showing the debit balances on the various dates of the remittances against the assessee with no information regarding the dealings in the intervening periods. It does not appear from the statement of account there produced, whether or not the whole of the opening balance on April 27, 1927 and July 5, 1930 would be wiped out if the revenue receipts for those years had been appropriated in accordance with the rule in *Clayton's case* (7), whereas in the present case it is quite clear it is the other way about. This difference in fact strikes me as a material one capable of affording a legitimate ground of distinction. It is also to be observed that the chief arguments on behalf of the assessee in that case were (i) that the account showed a

debit balance at the date of each of the remittances and (ii) that it was not material to know from what source the advances made by his agent, were repaid. I may say at once that the first point affords insufficient basis for a correct inference. The second ignores what is to my view an essential source of material information. Against these arguments, the Crown contended, I think quite rightly, that the fact that his current account with his agent was overdrawn at the dates when the remittances were made was not sufficient evidence that the remittances were from a capital source. There are indications in the judgment of the Lord President that this insufficiency influenced the decision. He has drawn pointed attention to it by observing as follows:

"The account starts with a debit balance of some Rs. 35,000, and it ends with a debit balance of some Rs. 7,000. In the interval between the commencement and the end of the account there were great variations, some upwards and some downwards. We are not exactly informed what other transactions took place in Ceylon which affected the amount of the balance from time to time, but this much is certain, that, in so far as it was reduced, the reductions were due to no other cause than the payment into the account of his agents, of income from the appellant's possessions in Ceylon. It, therefore, appears that the income in Ceylon was in excess on the whole, of the total amount of the remittances received in this country by the appellant. That being so, I am unable to understand on what principle he is to escape income-tax upon the income arising from his Ceylon possessions on the full amount of the actual sums, being remittances received by him in this country and ultimately traceable to his income."

The italics are mine. There is no reference in this judgment to the principle of appropriation arising by reason of the rule in *Clayton's case* (7), or the presumed intentions of the party, as the necessary material for the application of the principle was not available. In its absence it would be perfectly legitimate to hold that the presumption arising from *Scottish Provident Institution v. Allan* (6), had not been rebutted, and I think that this was the real basis of the Lord President's conclusion. Otherwise, it will be difficult to reconcile the decision with what the Lord President himself stated lower down in his judgment where he pointed out that the existence of profits, and the fact of a remittance are by themselves insufficient. If the matter stood there, I should be prepared to answer the question referred in favour of the assessee. But the matter does not rest there. From the additional information furnished by the Commissioner it appears that in the year 1933-34, the assessee received a remittance of \$8,000 from Saigon through his Bankers and out of this amount debited in the account, a portion only, name-

ly \$1,680 or Rs. 2,300 had been taxed in 1934-35 as a remittance of profit, leaving a balance of \$6,320 untaxed in that year. According to the proposition of law conceded by Mr. Venkatarama Sastriar and referred to already, if this balance has been wiped out by the revenue receipts of the year 1935-36, it is automatically turned into a remittance from an income source though in origin it was from a capital source. The income during the account year was admittedly sufficient to discharge the whole of that balance and certainly to the extent of the whole of the remittance sought to be assessed to tax. It is this fact, which in my judgment turns the scale in favour of the Crown, and I accordingly agree in the answer given by my Lord though as I have explained, I rest my decision on a different ground.

N.-D.

Answer in affirmative.

PATNA HIGH COURT

Civil Revision Petition No. 34 of 1940

December 20, 1940

FAZL ALI, J.

LAKSHMANA SAHU—PETITIONER

versus

M. SIMACHALA PATRA—

OPPOSITE PARTY

Evidence Act (I of 1872), s. 92—Expression "between the parties to any such instrument," whether applies to questions raised between parties on the one side only of deed regarding their relations to each other under contract—Res judicata—Suit against two defendants on basis that one of them was principal and the other surety—Question which of them was principal and which surety neither agitated nor decided—Subsequent suit by one of the defendants against the other—Defendant in subsequent suit, if can raise defence that he was not principal.

The words "between the parties to any such instrument" as used in s. 92, Evi. Act refer to the parties who on the one side and the other came together to make the contract or disposition of property, and would not apply to questions raised between the parties on the one side only of a deed regarding their relations to each other under the contract. *Mulchand v. Madho Ram* (1) and *Shamsh-ul-Jahan Begam v. Ahmad Wali Khan* (2), followed, 137 Ind. Cas. 285 (3), dissented from.

A suit was brought against two defendants on the footing that one of the defendants was principal and the other was surety. The question as to which of the defendants was surety and which the principal was neither agitated between the defendants *inter se*, nor decided. In a subsequent suit by one of the defendants against the other defendant:

Held, that the defendant (in the subsequent suit) could raise the defence that he was not the principal, such defence not being barred by *res judicata*.

C. R. P. from an order of the Sub-Judge, Berhampur, dated January 27, 1940.

Mr. P. V. B. Rao, for the Petitioner.

Mr. R. K. Ratho, for the Opposite Party.
Order.—This is an application in revision against the judgment and decree of the Small Cause Court Judge of Berhampur in a suit for contribution which was brought by the plaintiff opposite party against the petitioner. It appears that a decree was obtained by Messrs. Addison & Co., against the plaintiff, the defendant and another person on the basis of a contract of hire and purchase by which the company had sold a typewriting machine on the instalment system. In the contract of hire and purchase the petitioner was described as the hirer and the plaintiff and one B. Maharana as guarantors. Subsequently, the company sued all these persons and obtained an *ex parte* decree. The company then transferred the decree to one Radha Krishna Sahu who attached the land of the plaintiff. In order to save his land the plaintiff deposited the decretal amount and the decree was satisfied. The plaintiff thereupon brought the present suit to recover the amount from the petitioner. The defence of the petitioner was that he was not the purchaser of the typewriter, but it was the plaintiff who was the real purchaser of the typewriter and it was he who had been making payments to the company. The learned Small Cause Court Judge held that the defence could not be entertained firstly because the decree which was obtained by Messrs. Addison & Co., was based on the footing that the defendant was the purchaser and secondly because under s. 92, Evi. Act, the defendant could not be allowed to adduce any oral statement for the purpose of contradicting or varying the terms of the contract which had been reduced to writing. Thus, the learned Small Cause Court Judge did not allow the defendant to adduce any evidence in support of his allegation and decreed the plaintiff's suit with costs. The present application is directed against his decree.

In my opinion neither s. 11, Civil P. C., nor s. 92, Evi. Act, can be said to constitute a bar to the defendant's right to substantiate his defence. In the suit which was brought by Messrs. Addison & Co., the plaintiff and the defendant were arrayed on the same side. The suit was brought on the footing that all the three persons who were parties to the contract were liable. The question as to which of the defendants was surety and who was the principal purchaser was not agitated by the defendants among themselves and was not decided. That being so, the decree in the previous suit will not operate as *res judicata*. As to s. 92, Evi. Act, it is

enough to say that there are at least two decisions of the Allahabad High Court in which it has been held that the words "between the parties to any such instrument" as used in the section refer to the parties who on the one side and the other came together to make the contract or disposition of property, and would not apply to questions raised between the parties on the one side only of a deed regarding their relations to each other under the contract: see *Mulchand v. Madho Ram* (1) and *Shamsh-ul-Jahan Begam v. Ahmad Wali Khan* (2). The last case is directly in point because in that case a person had sued as a plaintiff on the allegation that though in a mortgage bond he appeared as a co-obligor, he was in reality merely a surety. In that case it was held that evidence was admissible to show that the plaintiff executed the mortgage bond as a surety only.

The opposite view seems to have been taken by a single Judge in *Muthukumaraswami Mudaliar v. Gobinda Padayachi* (3) but I prefer to follow the decisions of the Allahabad High Court which were decided by two Division Benches of that Court. The decision of the learned Small Cause Court Judge therefore, cannot be supported. It must, however, be observed that the statements made in the document cannot be lightly treated because they at least amount to an admission by the defendant who was a party to the document. Whether the defendant will by his evidence be able to show that the admissions do not represent the correct state of things is a matter on which I cannot express any opinion. The whole question will be decided with reference to such evidence as may be adduced by the parties. The defendant will be given an opportunity to prove his case and an opportunity will also be given to the plaintiff to adduce such evidence as he chooses to offer to support his case that the defendant was the principal and not the surety. The decree of the Court below is, therefore, set aside and the case is remanded to it for disposal according to law. Costs will abide the result. Hearing-fee one gold mohur.

D.

Case remanded.

(1) 10 A 421; A W N 1888, 127.

(2) 25 A 337; A W N 1903, 64.

(3) A I R 1932 Mad. 218; 137 Ind. Cas. 285; 35 L W 145; (1932) M W N 168; Ind. Rul. (1932) Mad. 359.

OUDH CHIEF COURT

Criminal Revision Application No. 63
of 1941

May 19, 1941

GHULAM HASAN, J.

CHHUTAI (CHITAI)—APPLICANT

versus

KING-EMPEROR—COMPLAINANT—

OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 109 (a)—Applicability—Accused coming within local limits of jurisdiction of certain Magistrate and taking precaution to conceal himself—S. 109 (a) applies.

Section 109 (a) of the Criminal P. C., is applicable to a person who, being or coming within the local limits of the jurisdiction of a certain Magistrate, takes precautions to conceal his presence with a view to committing an offence. It is not limited to the more restricted case of a person who, with a similar object, takes precautions to conceal the fact of his presence within the local limits of the jurisdiction of a certain Magistrate. If a man is taking precautions anywhere in order to conceal his presence, and that concealing is to be effected within the jurisdiction of a Magistrate who receives information, such Magistrate has power to demand security, even though the residence of the person informed against within the jurisdiction is well-known. 113 Ind. Cas. 417 (1), followed.

Cr. R. App. of the order of the Additional Sessions Judge of Bahraich, dated April 15 1941.

Mr. K. P. Misra, for the Applicant.

The Government Advocate, for the Crown.

Order.—The applicant Chhutai Chamar files this revision application against the order passed by a Magistrate of the first class directing him to execute a personal bond of Rs. 200 and two sureties in the like amounts to be of good behaviour for a period of one year under s. 109 (a) and (b) of the Criminal P. C.

He went in appeal to the Additional Sessions Judge of Bahraich, who, however, upheld the Magistrate's order.

The applicant, according to the prosecution case, was seen hiding himself between the night of February 18/19, 1941, along with two other men in the hedges of the forest at a little distance from the motor road in village Billi, Police Station, Bhinga, in the District of Bahraich, in order to commit an offence. The case against him was that he was taking precautions to conceal his presence with a view to commit an offence and further that he could not give a satisfactory account of himself. The case was started against him upon Police Report. It appears that Ram Binayak Singh Constable was on patrol duty along with Waris Ali Constable and a *chaukidar* on the night in question. When the party got on to the motor road, Ram Binayak Singh suspected

that certain bad characters were hiding in the hedges near village Billi at a short distance. The party went towards the hedges and found three men concealing themselves in the hedges. Seeing the Police party, the applicant along with his companions ran away but the Police gave a chase and certain other persons from the neighbouring fields came up on the spot. The applicant was arrested but his companions got away into the jungle. The applicant on being questioned gave a wrong name and address. Waris Ali Constable, however, recognised him. The applicant was found in possession of a house breaking instrument called *sabar*. The applicant was unable to explain his presence in the hedges at night and did not disclose the identity of his companions. These facts have been fully proved by the prosecution evidence.

The defence of the accused was that he was arrested at Piprehwa, where he had gone with Bhagwan Bania of his village to ask for the *gauna* of Lala Bania's daughter, who was married to the grandson of Bhagwan. The applicant states that Bhagwan had hired his cart to go to Piprehwa. He attributed his arrest to enmity with Waris Ali, against whom he stated that he had filed an application (Ex. A) to the District Magistrate. The accused produced evidence in his defence.

The learned Magistrate disbelieved the defence and took the precaution of examining Lala Bania of Piprehwa under s. 540 of the Criminal P. C. He denied the fact of Bhagwan Bania's visit to him in order to settle the date of his daughter's *gauna*. The learned Magistrate also found that the recovery of the house breaking instrument from the possession of the accused could lead to no inference other than that he was concealing his presence at that unreasonable hour 10 or 12 miles away from his home with a view to commit an offence. Accordingly he made the order against the applicant under s. 109 (a) and (b) of the Criminal P. C.

The learned Additional Sessions Judge in appeal upheld the order of the Magistrate.

Learned Counsel for the accused has contended that the story about the applicant's arrest is concocted as village Billi where the applicant is alleged to have been arrested was not within the beat of the Police Constables. This argument was raised for the first time in appeal but the learned Additional Sessional Judge rejected it as being belated as well as being devoid of substance. He found no flaw in the arrest and

held that the applicant was actually arrested at the spot alleged by the prosecution. I agree with the view taken by the learned Additional Sessions Judge on the point.

It has been argued that s. 109 (a) and (b) has no application to the case. There is no doubt that cl. (b) of s. 109 is inapplicable and this point is conceded by the Govt. Advocate. I am, however, satisfied that the case is fully covered by cl. (a) of s. 109 of the Criminal P. C. Learned Counsel for the accused has referred to a number of cases of the different High Courts, but in my opinion it is not necessary to deal with any of them, as some of them are clearly inapplicable to the facts and circumstances of the present case and others have already been considered and discussed in a Full Bench decision of the Allahabad High Court in *Emperor v. Phuchai*, (I. L. R. 50 All. 909) (1). It was held by the Full Bench that s. 109 (a) of the Criminal P. C. is applicable to a person who, being or coming within the local limits of the jurisdiction of a certain Magistrate, takes precautions to conceal his presence with a view to committing an offence. It is not limited to the more restricted case of a person who, with a similar object, takes precautions to conceal the fact of his presence within the local limits of the jurisdiction of a certain Magistrate.

That case was practically similar in facts to the present case. There also the Police had received information that a number of persons were concealing themselves on a dark night at about midnight in a mango grove outside the *abadi* of a village with a view to commit some offence. When the Police went to the grove, they found four persons sitting there, who, on being challenged, tried to run away. They were chased, and two of them were captured. They had house breaking instruments with them. When caught, they first gave wrong names and addresses, but later on disclosed their real names and identities. It was held that s. 109 (a) was applicable to the above facts.

It was observed at p. 917* of the report that if a man is taking precautions anywhere in order to conceal his presence, and that concealing is to be effected within the jurisdiction of a Magistrate who receives information, such Magistrate has power to demand security, even though the residence of the

(1) 50 A 909; 113 Ind. Cas. 417; A I R 1929 All. 33; 10 A I Cr. R 531; 30 Cr. L J 145; 26 A L J 1257 (F B).

person informed against within the jurisdiction is well-known.

Accepting the view taken by the Full Bench, I am of opinion that the order passed against the applicant under s. 109 (a) of the Criminal P. O. calling upon him to execute the bond and sureties is perfectly justified. Clause (b) of s. 109 being inapplicable, the order under that clause is vacated. This will, however, not affect the order relating to the bond and the furnishing of sureties.

Subject to the variation indicated above, the application fails and is dismissed.

D. Application dismissed.

LAHORE HIGH COURT

First Appeal No. 454 of 1939

January 31, 1941

TEK CHAND AND BRACKETT, JJ.

Pandit GURAN DITTA MAL AND OTHERS

—PLAINTIFFS—APPELLANTS

versus

Mst. RAM RAKHI AND OTHERS—DEFENDANTS

—RESPONDENTS

Will—Construction—Hindu testator having two widows and no children, bringing up R, a daughter of his wife's brother, as his own daughter—Property devised in favour of one of widows, providing that after her death property should go to his two brothers and R in equal shares—No restriction placed on R's power of alienation—Will held gave absolute estate to R—Hindu Law—Adoption—Adoption of daughter is not allowed.

P a deceased Hindu had two widows, but no children. R the daughter of a brother of one of the widows, was brought up from her infancy with P as if she were his own daughter. Before his death, P had executed a will. By the will, he devised all the properties to his junior wife. She was directed to give one of the houses to the senior wife for residence for her life and also a monthly maintenance allowance of Rs. 10. The rest of the income, the junior wife was allowed to use in any way she liked. As regards the corpus of the estate, she was prohibited from selling it, except certain unproductive properties which she could sell with the consent of his brothers. After her death the whole property was to be divided in three equal shares, two to his two brothers and one to R. There was no restriction on R's power of alienation. On the contrary she was treated on the same footing as the testator's brothers: Held, that the intention of P was to confer an absolute estate on R.

Hindu Law does not permit adoption of a daughter.

F. A. from the decree of the Subordinate Judge, First Class, Amritsar, dated August 30, 1939.

Messrs. J. L. Kapur and Badri Das, for the Appellants.

Messrs. Mehr Chand Mahajan and Harnam Singh, for the Respondents.

Tek Chand, J.—The property in dispute is a part of the estate of the late Pandit

Rup Lal, Pleader of Amritsar, who died some time in August 1908. He had two widows, Mst. Teka Devi and Mst. Jai Kaur, but no children. Musammat Ram Rakhi (defendant No. 1) is the daughter of a brother of Mst. Jai Kaur. From her infancy, she had lived with Rup Lal and had been brought up by him as if she were his own daughter. In 1907, when Mst. Ram Rakhi was 13 years of age, Rup Lal arranged for, and celebrated, her marriage in his house and at his expense. On Rup Lal's death, besides the two widows, Mst. Teka Devi and Mst. Jai Kaur, his near relatives were his brothers, Pandit Mul Raj, Barrister-at-Law, and Pandit Sohawa Mal (father of the plaintiffs), both of whom were separate from him. On July 19, 1908, a few days before his death, Pandit Rup Lal had executed a will (Ex. P-5). It is in English, written at his dictation by a friend Lala Din Nath, who also was a legal practitioner of Amritsar. The signatures of the testator, were appended at the end, as also the attestation of his brothers, Mul Raj and Sohawa Mal and the Civil Surgeon of Amritsar. The will was registered a few days after Rup Lal's death and is admitted by all parties. It is also common ground that Rup Lal was the exclusive owner of the properties mentioned in the will and that he had full power of disposition over them. By the will, he devised all the properties to his junior wife Mst. Jai Kaur. She was directed to give one of the houses to the senior wife Mst. Teka Devi for residence for her life and also a monthly maintenance allowance of Rs. 10. The rest of the income, Mst. Jai Kaur was allowed to use in any way she liked. As regards the corpus of the estate, Mst. Jai Kaur was prohibited from selling it, except certain unproductive properties which she could sell with the consent of his brothers, but the sale-proceeds were to be invested in a suitable manner so as to yield a better return; and were to be kept intact. The testator then proceeded to say that

"after her (Mst. Jai Kaur's) death the whole of my property shall be divided in three equal shares, one share shall go to Pandit Sohawa Mal and to his male lineal descendants; second share shall go to Pandit Mul Raj and his male lineal descendants. The remaining one-third shall go to my daughter Bibi Ram Rakhi."

Rup Lal died within a month of the execution of the will, and Mst. Jai Kaur succeeded to his property for her lifetime, and remained in possession till her death, which occurred on October 30 1925. On November 1, 1925, Mul Raj and Sohawa Mal, brothers of Rup Lal and Mst. Ram Rakhi aforesaid,

executed an agreement appointing *Lala Dina Nath* (the scribe of the will) as sole arbitrator to divide the properties which after *Mst. Jai Kaur's* death "had in accordance with the terms of the will devolved on us, all the three parties in equal shares." *Lala Dina Nath* gave his award on May 18, 1926 and this award was made a rule of Court by a decree passed by the Senior Subordinate Judge, Amritsar, on August 31, 1926. In accordance with the terms of this decree, the parties took possession of the properties respectively allotted to them. About nine years later, on February 8, 1935, *Mst. Ram Rakhi* gifted to her brother *Ram Saran Das* (defendant No. 2), certain house property and agricultural land which had come to her under the will and the award. On the same day, she made a will bequeathing to *Ram Saran Das* some other properties. Two years later, on July 22, 1937, she mortgaged for Rs. 8,000 a shop to a stranger, *Mst. Sukh Devi* (defendant No. 3). On April 18, 1939, the plaintiffs, who are the sons of *Sohawa Mal*, brother of *Rup Lal*, brought a suit against *Mst. Ram Rakhi* and the alienees aforesaid for a declaration that the gift and bequest to *Ram Saran Das* and the mortgage in favour of *Mst. Sukh Devi* had been effected without authority and were not binding upon them after the life-time of *Mst. Ram Rakhi*, as under the will she had only a limited estate in the properties bequeathed to her and could not alienate them without valid necessity.

The defendants denied the plaintiffs' claim and pleaded that under the will, *Mst. Ram Rakhi* had become absolute owner of one-third of the properties of the testator and that she possessed full power to dispose of them in any way she liked, uncontrolled by the plaintiffs. The mortgagee, *Mst. Sukh Devi*, pleaded in the alternative, that the mortgage in her favour had been affected for necessity. The trial Judge held that under the will as well as the award *Mst. Ram Rakhi* had become absolute owner of the properties which had been allotted to her and that the plaintiffs had no *locus standi* to object to her alienation. On this finding he has dismissed the suit, without going into the question of necessity for the mortgage. The learned Judge in finding against the plaintiffs has, as stated above, relied upon the will as well as the award of *Lala Dina Nath*. So far as the award is concerned, the conclusion is clearly erroneous and Counsel for the respondents frankly conceded that he could not support this part of the judgment. The Sub-Judge was much impress-

ed by a declaration in the award that "*aj se, har ek fariq har ek shae maqbuza ka wahid malik tasawar kiya jave.*" This sentence, read with the context, clearly refers to certain movables, which the arbitrator had allotted to the parties and of which possession was stated to have been given to them. In the preceding sentence, these movables were described as "*shae*" and in this sentence the arbitrator declared that from that day each of the parties would be considered exclusive owner of the "*shae*" in his or her possession. Obviously, the reference was to those articles only, and not to the immovable properties which had, as stated in the earlier part of the award itself, been partitioned by the parties themselves by mutual agreement. The award therefore did not confer any right on *Mst. Ram Rakhi*, independently of what she had got under the will.

The real question for decision is the proper construction of the will. As has been pointed out already, the property devised by *Pandit Rup Lal* had been acquired by himself, and he had full power of disposition. He had no children of his own, but had brought up *Mst. Ram Rakhi*, as if she was his daughter. Indeed, in the will he described her as such. If she had been his natural daughter, she would have succeeded to the entire property to the exclusion of *Rup Lal's* brothers. But Hindu Law does not permit the adoption of a daughter and therefore *Rup Lal* could not adopt *Mst. Ram Rakhi* and thus make her his legal heir. The best, that he could do, was to bequeath a part of his estate to her, along with his two brothers, who would otherwise have succeeded after the death of his widows. He, accordingly, divided the property equally among all three, giving each a one-third share. And in doing so he did not qualify the bequest to *Mst. Ram Rakhi* in any manner whatever. The phraseology used in reference to the three bequests is almost identical, and there is nothing in the will to indicate that the estate conferred on *Mst. Ram Rakhi* was in any way different from that conferred on the two brothers. Indeed, his real intention appears to be clear from a comparison of the terms of the will relating to the bequest to *Mst. Jai Kaur* with those of the bequest to *Mst. Ram Rakhi*. It was explicitly stated that *Mst. Jai Kaur* was to remain in possession and enjoy the income; she was not to alienate the property, except certain specified items, which she was authorized to sell with a view to invest the sale proceeds in more productive investments but

these proceeds were to be kept intact. But no such restriction was placed on the property bequeathed to *Mst. Ram Rakhi*. On the other hand, she was put in the same category as the brothers, who admittedly took their shares absolutely.

Mr. Badri Das for the appellants referred to *Moulvi Mahomed Shumsool Hooda v. Shewukram* (1) and *Radha Prasad Mullick v. Rancee Mani Dassee* (2) in which it had been laid down that in construing wills it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property, that a female heir, whether she is the wife or in any other way related to the testator, takes only a limited estate. In the present case, however, this consideration is completely negated by the facts and circumstances mentioned above. As mentioned above the testator in making the bequests to *Mst. Ram Rakhi* and his two brothers, put them on the same footing. He stated that one-third share "shall go" to each. He gave no indication that the nature of the estate conferred varied according to the sex of the legatees. The legatees also appear to have understood the will in this manner. In the deed of reference to the arbitration they described Rup Lal's property as having "devolved on us, all three parties, in equal shares." They did not state that the share to be allotted to *Mst. Ram Rakhi* was for her life-time only. The learned Counsel for the appellants conceded that if *Mst. Ram Rakhi* had children, the properties allotted to her would devolve on them by inheritance. He merely urged that they were not alienable. But for this contention, there is no warrant whatever. After carefully examining the provisions of the will and taking into consideration the surrounding circumstances, we have no doubt that the intention of the testator was to confer an absolute estate on *Mst. Ram Rakhi* in one-third of his property which is bequeathed to her. This being so, the plaintiffs have no *locus standi* to challenge her alienations. The appeal fails and is dismissed, but having regard to the circumstances and particularly the fact that some of the reasons given by the lower Court in support of its decision were manifestly incorrect, we leave the parties to bear their own costs throughout.

D.

Appeal dismissed.

(1) 2 I A 7; 22 W R 409; 3 Sar. 405; 14 Beng. L R 226 (P.O).

(2) 35 Cal. 896; 35 I A 118; 12 C W N 729; 8 C L J 48 (P.O).

OUDH CHIEF COURT

Civil Revision Application No. 60 of 1940

May 9, 1941

YORKE, J.

L. GAYA PRASAD—PLAINTIFF—

APPLICANT

versus

AHMAD HUSAIN AND ANOTHER—

DEFENDANTS—OPPOSITE PARTY

Limitation Act (IX of 1908), Arts. 74, 75—Instalment bond with default provision—Article applicable—Option of suing for whole sum on default of six monthly instalments—Suit, when should be instituted—Waiver—Limitation—Provincial Small Cause Courts Act (IX of 1887), s. 25—Duty of High Court.

In the ordinary way when a debt is payable by instalments and there is no default provision, a new cause of action arises upon each default, and the plaintiff can recover in respect of instalments falling due within three years before suit, [vide Art. 74]. But if there is a default provision, Art. 74 cannot be relied upon, and under Art. 75 if the plaintiff sues more than three years from the first default and there is no waiver, the suit is totally time-barred, that is he cannot recover even those instalments which fell due within three years of suit. But facts should be so interpreted, if possible, as favouring the view that the creditor has waived the exercise of the option on the first instalment when he bases his suit on subsequent defaults which are within limitation and does not seek to found his cause of action on the earlier default. 191 Ind. Cas. 220 (1), relied on.

In a case of an instalment bond payable in monthly instalments with a default clause giving an option to the creditor to sue for the whole amount on failure of six instalments, under the provisions of Art. 75 the creditor can institute that suit within three years of the 6th default, and in that suit he can claim not only the instalments still outstanding at the date of the suit and the instalments which had fallen due within three years of the suit, but also the six instalments which constitute his cause of action. The principle which holds good in regard to the first exercise of the option under the default clause holds equally good in respect of a claim founded on subsequent defaults and accompanied by a waiver of the option which accrues to the plaintiff on the earlier defaults. In effect the plaintiff is in any case entitled to claim the instalments of three and a half years, that is 42 past instalments in addition to the instalments still remaining in the future at the date of the suit.

It is the duty of the High Court acting under s. 25 of the Small Cause Courts Act to see that substantial justice is done as between the parties.

C. R. App. of the order of the Munsif (as Judge of Small Cause Court), Kheri, dated April 10, 1940.

Mr. Akhlaq Husain, for the Applicant.

Mr. Siraj Husain, for Opposite Party Nos. 1 and 2.

Order.—This is an application under s. 25 of the Provincial Small Cause Courts Act by *Lala Gaya Prasad* plaintiff whose suit to recover Rs. 146 principal due on a bond for Rs. 170 dated August 27, 1935, has been dismissed with costs by the learned

Munsif of Kheri, sitting as a Judge of Small Cause Court.

The present suit was based on an instalment bond for Rs. 170 executed by the defendants in favour of the plaintiff Gaya Prasad on August 27, 1935. It was provided in the bond that the principal was repayable by monthly instalments of Rs. 2 and that on default of payment of six instalments, the creditor would have the option to realise the entire amount of the debt. The first instalment was made payable on September 1, 1935 and subsequent instalments on the 1st of each calendar month. Admittedly no instalments were ever paid towards the debt.

The present suit was instituted on February 24, 1940, the cause of action being stated as having arisen on February 27, 1937, and March 1, 1937. The plaintiff claimed Rs. 146, that is to say he gave up 12 monthly instalments, those which fell due on September 1, 1935, up to August 1, 1936. He claimed by implication to have waived the option which arose on every instalment after the first six up to and including the 12th. He sued to recover the instalments beginning from September 1, 1936, up to February 1, 1937, as if his cause of action had arisen on February 1, 1937. It seems actually that the plaintiff made a simple mistake of calculation. Claiming his cause of action to have arisen on March 1, 1937, that is within three years of the date of suit he could only claim to recover, as part of his cause of action, the six instalments ending on March 1, 1937, and it follows that he stated his waiver incorrectly as a waiver of 12 instalments instead of 13. In my opinion the plaintiff's suit should not be allowed to fail on the ground that he made a mistake of one month in calculation his intention having clearly been to waive his claim to any instalments going beyond the period which he could claim reckoning from the date of institution of the suit. I treat the suit therefore, as having been one of a claim for Rs. 144 only.

This mistake having been corrected, the question now is whether the plaintiff could maintain a suit for the amount of Rs. 144 or his suit was time-barred. By his suit the plaintiff claimed to exercise the option given to him under the default clause as provided by Art. 75 of the Lim. Act. Article 75 provides, for a suit on a bond payable by instalments which provides that if default be made in payment of one or more instalments, the whole shall be due, a period of limitation of three years which begins from the date

when the default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver. There is no doubt that in the ordinary way when a debt is payable by instalments and there is no default provision, a new cause of action arises upon each default, and the plaintiff can recover in respect of instalments falling due within three years before suit, *vide* Art. 74. But if there is a default provision, Art. 74 cannot be relied upon, and under Art. 75 if the plaintiff sues more than three years from the first default and there is no waiver, the suit is totally time-barred, that is he cannot recover even those instalments which fell due within three years of suit. On the other hand after a consideration of a number of cases of this Court on the point, I myself held in *Sheo Narain v. Bageshur* (1940 O. W. N., 1081) (1) that :

"The general current of decisions in the Chief Court of Oudh is in favour of interpreting any facts which can possibly be so interpreted as favouring the view that the creditor has waived the exercise of the option on the first instalment when he bases his suit on subsequent defaults which are within limitation and does not seek to found his cause of action on the earlier defaults".

In the present case the plaintiff does not found his cause of action on the first 12 defaults, and it is clear that when he founded it on the 13th default it was by a mistake of description only. The question however, is whether founding it on the 14th where date be seen correctly and the subsequent five defaults the plaintiff was entitled to maintain the suit, bearing in mind that the instalments in respect of which the 14th to 19th defaults took place, fell due more than three years prior to the date of suit.

Learned Counsel for the opposite party has contended strongly that the present suit must fail in any case because the plaintiff has claimed six instalments which were time-barred. On a fair consideration, however, it seems to me that this is a mistaken view. The plaintiff was entitled on the 6th default to institute a suit to recover the whole amount due under the bond. Under the provisions of Art. 75 he could institute that suit within three years of the 6th default and in that suit he could claim not only the instalments still outstanding at the date of the suit and the instalments which had fallen due within three years of the suit, but also the six instalments which constituted his cause of action. It appears to me that

(1) 1940 O W N 1081; 191 Ind. Cas. 220; 13 R.C. 219; 1940 O. L. R 711; A I R 1941 Oudh 74.

the principle which holds good in regard to the first exercise of the option under the default clause holds equally good in respect of a claim founded on subsequent defaults and accompanied by a waiver of the option which had accrued to the plaintiff on the earlier defaults. In effect the plaintiff was in any case entitled to claim the instalments of three and a half years, that is 42 past instalments in addition to the instalments still remaining in the future at the date of the suit.

Learned Counsel for the opposite party on the other hand has sought to argue that the plaintiff's suit, was no less than seven months over due. He contends that as the plaintiff claimed Rs. 146 his cause of action for that amount arose in August 1936, that is to say at the close of the first year of the instalments and that the plaintiff was not entitled to reckon time from the 18th instalment (or as it should have been the 19th instalment), I have dealt with that point sufficiently already. The plaintiff could not be worse off in regard to a claim based a subsequent cause of action than he would have been had he filed his suit when he could proceed on the first cause of action, and the same principle is applicable to cases where the right accrues after six months. Instalments as is applicable where it accrues on the failure to pay one six monthly instalment.

The main ground of argument put forward on behalf of the opposite party is that in all the cases which have been quoted (they were nearly all quoted in my decision in *Sheo Narain's case*) (1) the claim made by the plaintiff did not include any time-barred amount. Founding on the contention that the six months which furnished the cause of action are time-barred, learned Counsel argues that the claim includes time-barred amounts and must, therefore, fail. It seems to me to be clear that save in so far as there was an error in calculation by which the plaintiff by mistake claimed Rs. 2 more than he was entitled to, there was no claim for any amount which was time-barred, and, therefore, applying the principle applied in other Oudh cases, it is reasonable to hold that the plaintiff had waived the option whenever it accrued to him earlier. In my opinion, therefore, the plaintiff's suit was wrongly dismissed as barred by limitation. It should have been decreed for the amount which was properly due to him, namely Rs. 144.

It is the duty of this Court acting under s. 25 of the Small Cause Courts Act to see

that substantial justice is done as between the parties. I allow this application to this extent that the plaintiff's suit is decreed for Rs. 144 but as to a considerable extent the suit failed on account of the mistakes of the plaintiff and his inability to explain his case, I allow no costs of this application or of the suit.

D.

Application allowed.

CALCUTTA HIGH COURT

Appeal No. 70 of 1937

August 14, 1940

R. C. MITTER and MOHAMMAD AKRAM, JJ.
NILRATAN MUKHOPADHYA AND OTHERS
—APPELLANTS

versus

COOCH BE HAR LOAN OFFICE LTD.

PLAINTIFF AND OTHERS—RESPONDENTS

Foreign judgment—Effect—Creditor's option to bring action in domestic tribunal on foreign judgment—Notification under s. 44, Civil Procedure Code (Act V of 1908), whether alters character of foreign judgment—Foreign judgment obtained against some joint promisors or contractors—Suit on original cause of action, if can be maintained against rest in domestic tribunal.

It is a well-established principle of Private International Law that a foreign judgment only creates a new obligation to pay but does not extinguish the original cause of action for the debt. A foreign judgment involves no merger of the original cause of action especially when it has been declared to be a nullity by a competent British Indian Court. The creditor thereupon has the option of bringing an action in a domestic tribunal on the foreign judgment which he has recovered or of bringing in a domestic tribunal a suit upon the original cause of action. It does not matter whether the procedure for enforcing a foreign judgment is by a suit or by an application in the form of execution. The mere fact that by reason of the notification issued by the Governor-General in Council under s. 44, Civil P. C., the plaintiff had the right to enforce the foreign judgment by an application for execution would not alter the legal character of the foreign judgment. In law it would still be regarded as only creating an independent obligation on the judgment debtor to pay the sum adjudged without involving a merger of the original cause of action. *Smith v. Nicolls* (1) and 176 Ind. Cas. 380 (2), referred to. [p. 747, col. 2; p. 748, col. 1.]

Where the first judgment pronounced against some of several joint promisors or contractors is a judgment not of a domestic Court but of a foreign Court, the original cause of action still subsists and a second suit based on it can still be filed in a domestic tribunal. The promisee who has the right to sue on the original cause of action both in the foreign Court and in the domestic Court may in such a case sue those promisors who are residents or subjects of the foreign State in the foreign Court and so get against them an effective judgment in that Court and may also sue the others who are residents or subjects of British India in a British Indian Court on the original cause of action and so get an effective judgment against them. [p. 749, col. 2; p. 750, col. 1.]

[Case-law referred to.]

A. from the original decree of the Sub-Judge, Jalpaiguri, dated December 4, 1936.

Dr. Naresh Chandra Sen Gupta Messrs. Bhagirath Chandra Das, Hamendra Chandra Sen and Satyendra Chandra Sen, for Appellants Nos. 6 and 1 to 5 (B), respectively.

Messrs. Atul Chandra Gupta, Jatindra-nath Sanyal, Jatindra Mohan Chaudhury, Joy Gopal Ghosh and Sisir Kumar Basu, for the Respondents.

Judgment.—On January 7, 1929 ten persons jointly borrowed Rs. 18,000 from the Cooch Behar Loan Company Limited hereafter called the company, on a promissory note carrying interest at nine per cent. per annum. Of these ten persons, five were and are residents and subjects of the Cooch Behar State but the remaining five persons were and are British subjects and residents of British India. On January 6, 1932 the company instituted a suit to recover its dues against the said ten persons in the Court of the Civil Judge at Cooch Behar and on April 1, 1932 recovered an *ex parte* decree for Rs. 21,203 and costs. The five persons who are British subjects and residents of British India (defendants Nos. 1 to 5 of this suit) did not at any stage appear in the Cooch Behar Court, and so did not submit to the jurisdiction of that Court. After the said decree a sum of Rs. 12,236 was realised by the company from the five persons who were residents of Cooch Behar and subjects of that State. They are defendants Nos. 6 to 10 in this suit. Thereafter the company applied on January 17, 1934 to execute the said decree against defendants Nos. 1 to 5 in a British Indian Court, namely the Court of the Subordinate Judge at Jalpaiguri, as in the notification issued by the Governor-General in Council under s. 44, Civil P. C., Civil Courts of Cooch Behar are included. The Subordinate Judge at Jalpaiguri, however, by his order dated March 17, 1934 refused to execute that decree, on the ground that the decree of the Civil Court of Cooch Behar passed against the said defendants (defendants Nos. 1 to 5) was void as that Court had no jurisdiction over them, as they were neither residents of Cooch Behar, nor subjects of the Cooch Behar State, nor had they submitted to the jurisdiction of that Court. On the same date on which the application for execution was filed in the said Court, that is January 17, 1934, the suit in which this appeal arises was filed by the company in the Court of the Subordinate Judge at Jalpaiguri against the aforesaid

ten persons to recover the balance, namely the sum of Rs. 11,959. The suit was for enforcement of the judgment of the Cooch Behar Court against defendants Nos. 1 to 5, alternatively it was based on the original cause of action, namely on the promissory note, and a decree against defendants Nos. 1 to 5 for the balance due was prayed for. To save the suit from the bar of limitation, so far as it was based on the original cause of action, acknowledgment of liability on the part of the defendants was pleaded. The claim to enforce the judgment of the Cooch Behar Court against the said defendants was given up by the company in the lower Court and that claim has not been reiterated before us.

The learned Subordinate Judge by his judgment dated December 4, 1936 held that the company had the right to fall back upon the original cause of action and that the suit based on the promissory note was not barred by limitation by reason of acknowledgment of liability by defendants Nos. 1 to 4 and of defendant No. 5 who had died during the pendency of the suit and whose heirs are defendants Nos. 5 (a) and 5 (b). He accordingly decreed the suit against defendants Nos. 1 to 5 (b). Defendants Nos. 1 to 5 (b) have preferred this appeal. It is contended on their behalf that (1) the suit based on the promissory note is not maintainable and (2) in any event it is barred by limitation. The first point has been urged on two grounds : (a) that the original cause of action, no longer subsists after the judgment of the Cooch Behar Court, it being merged therein and (b) even if that be not the position, the company having sued and obtained an effective decree in the Cooch Behar Court against some of the joint promisors, *e. g.*, defendants Nos. 6 to 10, cannot again sue the other joint promisors, (defendants Nos. 1 to 5) on the promissory note.

It is a well-established principle of Private International Law that a foreign judgment only creates a new obligation to pay but does not extinguish the original cause of action for the debt. A foreign judgment involves no merger of the original cause of action. The creditor thereupon has the option of bringing an action in a domestic tribunal on the foreign judgment which he has recovered or of bringing in a domestic tribunal a suit upon the original cause of action. Tindal, C. J., speaking of a foreign judgment in *Smith v. Nicolls* (1) observed

(1) (1839) 5 Bing. (N o) 208; 7 Scott 147; 7 Dowl. P C 282; 1 Arn. 474; 8 L J (N s) C P 92; 50 R R 658.

thus :

"If therefore the judgment has not altered the nature of the rights between the parties, it appears to me that the plaintiff has the option, either to resort to the original ground of action or to bring an *assumpsit* on the judgment recovered."

Such being the principle, it does not matter whether the procedure for enforcing a foreign judgment is by a suit or by an application in the form of execution. The mere fact that by reason of the notification issued by the Governor-General in Council under s. 44, Civil P. C., the plaintiff had the right to enforce the foreign judgment by an application for execution would not, in our judgment, alter the legal character of the foreign judgment. In law it would still be regarded as only creating an independent obligation on the judgment-debtor to pay the sum adjudged without involving a merger of the original cause of action. The case in *Chormal Balchand v. Kasturi Chand* (2) was a case where the plaintiff had sued on the foreign judgment and not on the original cause of action. The effect of the notification issued under s. 44, Civil P. C. was however, considered and it was held that only the procedure for enforcing the foreign judgment in a British Indian Court had been changed thereby, leaving all the incidents of a foreign judgment untouched. In the case before us, there is an additional reason for holding that the original cause of action against defendants Nos 1 to 5 had not been merged in the judgment of the Cooch Behar Court, because from the point of view of private international law the judgment of that Court against defendants Nos. 1 to 5 is a nullity and has been so adjudged by a competent British Indian Court. We accordingly hold that the company's suit in the Court of the Subordinate Judge at Jalpaiguri regarded as a suit based on the original cause of action, *e. g.*, on the promissory note, is a good suit. The first branch of Dr. Sengupta's argument on the first point is accordingly overruled.

The second ground in support of the first point has been urged in the following manner. It is said that a joint promise by two or more promisors creates a joint liability and that this is the law in India. The only effect of s. 43, Contract Act, is to give the promisee the right to sue any one of the joint promisors, without impleading the others in the suit, but it does not make the liability of joint promisors joint and several. A decree recovered against some of the joint promisors accordingly bars a second suit

(2) 40 C W N 591; 176 Ind. Cas. 380; A I R 1938 Cal. 511; 63 C L J 175; 11 R C 95; 63 C 1033.

against the rest. For these propositions reliance has been placed on the judgment of Garth, C. J., and Markley J., in *Hemendra Coomar Mullick v. Rajendrolall Moonshee* (3). The rule laid down in that case is invoked by the appellants' Advocate by saying that as the decree passed against defendants Nos. 1 to 5 by the Cooch Behar Court is a nullity they must be regarded as not being parties in the Cooch Behar Court and the suit filed in the Cooch Behar Court must be regarded as having been filed against defendants Nos. 6 to 10 only. We will assume that this is the true position.

There cannot be any dispute that if the liability is joint and several, a judgment obtained against some would be no bar to a suit against the others. In *Hemendra Coomar Mullick v. Rajendrolall Moonshee*, (3), it was held that a promissory note executed by several persons jointly creates in India a joint and not a joint and several liability. The rule laid down in *King v. Hoare* (4) a case of joint contract, and in *Brinsmead v. Harrison* (5) a case of joint tort, was applied and it was held that a judgment, though unsatisfied, obtained against some of the joint promisors barred a second suit against the rest. The cases in *Hemendra Coomar Mullick v. Rajendrolall Moonshee* (3) and *King v. Hoare* (4) and cases of the same type where the same rule has been laid down. *e. g.* *Kendall v. Hamilton* (6) etc., were all cases where both the suits, the first and the second; had been brought in domestic Courts.

In India there is a divergence of judicial opinion as to the effect of s. 43, Contract Act. In *Hemendra Coomar Mullick v. Rajendrolall Moonshee* (3), it was held that that section had not the effect of making the liability of joint promisors joint and several, and had not the effect of making inapplicable in India the rule laid down by Parke B. in *King v. Hoare* (4). This view has been adopted in Madras. In *Muhammad Askari v. Radhe Ram* (7), Strachey C. J., and Banerjee, J., took a different view. In Bombay Farran, J., also took a different view of s. 43, Contract Act : *Motilal v. Ghellabhai* (8). In *Shivlal Matilal v. Bridhichand Jivraj* (9)

(3) 3 C 353; 1 C L R 488; 2 Ind. Jur. 758.

(4) (1844) 13 M. & W. 494; 14 L J Ex. 29; 2 Dowl. & L. 382; 8 Jur. 1127; 67 R R 694; 153 E R 206.

(5) (1872) L R 7 C P 547; 41 L J C P 190; 27 L T 99; 20 W R 784.

(6) (1879) 4 A C 504; 48 L J C P 705; 41 L T 418; 28 W R 97.

(7) 22 A 307; A W N 1900, 73.

(8) 17 B 6; Chitty's S C C R 336.

(9) 19 Bom. L R 370; 40 Ind. Cas. 194; A I R 1917 Bom. 268.

Macleod, J. reviewed the leading cases on the subject and agreed with the view taken in *Hemendra Coomar Mullick v. Rajendrolall Moonshee* (3). In this Court the principle laid down therein has been followed in many cases. In *Krishnadas Roy v. Kalitara* (10), however, the specific question we have to decide was not decided, but there are observations in the judgment of both Chatterjee and Richardson, JJ. which imply that a joint contract in India creates a joint and several liability on the part of the joint promisors. The matter again came up for decision in *Miss Moselle Solomon v. Martin & Co.* (11). The learned Judges Lort-Williams and Jack, JJ., differed on this point, though they agreed in decreeing the appeal on other grounds. In this state of the case-law we would have referred the matter to the Full Bench, but in the view we are taking that course is not necessary. We would proceed upon the assumption that the rule laid down in *Hemendra Coomar Mullick v. Rajendrolall Moonshee* (3) is a good rule when both the suits are suits filed in domestic Courts. The observation made in that case must be taken to relate to suits in domestic tribunals, for Garth, C. J. and Markley, J. were dealing with the previous judgment of a domestic and not of a foreign Court. The rule laid down by them was expressly based on the decision in *King v. Hoare* (4). We will have therefore to examine the grounds on which *King v. Hoare* (4) and other English cases have proceeded.

Parke B. first considered the case of only one debtor or one wrong-doer. He observed that on a judgment being recovered in a Court of Record, the judgment was a bar to the original cause of action, because it is thereby reduced to a certainty and the object of the suit attained. It would be useless and vexatious to subject the defendant again to another suit to obtain the same result. The second suit would be barred on the principle that the matter had passed by the result of the first suit to the domain of judgment *transit in rem judicatum*. The original cause of action, so to say, had merged in the judgment rendered. It had thereafter no existence, and so could not be enforced by a separate action. Parke B. then considered the case of more than one joint debtor or more than one joint tort-feasor. He said that in such cases as the liability was joint, there was one cause of action for the breach of the

joint contract or for the joint tort, and not as many causes of action in number as were parties to the joint contract concerned in the breach or as many persons concerned in the joint tort. As soon therefore there was a judgment against one or some of them the cause of action which was a single one merged in the judgment on the same principles formulated in the case where there was only one debtor or one tort-feasor. After the judgment in law nothing of original cause of action was left.

In some cases which were decided after *King v. Hoare* (4), it was said that Parke B. had only lay down a rule of procedure but this view of *King v. Hoare* (4), was negated by the House of Lords in *Kendall v. Hamilton* (6). In that case it was also pointed out that the rule formulated in *King v. Hoare* (4), did not proceed upon the principle of election, namely, that the plaintiff by suing some out of several joint debtors had elected to take them as his debtors to the exclusion of those whom he had not joined in the action, but that it proceeded upon two principles of substantive law. The first was the principle of the merger of the cause of action in the judgment—*transit in rem judicatum*, and the second was a principle of public policy that there should be an end of litigation—there should not be a vexatious succession of suits on the same cause of action—*nemo debet bis vexari pro una et eadem causa*. Such being the basis of the rule laid down in *King v. Hoare* (4), the said rule cannot in our judgment apply where the first judgment pronounced against some of several joint promisors or contractors is a judgment not of a domestic Court but of a foreign Court, for a judgment of a foreign Court does not operate in merging in it the original cause and the principle of *nemo debet bis vexari* etc., also does not apply. The original cause of action still subsists in such a case and a second suit based on it can still be filed in a domestic tribunal. On the principle analogous to the principle of *cessante ratione legis, cessat et ipsa lex* the rule formulated in *King v. Hoare* (4), and here in India in *Hemendra Coomar Mullick v. Rajendrolall Moonshee* (3), should not be applied to the case before us because the judgment in the previous suit was a judgment of a foreign Court. If that foreign judgment had been fully satisfied, a suit in the domestic tribunal would have been barred but then on a different principle. The application of the rule laid down in *King v. Hoare* (4), and *Hemendra Coomar Mullick v. Rajendrolall Moonshee* (3), to a type of

(10) 22 C W N 289; 44 Ind. Cas. 80; A I R 1918 Cal. 512.

(11) 39 C W N 461; 163 Ind. Cas. 331; 62 C 612; 9 R C 4.

case which we have before us would work great injustice. When a creditor lends money to several persons on a joint promissory note or when a person enters into a joint contract with several persons he relies upon the joint credit, the credit of all of them. According to the English Rule he has to sue them all in one suit, and when all are residents or subjects of the same estate he gets an effective decree against all which he can execute against the property of one and all the defendant judgment-debtors.

In India he can sue one or some without making others parties, but that is his own option. He can sue all or some in one action. If, however, some of the joint promisors be the residents or subjects of one State and the others of another State and if the rule laid down in *King v. Hoare* (4), and *Hemendra Coomar Mullick v. Rajendrolall Moonshee* (3) be made applicable to such a case the promisee would, on the breach of that joint contract, be compelled to make his election of either proceeding against the first set or the second set of joint promisors. That rule would have the effect of compelling him to have recourse to the security of some of the joint promisors only, when by entering into the contract he intended to have the security of all of them. For the aforesaid consideration also we think that the rule formulated in *King v. Hoare* (4), and *Hemendra Coomar Mullick v. Rajendrolall Moonshee* (3), should not apply to such a case. The promisee who has the right to sue on the original cause of action both in the foreign Court and in the domestic Court may in such a case sue those promisors who are residents or subjects of the foreign State in the foreign Court and so get against them an effective judgment in that Court and may also sue the others who are residents or subjects of British India in a British Indian Court on the original cause of action and so get an effective judgment against them. Any other view would work hardship. In *Lakshmishankar v. Vishnuram* (12), the learned Judges held that a decree passed in a foreign Court (Court at Baroda) against one person on a joint *khata* account did not bar a suit in a British Indian Court against his partners, though the liability was joint. Though the reason for the decision given was that the judgment of the Baroda Court was not *res judicata* in the suit in British India, and not the reasons on which we support our judgment, the result is the same. We accordingly overrule this branch of the argument of the appellants' Advocate on the first point.

(12) 24 B 77; 1 Bom. L R 534.

We do not also see any substance in the second point, the point regarding limitation. On January 27, 1931, the company wrote a letter to all the defendants. By that letter it demanded payment within two months and threatened them with a suit if the demand was not complied with. In reply to this letter, defendant No. 1 wrote a letter to the company on January 28, 1931, (Ex. 27). That letter contains an acknowledgment of liability by him and the suit against him is saved. The company led uncontradicted evidence that the other defendants authorized defendant No. 9 to write this letter on their behalf. The learned Subordinate Judge has discussed that evidence and we do not think it necessary to reiterate the reasons given by him for holding that defendant No. 1 was their agent in the matter of acknowledgment of liability. We accept the findings of the learned Subordinate Judge in this respect and hold that the suit is in time against all the defendants-appellants. The result is that this appeal fails. It is accordingly dismissed with costs to the plaintiff company. The application for adducing additional evidence is rejected.

O. L. Appeal, dismissed.

MADRAS HIGH COURT

Appeal No. 295 of 1936

October 16, 1939

VENKATARAMANA RAO AND KUNHI

RAMAN, JJ.

AKKI DODDA BASAPPA—

APPELLANT

versus

AKKI MALLAMMA AND ANOTHER

—RESPONDENTS

Hindu Law—Widow—Maintenance—Decree for maintenance against undivided members made charge on family property—Subsequent partition does not affect decree—Subsequent partition with consent of widow—Suit by member for declaration that he is liable under decree due to partition does not lie—Question falls under s. 47, Civil Procedure Code (Act V of 1908).

When a member of an undivided family dies leaving him surviving his widow and his sons and brothers, the widow's right to maintenance is against the entire joint family composed of the sons and brothers of the husband. It may be that if she waits until a partition takes place she may have a lesser right, i. e., instead of a right over the entire family, a right over those persons who take her husband's share. But if before a partition is effected, she gets her right declared, defined and reduced to a certainty by a decree of Court, her rights cannot be taken away by any subsequent partition effected among the members of the family. When therefore, the widow has secured her right fixing her claim against the whole joint

family and getting a charge on a reasonable portion of the property the right or charge cannot be taken away from her by any subsequent partition between the members of the family. 188 Ind. Cas. 696 (1), explained, *Jayanti Subbiah v. Alamelu Mangamma* (4), *Lakshman Ramachandra v. Satyabhamabai* (5), *Karuppa Koundan v. Chinna Nallammal* (6) and 177 Ind. Cas. 33 (7), relied on.

Where subsequent to the passing of a maintenance decree creating a charge on certain joint family property, the members of the joint family effect a partition to which the widow is a consenting party, a subsequent suit by one of the members for a declaration that he was not liable for the maintenance of the widow as the result of the partition with widow's consent is not maintainable as the question is one under s. 47, Civil P. C.

A. against the decree of the District Court, Bellary, dated October 13, 1936.

Mr. V. S. Narasimhachari, for the Appellant.

Messrs. D. R. Krishna Rao and K. Umamaheswaran, for the Respondents.

Venkataramana Rao, J.—This is an appeal from the decree of the learned District Judge of Bellary dismissing the plaintiff's suit for a declaration that the decree passed in O. S. No. 3 of 1928 on the file of the Sub-Court of Bellary against himself and defendant No. 2 in favour of defendant No. 1 is not binding on him. The facts are few and not in dispute. Defendant No. 1's husband died in or about 1918 leaving him surviving defendant No. 1, defendant No. 2 his son by the first wife and the plaintiff his brother. On the date of his death defendant No. 1's husband was a member of an undivided family consisting of himself, the plaintiff and defendant No. 2. In 1928 defendant No. 1 filed a suit for maintenance and residence against the plaintiff and defendant No. 2 and obtained a decree on January 23, 1929, by which the plaintiff and defendant No. 2 were directed to pay maintenance at the rate of Rs. 40 per month and arrears of maintenance and the maintenance decreed was made a charge on the property described in Schs. A and B to the decree. The decree also directed the plaintiff and defendant No. 2 to put defendant No. 1 in possession of the house, Item No. 2 in Sch. C to the decree, and defendant No. 1 was to enjoy the same for her lifetime after which it must revert to the plaintiff and defendant No. 2. In pursuance of the said decree, defendant No. 1 was put in possession of the said house and she had been realizing the maintenance in accordance with the terms of the said decree. It is alleged in the plaint that on December 18, 1935, the plaintiff and defendant No. 2 effected a partition between themselves and that by reason of the said partition the

plaintiff was no longer bound by the said decree. The allegation in regard thereto is made in para. 5 of the plaint thus :

"Under Hindu Law defendant No. 1 is entitled to be maintained out of her husband's property and there is no such obligation against the plaintiff after the division of the joint family properties. The decree in O. S. No. 3 of 1928 became inoperative after the division between plaintiff and defendant No. 2. The decree in O. S. No. 3 of 1928 is against the joint family properties and there are no such properties now. There is no personal obligation on the plaintiff to maintain defendant No. 1."

It is alleged in the plaint that defendant No. 1 agreed to the terms of the division by which the plaintiff was not to be liable under the decree. The main defence of defendant No. 1 was that she was not a consenting party to the division at all and that the decree in question was obtained by her against the plaintiff and defendant No. 2 personally as well as against the joint family properties of the family, that no partition made subsequently by the plaintiff and defendant No. 2 without her assent would be of any avail or could legally operate to extinguish the decree obtained by her. The defence of defendant No. 2 was that in the partition effected between himself and the plaintiff he got very little property, that the major portion of the property was retained by the plaintiff that it would be unjust to shift the burden of the entire decree on him and in any event the decree in O. S. No. 3 of 1928 continued to be binding on all the parties and could not be declared to be not binding on the plaintiff. The learned District Judge dismissed the suit on the ground that the suit was incompetent by reason of s. 47, Civil P. C.

In appeal, it is contended by Mr. Narasimhachari, Counsel for the plaintiff-appellant, that by reason of the subsequent partition the plaintiff is no longer bound to maintain defendant No. 1 and the said decree obtained against him must therefore be declared inoperative. He contends that as the decree is a maintenance decree, it is open to the plaintiff to institute a suit by reason of the events that happened subsequent to the date of the decree, that there was a change of circumstances which would necessitate the modification of the said decree and that it is competent to the Court to modify the same in view of the said change of circumstances. He has also urged that the partition is such a subsequent event and under the Hindu Law the obligation to maintain a widow is only from out of her husband's share and as the husband's share has now fallen to defendant No. 2 the proper person to maintain her is defendant No. 2, the plaintiff's obligation having ceased with

the disruption of the family. Mr. Narasimhachariar has not been able to cite any authority in support of any of the contentions put forward and he frankly confesses that there is no direct authority on the point. He however contends that the recent decision of the Full Bench in *Lakshmiddevamma v. Veera Reddi* (1) at p. 343, though not a direct decision on the point would cover the present case. The exact point for decision before the Full Bench was whether the decision in *Subrayulu Chetti v. Kamalavalli Thayaramma* (2), or the decision in *Narasimham v. Venkatasubbamma* (3), was correct. Their Lordships were of the opinion that *Subrayulu Chetti v. Kamalavalli Thayaramma* (2), was wrongly decided and that *Narasimham v. Venkatasubbamma* (3), should be followed; *Narasimham v. Venkatasubbamma* (3), decided that

"where the widow of a co-parcener sues for maintenance after there has been a partition, she cannot enforce her right against any of the surviving co-parceners except those who have taken her husband's share."

But Mr. Narasimhachariar contends that the reasoning on which that decision was based would apply to the case in question. We are not inclined to agree with him in this contention. The observations in *Lakshmiddevamma v. Veera Reddi* (1) at p. 343*, on which reliance is placed, runs thus :

"There is here a clear statement (referring to *Smritichandrika*) that the duty of maintaining the widow devolves on the persons who take the property of the deceased undivided member of the family and it is emphasized that the duty is dependent on the taking of the property."

But their Lordships proceed further and remark as follows :

"While the family remains undivided the position is different. The property is held jointly and of necessity the amount required for a widow's maintenance has to be paid out of the estate regarded as a whole, but in no circumstances can she claim an allowance greater than the income of her husband's share in the estate."

It seems to us that these observations would apply to the present case. When a member of a undivided family dies leaving him surviving his widow and his sons and brothers, her right to maintenance is against the entire joint family composed of the sons and brothers of the husband. It may be that if she waits until a partition takes

place she may have a lesser right, i. e., instead of a right over the entire family, a right over those persons who take her husband's share. But if before a partition is effected, she gets her right declared, defined and reduced to a certainty by a decree of Court, her rights cannot be taken away by any subsequent partition effected among the members of the family. In *Jayanti Subbiah v. Alamelu Mangamma* (4), Bhashyam Ayyangar, J., made the following observations which are referred to by the Full Bench with approval :

"When an undivided Hindu family consists of two or more males related as father and sons or otherwise, and one of them dies leaving a widow, she has a right of maintenance against the surviving co-parcener or co-parceners, quoad the share or interest of her deceased husband in the joint family property which has come by survivorship into the hands of the surviving co-parcener or co-parceners and though such right does not in itself form a charge upon her husband's share or interest in the joint family property, yet when it become necessary to enforce or preserve such right effectually, it could be made a specific charge on a reasonable portion of the joint family property, such portion of course not exceeding her husband's share or interest therein."

These observations are in strict consonance with the theory of Hindu Law that when a member of an undivided family dies, his share survives to all the members of the family and every member has got an interest therein subject to the principle that so long as there is a son, grandson, and a great grandson of the deceased co-parcener this share of the deceased co-parcener would be taken by the son or grandson or great grandson on a partition on the principle of representation and in their absence only would the shares of the other members be augmented. As observed by West, J., in *Lakshman Ramachandra v. Satyabhamabai* (5) at p. 509 :

"The rule is a consequence of the doctrine that the right of each co-parcener extending to the whole estate, it is fully owned as to every part notwithstanding the death of one of the joint tenants."

In fixing the quantum of maintenance the measure has always been taken to be the husband's share but as observed in *Karuppa Koundan v. Chinna Nallammal* (6) and also by Varadachariar, J., in *Dandamudi Ramarayudu v. Daudamudi Sitalakshamma* (7) the charge created in her favour need not be limited to the husband's share but in certain circumstances may exceed the husband's share. When

(1) (1939) 2 M L J 340 (343); 188 Ind. Cas. 696; (1939) M W N 780; 50 L W 239; A I R 1939 Mad. 781; I L R (1939) Mad. 877; 13 R M 55 (F B).

(2) 35 M 147; 10 Ind. Cas. 347; 21 M L J 493; (1911) 2 M W N 148; 10 M L T 1.

(3) 55 M 752; 137 Ind. Cas. 749; A I R 1932 Mad. 351; 62 M L J 433; (1932) M W N 286; 35 L W 513; Ind. Rul. (1932) Mad. 438.

*Page of (1939) 2 M. L. J.—[Ed.]

(4) 27 M 45.

(5) 2 B 494 (509).

(6) A I R 1927 Mad. 1189.

(7) 46 L W 550; 177 Ind. Cas. 33; A I R 1937 Mad. 915; (1937) M W N 1014; 11 R M 235.

therefore the widow has secured her right fixing her claim against the whole joint family and getting a charge on a reasonable portion of the property the right or charge cannot be taken away from her by any subsequent partition between the members of the family. The cases relied on by Mr. Narasimhachariar where the maintenance has been reduced or increased according as the circumstances of the family do not affect the question in issue at all, nor can the Full Bench decision be taken as an authority for the position that a right secured by a widow against the entire joint family by a decree of Court is taken away by a subsequent partition between the members of the family. At the partition it is open to members to stipulate that the widow's maintenance may be paid by any one of the members as in this case by defendant No. 2 and that in default of payment the other members may have a right to contribution or indemnity against the person who under the partition was made liable to pay. But that is an arrangement *inter se* between the members with which the widow has no concern.

Where a widow has secured a charge on certain properties that charge is not defeated by any subsequent transfer of the said properties by the members of the family and she is entitled to enforce the charge in the hands of the transferee. In our opinion partition would be a subsequent transfer and her charge is liable to be enforced in respect of the properties charged in whosever's hands the properties may be. We are therefore of the opinion that the plaintiff is not entitled to the declaration sought. In view of this, it is unnecessary to go into the question whether a suit is competent or not. But there is a question of fact raised by the plaintiff, namely that the widow was a consenting party to the partition by which the plaintiff's liability came to an end and therefore by reason of the adjustment thus arrived at between all parties his liability under the decree became satisfied. This would strictly be a question under s. 47, Civil P. C., and cannot be gone into in an independent suit. Mr. Narasimhachariar now requests that the plaintiff may be converted into a petition under s. 47, Civil P. C. We allow the plaint to be treated as a proceeding under s. 47, in so far as the relief based on adjustment of the decree is concerned and direct the plaintiff to strike out para. 5 of the plaint and all other allegations in the plaint in so far as they have a bearing on the question raised in para. 5 which has been decided against him by this

judgment. We therefore direct the District Judge of Bellary to go into the question whether defendant No. 1 was a consenting party to the partition and agreed to take her maintenance only from defendant No. 2 and agreed to treat the liability of the plaintiff as satisfied under the decree. It is open to the defendants to file a counter affidavit raising such objections as they may be advised in regard to the premises. Subject to the directions given above, the appeal fails and is dismissed with costs—one set.

N.-S.

Appeal dismissed.

MADRAS HIGH COURT

Civil Revision Petition No 1317 of 1938

April 26, 1940

WADSWORTH AND PATANJALI SASTRI, JJ.

MOTAM KOTAYYA—PETITIONER

versus

SINGAMPALLI VENKATA PUNNAYYA

—RESPONDENT

Madras Agriculturists Relief Act (IV of 1938), s. 8.—Debt incurred before October 1, 1932—Decree passed after commencement of Act—Debt cannot be scaled down under s. 8.

A debt for the repayment of which a decree has been passed after the commencement of the Mad. Agri. Relief Act, is not liable to be scaled down in accordance with s. 8 of the Act when the debt is one incurred before the October 1, 1932. The word 'decree' in ss. 7, 8 and 9 must be taken to refer to decrees passed before the commencement of the Act. 192 Ind. Cas. 400 (1), held no good law.

C. R. P. to revise an order of the District Munsif, Tenali, dated July 9, 1938.

Mr. A. Lakshmayya, for the Petitioner.

Mr. M. Subramania Sarma, for the Respondent.

Wadsworth, J.—I agree with the conclusion and reasoning of the judgment which my learned brother is about to deliver. I only wish to add that after hearing a fuller argument and having the benefit of discussion with my learned brother, I am of opinion, that my decision in *Kankarazu v. Achutaramanarazu* (1), is erroneous.

Patanjali Sastri, J.—The question that falls to be decided in this revision petition is whether a debt for the repayment of which a decree has been passed after the commencement of the Mad. Agri. Relief Act, 1938, is liable to be scaled down in accordance with s. 8 of the Act when the debt is one incurred before October 1, 1932. The facts are

(1) (1940) M W N 338; 192 Ind. Cas. 400; 51 L W 452; 13 R M 552 (1); A I R 1940 Mad. 432; (1940) 1 M L J 600.

simple and not in dispute. The respondent sued the petitioner in S. C. S. No. 4 of 1938 on the file of the Court below for recovery of the principal and interest due on a promissory note executed on October 29, 1929. The suit was brought on January 3, 1938 and the petitioner filed his written statement on January 30, 1938. Though the Act came into force when the suit was pending, the petitioner failed to put forward a claim to have the debt scaled down in accordance with the Act, and a decree was passed on April 18, 1938, for the full amount claimed by the respondent. Soon after the passing of the decree, however, the petitioner applied to the Court on April 29, 1938, to scale down the debt and the application was dismissed on the ground that there is no provision in the Act for scaling down a debt in respect of which a decree has been passed after the Act came into force. The petitioner has preferred this revision petition and contests the correctness of that view.

It is argued that the *non obstante* clause in s. 7 and the words "whether the debt or other obligation has ripened into a decree or not" in s. 8, indicate that all debts incurred before the commencement of the Act should be scaled down irrespective of any decrees passed in respect of them, whether such decrees were passed before or after the commencement of the Act. These provisions are not free from ambiguity and may, at first blush, appear to lend some countenance to the contention of the petitioner. But on a closer examination of these sections in the light of other provisions of the Act and the scheme revealed thereby, it is fairly clear that the reference to decrees is intended only to extend the benefit of scaling down to debts which had ripened into decrees before the Act came into force. The provisions appear to envisage the state of things on October 1, 1937 and the reference to contracts obviously relates to contracts made prior to that date. It is therefore reasonable to assume that the word 'decree' which occurs in the same context is also used subject to the same qualification. It is significant that the machinery provided in ss. 19 and 20 for 'amendment' of decrees by scaling them down in accordance with the Act, and for stay of execution pending proceedings for such amendment, are made applicable only to decrees passed before the commencement of the Act and there are no similar provisions in respect of decrees passed after the Act came into force.

Similarly, s. 18 provides for 'amendment' of decrees passed before the Act in suits

instituted after October 1, 1937, by a proportionate reduction of costs also. These provisions which, in the case of decrees passed before the Act, expressly supersede the finality which attaches to decrees under the general law seem to indicate that, in the contemplation of the Legislature the relief which the Act provides for agriculturists should be claimed and obtained before decree, where such decree happens to be passed after the commencement of the Act, and that the principle of finality should operate unimpaired in such cases. Indeed, if the Legislature intended to exclude the operation of this principle in the case of all decrees against agriculturists whether passed before or after the commencement of the Act, the provisions of s. 19 and the latter part of s. 18, sub-s. (1) relating to 'amendment' of decrees passed before the commencement of the Act would be meaningless and otiose.

Nor is there any apparent reason to suppose that the Legislature intended to introduce into the Act such a startling departure from the basic principle of all judicial proceedings, namely, that all available pleas in answer to a claim should be made the subject of enquiry before the Court passes the decree. It is one thing to provide relief to agriculturists by way of scaling down their debts even when such debts had already ripened into decrees before such relief was thought of, but it is a different thing to declare that even if they failed to claim, when they could have claimed, such relief before a decree was passed, they should nevertheless be entitled to claim it at any time afterwards. It may be laudable to re-habilitate agriculturists by a compulsory scaling of their debts but it could be no part of this object to condone, and thereby encourage, their leaches in the conduct of legal proceedings. On the other hand, having regard to the expropriatory nature of the provisions, Courts should watch with a jealous eye attempts to have the scope of the Act extended, under colour of interpretation, beyond what its terms expressly warrant. I am therefore of opinion, reading the Act as a whole, that the word 'decree' in ss. 7, 8 and 9 must be taken to refer to decrees passed before the commencement of the Act.

The petitioner's learned Counsel placed reliance upon the decision of my learned brother Wadsworth, J., in *Kankarazu v. Achutaramanarazu* (1), as supporting his contention. The judgment is very brief and the question does not appear to have been fully argued and considered and my learn-

ed brother is now inclined, in the light of the fuller argument before us, to agree with the view expressed above. In *Somasundaram Chettiar v. Peria Karuppan Chettiar* (2), the suit was dismissed by the trial Court as barred by limitation but was decreed by this Court on appeal. An application for scaling down the debt was made to this Court before the decree was drafted and issued, along with another application to stop the drafting of the decree pending the disposal of the former application. This Court held that in those circumstances the judgment-debtor was entitled to have the debt scaled down. The broader question arising for decision in the present case was raised but the learned Judges observed that it was not necessary to deal with it on the facts before them. This decision therefore does not assist the petitioner. A decision of the Allahabad High Court in *Abdul Noor v. Brijmohan Saran* (3), was also brought to our notice but it relates to the construction of differently worded provisions in the U. P. Agri. Relief Act and has no bearing on the interpretation of the provisions of Mad. Act IV of 1938. This revision petition fails and is dismissed with costs.

N.-S.

Petition dismissed.

(2) (1940) M W N 412; 51 L W 606; A I R 1940 Mad. 478.

(3) I L R (1938) All. 308; 174 Ind. Cas. 659; A I R 1938 All. 153; (1938) A L J 107; 1938 R D 223; 1938 A L R 305; 10 R A 603.

ODUH CHIEF COURT

Civil Revision Application No. 154 of 1939
April 8, 1941

GHULAM HASAN, J.

RAM DHANI AND ANOTHER—PLAINTIFFS

—APPLICANTS

versus

L. NAGAR MAL AND OTHERS—

DEFENDANTS—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), s. 151, O. XLI, rr. 23, 25, 27—Trial Court refusing to give opportunity to produce evidence—Evidence not sufficient for decision on point at issue—Remand by Appellate Court for obtaining evidence—Remand is under s. 151 and proper.

An Appellate Court's power of remand is not circumscribed within the rr. 23 and 25 of O. XLI of the Civil P. C. An order of remand under s. 151 would be a proper order, if it is made by the Appellate Court in a case in which the evidence on the record is not sufficient for a correct decision on the point at issue, to obtain further evidence before the trial Court which had refused to give an opportunity to produce that evidence. 167 Ind. Cas. 922 (3), followed, 44 Ind. Cas. 832 (1) and 92 Ind. Cas. 1055 (2), distinguished.

C. R. App. of the order of the District Judge of Gonda, dated August 30, 1939.

Mr. Mahabir Prasad Srivastava, for the Applicants.

Mr. L. S. Misra, for Opposite Party Nos. 1 to 9.

Order.—This is a revision application under s. 115 of the Civil P. C. against an order of the District Judge of Gonda remanding the case to the trial Court for recording the evidence of a witness and for a fresh finding upon the issues after taking into consideration the said evidence.

The suit out of which this present application arises was one for recovery of damages for malicious prosecution. Issues were framed in the case, and when the evidence of the plaintiffs was closed, the defendants applied for the adjournment of the case to enable them to examine one Pandit Badri Prasad as their witness. This application was rejected by the trial Court. The result was that the suit was partly decreed.

The defendant-opposite parties went in appeal to the District Judge of Gonda, and, in addition to challenging the decree of the trial Court on the merits, they objected in para. 7 of their grounds of appeal that the lower Court had erred in law in not allowing an opportunity for examining the appellant No. 3, Pandit Badri Prasad, as a witness in the case.

The learned District Judge was of opinion that the trial Court was not justified in refusing the application of the defendants-opposite party to examine Pandit Badri Prasad in the case. He consequently remanded the case to the trial Court for recording the evidence of Pandit Badri Prasad as the defendant's witness and for coming to fresh findings on the issues after taking that evidence into consideration. This order of remand was made conditional upon payment of Rs. 25 by the defendants to the plaintiffs. He ordered the appeal to be fixed before him on October 13, 1939, after the findings had been received from the trial Court.

It is against the order of remand that present revision application is directed. It has been contended on behalf of the plaintiffs-applicants that the order of remand was neither one under r. 23 nor r. 25 of O. XLI of the Civil P. C. but the case clearly fell within the purview of r. 27 of O. XLI of the Civil P. C. and in these circumstances the learned District Judge acted illegally in remanding the case to the trial Court for recording the

evidence of the witness, whereas he should have recorded that evidence himself under the provisions of r. 27 of O. XLI of the Civil P. C. Reliance has been placed in this connection on two decisions, namely *Saiyid Fida Abbas v. Rahim Bakhsh*, (5 O. L. J. 139) (1) and *V. Venkatarama Aiyer v. T. V. Sundaram Aiyar*, (92 Ind. Cas. 1045) (2).

On behalf of the defendants-opposite parties it has been argued that the order of remand was not one under r. 27 of O. XLI of the Civil P. C. but was under the inherent powers of the Court. It has also been contended that the provisions of r. 27 of O. XLI of the Civil P. C. are no bar to the exercise by the Court of its inherent powers of remand. Rule 27 of O. XLI of the Civil P. C. opens with these words:—The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. This shows clearly that the production of additional evidence, whether oral or documentary, is to be not before the trial Court but before the Appellate Court. The rule, however goes on to say:

But if:—

"(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined."

There is no doubt that in either of the two cases which may arise before the Appellate Court, the latter will be entitled in its discretion to allow the production of evidence or document or the examination of a witness. Having regard to the circumstances of the case, it was no doubt open to the Appellate Court to have acted under r. 27 (1) (a) of O. XLI of the Civil P. C. and recorded the evidence of Pandit Badri Prasad itself and then given its own finding upon the issues in the case. Instead of acting under r. 27 (1) (a) the lower Appellate Court preferred to remand the case in its inherent powers for the examination of Pandit Badri Prasad by the trial Court and for obtaining its finding upon the issues in question after taking into consideration that evidence. In my opinion the course adopted by the lower Appellate Court was neither illegal nor unreasonable. Learned Counsel on behalf of the plaintiffs-applicants concedes that apart from the provisions of rr. 23 and 25 of O. XLI of the

Civil P. C. an Appellate Court has ample jurisdiction to remand a case. The case of *Hira Lal Bajpai v. Sri Ram Janki*, (1937 O. W. N. 377) (3), may also be referred to in support of this view. There is no indication on the record to show that the defendants wanted to produce Pandit Badri Prasad before the lower Appellate Court. On the other hand, ground No. 7. of the memorandum of appeal states that the defendants' grievance was that the trial Court was not justified in refusing to give an opportunity to produce Pandit Badri Prasad and that the witness should have been examined by the trial Court. This being the state of facts before the lower Appellate Court, the question of examining Pandit Badri Prasad before the lower Appellate Court did not arise at all, and the only question which the lower Appellate Court was called upon to determine was whether the lower Court was justified in declining to give an opportunity to the defendants to produce the witness or not. The lower Appellate Court upon a consideration of the circumstances of the case came to the conclusion that the evidence of Pandit Badri Prasad should have been examined by the trial Court, and in this view of the matter the lower Appellate Court rightly remanded the case presumably under its inherent powers, for the examination of that witness. Under these circumstances no question of the applicability of r. 27 of O. XLI, arose, and the decision of the learned Additional Judicial Commissioner in *Saiyid Fida Abbas v. Rahim Bakhsh* (5 O. L. J. 139) (1), has no application to the facts of the present case. There the lower Appellate Court had remanded the suit for rehearing *ab initio* under the provisions of O. XLI, r. 23 of the Civil P. C. Under the provisions of O. XLI, r. 23 in a case where the trial Court had refused to record certain evidence, which the lower Appellate Court considered ought to have been recorded by him. It was held that the provisions of O. XLI, r. 23 had no application to such a case though the lower Appellate Court could utilise the provisions of O. XLI, r. 27, in any manner which appeared proper. In the present case the order was not made under r. 23 of O. XLI, of the Civil P. C. under any mistaken apprehension of law, and having regard to the trend of the order, it seems to me that the lower Appellate Court acted under s. 151 of the Civil P. C. in directing the trial Court

(1) 5 O. L. J. 139; 45 Ind. Cas. 832; A I R 1918 Oudh 170.

(2) 92 Ind. Cas. 1045; (1925) M W N 48,

(3) 1937 O. W. N. 377; 167 Ind. Cas. 922; 1937 O. L. R 179; 9 R O 416; A I R 1937 Oudh 338.

to record the evidence of Pandit Badri Prasad.

In *V. Venkatarama Aiyar v. T. V. Sundaram Aiyar*, (92 Ind. Cas. 1045) (2), the Subordinate Judge had remanded the case while he had directed the trial Court to re-try only Issues Nos. 5 and 6. All that the learned Judges of the Madras High Court laid down was that this order was without jurisdiction and that the proper course for the Subordinate Judge was to direct the trial Court to take further evidence he wished and submit it to his Court, whereupon he would record his own finding. In the present case there is only one principal issue, namely, whether the complaint of defendants was false, malicious and without any responsible and probable cause. The second issue merely relates to the quantum of damages. If the first issue is found in the affirmative, the second issue will necessarily arise for decision, but if the issue is found in the negative, the question of damages will not arise at all, although the Court will no doubt give a finding on both the issues.

In *Hira Lal Bajpai v. Sri Ram Janki*, (1937 O. W. N. 377) (3), it was observed that

"it cannot be laid down that an Appellate Court has no power to remand a case to the trial Court unless the case falls strictly within the purview of r. 23 or r. 25 of O. XLI, Civil P. C. rr. 23 and 25 of O. XLI, Civil P. C. do not make provision to meet the contingency where the evidence on the record is not considered sufficient by the Appellate Court for a correct decision on the point in issue. Where, however, there is no reason to think that the parties did not get an opportunity of producing all the evidence that they desired to produce before the trial Judge, order of remand is not a very proper order."

This decision is an authority for two propositions firstly that an Appellate Court's power of remand is not circumscribed within the rr. 23 and 25 of O. XLI, of the Civil P. C. and secondly that an order of remand under s. 151 would be a proper order, if it is made by the Appellate Court in a case in which the evidence on the record is not sufficient for a correct decision on the point at issue, to obtain further evidence before the trial Court which had refused to give an opportunity to produce that evidence. The order of remand passed by the lower Appellate Court discloses no illegality which vitiates the said order and renders it liable to interference under s. 115 of the Civil P. C.

On the merits also the plaintiffs-applicants can have no legitimate ground for complaint. After Pandit Badri Prasad has been examined before the trial Court, the trial Court will be in a position to record its own findings after a consideration of that evidence

and return those findings to the lower Appellate Court, which will have a right to examine those findings in the light of the fresh evidence. It seems to me clear that the order directing the trial Court to record the evidence of Pandit Badri Prasad instead of taking his evidence itself has caused no prejudice to the plaintiffs-applicants and in any event the order of remand was eminently just and reasonable upon the merits.

The application, therefore, fails and is dismissed with costs.

s.

Application dismissed.

MADRAS HIGH COURT

Civil Revision Petition No. 903 of 1940

August 16, 1940

WADSWORTH, J.

KANNABHIRAN PILLAI—PETITIONER

versus

GOVINDASWAMI PILLAI—RESPONDENT

Madras Agriculturists Relief Act (IV of 1938)—Appellate Court's decree declaring liability for first time—No written application raising plea for relief under Act before Appellate Court—Proper procedure—S. 19—Applicability, to decree passed after Act.

When a liability is being declared in the Appellate Court's decree for the first time and a plea is open to the defendants under the Act there should be a written application raising this plea before the Appellate Court and on such application the Appellate Court should either give its own decision or reserve in its decree the right to have the matter decided by the Court below.

It is doubtful whether an order reserving a plea under the Mad. Agri. Relief Act for subsequent adjudication should be passed in the absence of an express prayer for the benefits of the Act. But the irregularity, if irregularity it be, should not deprive the defendants of their remedy when both parties have treated the order as binding upon them : 58 Ind. Cas. 806 (2), and 48 Ind. Cas. 611 (3), referred to.

Section 19, has no application to a decree passed after the Act came into force, *Motam Kotayya v. Singampalli Venkata Punneyya* (1), followed.

Messrs. A. V. Viswanatha Sastri and S' Amudachari, for the Petitioner.

Mr. K. V. Srinivasa Aiyar, for the Respondent.

Order.—This revision petition raises the question of the proper procedure in a matter arising under Mad. Act IV of 1938. The present petitioner was a defendant in a suit which was dismissed on November 30, 1937, that is to say, before the Act came into force. There was an appeal by the plaintiff and the Appellate Court after Act IV of 1938 came into force reversed the decision of the lower Court and gave a decree. The last sentence of the judgment of the Appellate Court is as follows :

"This judgment will not preclude the defendants

from applying to the lower Court for scaling down the debt under the provisions of Mad. Act IV of 1938 if they are entitled to have such relief."

It is common ground that no formal application under Mad. Act IV of 1938 was before the learned Judge when he disposed of the appeal. It is not clear whether any oral representation was made at the time of passing judgment that the defendants' rights under Act IV should be reserved. But it seems to me probable that something must have been said to cause the learned Judge to make this reservation in his judgment. After the pronouncement of this judgment a decree was drawn up which contains no provision for a reservation such as the judgment contains. Thereafter the present petitioner applied to the trial Court to scale down the Appellate Court's decree under s. 19 of Act IV. At the time when this application was made there was a good deal of difference of opinion on the question whether a decree passed after the Act came into force could be scaled down. That doubt has, I hope, been finally set at rest by our decision reported in *Motam Kotayya v. Singampalli Venkata Punnayya* (1). In the light of that decision, it must be held that the application to the lower Court to scale down the Appellate Court's decree under s. 19 was not the proper procedure. At the same time it does not seem equitable merely because the petitioner has adopted a wrong procedure and has not understood what is the right procedure to leave him without a remedy if a legal remedy is open to him.

Now it is doubtful whether the order of the Subordinate Judge reserving a plea under Act IV of 1938 for subsequent adjudication should have been passed in the absence of an express prayer for the benefits of the Act. Assuming, however, that the Judge had the intention or reserving a plea which was open to the defendants and which would have been taken in writing had the necessity therefor been made plain, the irregularity, if irregularity it be, should not deprive the defendants of their remedy when both parties have treated the order of the Subordinate Judge as binding upon them: *vide Hriday Nath v. Ramachandra* (2) and *Tuljaram Rao v. Gopala Iyer* (3). The Subordinate Judge having granted the defendants leave to raise in the trial Court the question of the relief to which they may

(1) 52 L W 176; 194 I. d. Cas. 753; (1940) 2 M L J 202; (1940) M W N 809; A I R 1940 Mad. 910; I L R (1940) Mad. 1023.

(2) 48 C 138; 58 Ind. Cas. 806; A I R 1921 Cal. 34; 31 C L J 482; 24 C W N 723 (F. B.).

(3) 32 M L J 434; 40 Ind. Cas. 611; A I R 1918 Mad. 1093; (1917) M W N 234; 21 M L T 229.

be entitled under Act IV of 1938 this order binds both parties and cannot be treated as void merely by reason of an alleged irregularity. I would, however, observe that, though no procedure has been laid down in the Act, in a case of this kind when a liability is being declared in the Appellate Court's decree for the first time and a plea is open to the defendants under Mad. Act IV of 1938 there should be a written application raising this plea before the Appellate Court and on such application the Appellate Court should either give its own decision or reserve in its decree the right to have the matter decided by the Court.

On the facts of the present case it seems to me clear that the Court below could not proceed with the enquiry under Act IV of 1938 in the face of the Appellate Court's decree which makes no provision therefor. The proper procedure therefore appears to be for the petitioner to apply to the Appellate Court to have the decree brought in accordance with the judgment by embodying therein a direction to the trial Court to deal with the application for relief under Act IV of 1938 and amend the decree according to its decision. If and when the petitioner makes such an application to the Appellate Court it will of course be open to the respondent to urge any objections which may be available to him to the amendment of the decree. Should the Appellate Court carry out the desired amendment, the petitioner will then be at liberty to apply to the trial Court—not under s. 19 which really has no application to a decree passed after the Act came into force—but under ss. 8 and 9 as in a pending litigation, the matter having been reserved in the appeal for separate disposal. The revision petition against the order of the District Munsif must be dismissed, his order being correct on the frame of the petition, though he might perhaps have given to the petitioner some guidance as to the course which he should follow. In the circumstances, I make no order as to costs.

N.-S.

Petition dismissed.

SIND CHIEF COURTCriminal Revision Application No. 238
of 1940

October 3, 1940

DAVIS, C. J. AND TYABJI, J.

BHAIRO MURID JAGIRANI—ACCUSED

—APPLICANT

versus

EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), s. 99—Constable not having power to arrest trying to arrest person and meeting with resistance by third person—S. 99, if applies—Criminal trial—Revision—Error of law resulting in sentence of six months—Interference.

While the protection of s. 99, I. P. C., extends to acts that are not strictly justifiable by law, it does not extend to acts which are *ultra vires* and have no legal basis. The section applies indeed to a case where an official has done wrongly what he might have done rightly but not to cases where the act could not have been done rightly at all by the official concerned.

Consequently where a Police constable could not have rightly exercised the authority he did in arresting a person unless he had promoted himself to be an officer in charge of a Police Station or to the rank of a Sub-Inspector, there is no legal basis to his action and if the constable is met with resistance by third person s. 99 cannot protect his action.

Where there has been a clear error in law resulting in a sentence of six months' rigorous imprisonment upon the applicant, the High Court should interfere in revision.

Cr. R. App. to revise the judgment of the Additional Sessions Judge, Sukkur, dated June 29, 1940.

Mr. Partabrai D. Punwani, Advocate-General, for the Crown.

Davis, C. J.—This is an application from jail by one Bhairo, son of Murid Jagirani, who has been sentenced for an offence under s. 323, I. P. C., to six months' rigorous imprisonment, and prays to this Court that either his sentence should be quashed or that it should be ordered to run concurrently with the sentence imposed upon him for an offence under s. 19-E, Arms Act. The two offences of which he has been convicted are part of the same transaction. We think that the conviction under s. 323, I. P. C., cannot be sustained, for the learned Additional Sessions Judge has not sufficiently considered the provisions of s. 99, I. P. C. He states that the appellant had no right of private defence against the Police constable Ghulam Hussain who had apparently acted in good faith under colour of his office in apprehending one Amil Jagirani, to whose assistance the appellant had gone and in whose defence simple hurt was caused to the Police constable Ghulam Hussain who, the learned Judge found, had without lawful authority arrested him.

It appears that while Head Constable Dodo Khan and the Police constable Ghulam Hussain and Police constable Hamidali were returning from the village of Jagirani where they had gone to investigate a case they heard a gunshot not far from the road. They went to investigate and found the appellant Bhairo, one Amil Jagirani and another person. Bhairo had a gun in his hand; Amil Jagirani was in the act of killing a partridge which it appeared Bhairo had shot. Amil Jagirani, it is said, was absconding after committing an offence under the Criminal Tribes Act. Police constable Ghulam Hussain caught hold of him, while Dodo Khan and Police constable Hamidali went in pursuit of the appellant Bhairo and his other companion. In the meantime Amil Jagirani raised cries for help, and the appellant Bhairo returned and came to release Amil Jagirani from arrest at the hands of Ghulam Hussain, and he struck Ghulam Hussain with the butt of his gun and rescued Amil Jagirani who ran away; but the appellant was pursued and overtaken by Head Constable Dodo Khan and Police constable Hamidali.

The appellant was convicted of an offence under s. 19-E, Arms Act, and also of offences under ss. 225 and 332, I. P. C., and sentenced to three months' rigorous imprisonment for the offence under s. 225, I. P. C., and 8 months' rigorous imprisonment for the offence under s. 332, I. P. C., and he appealed to the Sessions Court against these convictions and the learned Additional Sessions Judge set aside the conviction under s. 225, I. P. C., altered the conviction under s. 332, I. P. C., to one under s. 323, I. P. C., finding, we think rightly, that Ghulam Hussain had no right to arrest Amil Jagirani and therefore the appellant was entitled to free Amil Jagirani from the wrongful confinement in which a Police constable was holding him. The learned Judge came to this conclusion because s. 22(3), Criminal Tribes Act, only authorizes an officer in charge of a Police Station or a Police Officer not below the rank of a Sub-Inspector to arrest any person who is reasonably suspected of having committed an offence made punishable under the section. Ghulam Hussain, Police constable was not an officer in charge of a Police Station nor was he a Sub-Inspector of Police; he had therefore no jurisdiction at all to arrest Amil Jagirani. Therefore, when Ghulam Hussain arrested Amil Jagirani he was not acting in the exercise of a lawful authority. Resistance in which hurt was caused to him by the appellant was

resistance to the exercise by him of an unlawful authority and was not an offence under s. 332, I. P. C., neither was an offence under s. 225, I. P. C., committed, for the resistance offered to the apprehension of Amil Jagirani by the appellant was not resistance to a lawful apprehension but to an unlawful apprehension.

Nevertheless while the learned Additional Sessions Judge held that the Police constable was not entitled to the protection of these two particular sections, he held he was entitled to the protection of s. 99, I. P. C., though the learned Judge has not referred to this section nor has he quoted it, stating merely that the Police constable was acting in good faith under colour of his office. But that statement does not correctly represent the section. The section contains at the end of its first paragraph certain significant words and they are these; ".....though that act may not be strictly justifiable by law." The inference from these words is that while the protection of the section extends to acts that are not strictly justifiable by law, it does not extend to acts which are *ultra vires* and have no legal basis. The section applies indeed to a case where an official has done wrongly what he might have done rightly but not to cases where the act could not have been done rightly at all by the official concerned.

In this case the Police constable Ghulam Hussain could not have rightly exercised the authority he did in arresting Amil Jagirani unless he had promoted himself to be an officer in charge of a Police Station or to the rank of a Sub-Inspector. There was therefore no legal basis to his action. We do not think therefore it can be said that his act was nothing more than an act not strictly justifiable by law within the meaning of s. 99, I. P. C. If for instance, Ghulam Hussain had been an officer in charge of a Police Station or had been a Sub-Inspector of Police and some mistake had occurred as to the offence under the Criminal Tribes Act which Amil Jagirani had committed, so that it could not fall within the provisions of s. 22, Criminal Tribes Act, it might be said that s. 99, I. P. C., applied, for a Police Officer in charge of a Police Station or a Sub-Inspector may arrest without warrant under the section for an offence made punishable under the section even though that offence is not a cognizable offence. But this Police constable had no power to arrest under that section at all. Whether an act does or does not fall within the provisions of s. 99,

I. P. C., is a question of fact to be decided in each case.

We think therefore that s. 99, I. P. C., does not apply to this case. We think therefore the appellant had a right of private defence on behalf of Amil Jagirani when he released him from what was an unlawful confinement or restraint, a confinement or restraint which had no basis in law at all, and as he did not cause more hurt than was necessary, we do not see how the conviction under s. 323, I. P. C., can be sustained. We appreciate the fact that we are dealing with this case in revision. But where there has been, as we think in this case, a clear error in law resulting in a sentence of six months' rigorous imprisonment upon the applicant, we think we should interfere. We therefore allow this revision application from jail and set aside the conviction and sentence under s. 323, I. P. C. The applicant will then be left to serve his sentence under s. 19-E of the Arms Act.

D.

Application allowed.

MADRAS HIGH COURT

Second Appeal No. 640 of 1936

October 27, 1939

HORWILL, J.

KOWTHA SURYANARAYANA RAO—

APPELLANT

versus

PATIBANDLA SUBRAHMANYAM

AND OTHERS—RESPONDENTS

Society—Acts of management within powers of society—Dispute between its individual members and those responsible for its management, if can be decided by Civil Court—Civil Court, when can assume jurisdiction—Association—Association maintained not merely by subscription of members but by donations is not club—Member, when can sue management, stated.

It is a well-established principle that, provided that the acts of the management are within the powers of the society itself, any dispute between individual members of the society and those responsible for its management must be decided by the machinery provided by the rules and not in a Court of law. It is only when an act is *ultra vires* the society that a member is entitled to come to a Civil Court and have the act of the management which is *ultra vires* declared to be void.

Where an Association is maintained not by mere subscriptions from its members but by donations; it is not a club. A member of an association cannot sue the management because it does some act of which he disapproves, provided of course that he is not personally damaged by expulsion or punishment or by loss to property of which he may be a joint owner.

S. A. against the decree of the Sub-Judge, Bezvada, in A. S. No. 36 of 1935.

Messrs. S. Parthasarathy and V. K. Thiruvengkatachari, for the Appellant.

Messrs. G. Lakhmanna and G. Chandra-sekhara Sastri, for the Respondents.

Judgment.—The plaintiffs are five members of an Association called the Ram Mohan Roy Free Library and Reading Room Association, which was registered in 1914 under the Societies Registration Act XXI of 1860. Defendants Nos. 1 to 9 are the members of the managing committee of that Association and defendant No. 10 is a person who according to the findings of the lower Appellate Court, has given an unconditional gift of an upstairs room erected above the original premises of the Association. The managing committee has permitted defendant No. 10 to have embedded in three walls plates with the name "Kowtha Suryanarayana Rao Public Hall" engraved. The plaintiffs have brought this suit to restrain the defendants from affixing plates of cast letters of this description or any other letters either cast or written or of any kind except those bearing the words, Ram Mohan Roy.

It is argued not only that the managing committee acted *ultra vires* in permitting defendant No. 10 to place plates with this inscription on the walls of the upstairs room; but that the grant of such permission was *ultra vires* of the association itself. This last contention seems so ludicrous as not to need any argument to refute it. There is certainly nothing in the rules which prevents the association from naming any hall or room in any manner it pleases; and the giving of a particular name cannot be in contravention of any rules of the association relating to the aims and objects of the society. If, as defendant No. 10 alleged in his written statement, his gift had been subject to conditions, it might well be argued that those conditions were not in consonance with the objects of the association; but with that case of defendant No. 10 we are not concerned, in view of the findings of the lower Appellate Court that the gift was unconditional. It is a well-established principle that provided that the acts of the management are within the powers of the society itself, any dispute between individual members of the society and those responsible for its management must be decided by the machinery provided by the rules and not in a Court of law. If disgruntled members were allowed to air their domestic grievances in Court, orderly management of the affairs of societies and corporations would be impossible. If the society as a whole does not approve of the acts of its management, it has every power by summoning a general meeting and passing a resolution to correct and

control the acts of the management. In the suit society the acts of the managing committee are subject to the control of the general committee of which every member of the society is a member. It is only when an act is *ultra vires* the society that a member is entitled to come to a Civil Court and have the act of the management which is *ultra vires* declared to be void.

The Courts below seem to have come to their conclusions on the assumption that this Ram Mohan Roy Free Library and Reading Room Association was a members' club; but it is clear that the Association is maintained not by mere subscriptions from its members but by donations; and it is therefore difficult to see how it can be a club. However, for the purposes of this appeal, it is immaterial whether the society is a club or not; for even a member of a club cannot sue the management because it does some act of which he disapproves, provided of course that he is not personally damaged by expulsion or punishment or by loss of property of which he may be a joint owner. The decisions of the Courts below are therefore, wrong; and the matter in dispute being one that should be decided by the Association itself, the suit has to be dismissed. In order that the gift of this room and the inscriptions on it should not cause further disharmony between the members of the Association, defendant No. 10 is willing to delete the word "public" from the inscriptions. He undertakes through his Advocate to do this within three months of this date. As defendant No. 10 has given this undertaking, this appeal is allowed and the suit dismissed. The plaintiffs will pay the costs of defendant No. 10 in this Court only. Leave refused.

N.-S.

Appeal allowed.

NAGPUR HIGH COURT

Second Appeal No. 508 of 1938

July 24, 1940

STONE, C. J. AND BOSE, J.

DAU BHAIROPRASAD AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

JUGALPRASAD AND OTHERS—DEFENDANTS

—RESPONDENTS

Deed—Construction—Value of case law—Transfer of Property Act (IV of 1882), s. 100—Charge in India, whether same as charge in England—Interest in property, if should be created under Indian law—Deed held created charge.

In a matter turning on the construction of a document cases are not very helpful except to clear one's

mind as to the essence of the transaction which the agreement is said to effect. [p. 762, col. 2.]

Charge in India cannot usefully be compared with a charge, legal or equitable, in England because in India such a charge is defined by statute. What is essential is that immovable property must be made a security for the payment of money in such a way that the transaction does not amount to a mortgage in the Indian law sense. In that sense a mortgage is a transfer of an interest in specific immovable property for the purpose of securing money. Of course if the transaction falls within s. 58 it is outside s. 100. So a charge is something other than a transfer of an interest in specific immovable property. It is not a question whether there is an expression of an intention to create an interest but whether on its true construction, the document makes immovable property security for the payment of money. [*ibid.*]

[Case-law discussed.]

One J by a document admitted liability. In respect of this liability he undertook to execute a charge bond over a specified share and rights in a village together with the *sir* land. He further undertook to get sanction for the transfer of *sir* and not to assign certain property until the above were carried out:

Held, that the only possible purpose of the last undertaking was to segregate the property so that it would be answerable in the hands of J should he fail to give the charge bond, and that made this property a security for the payment of money. Thus a charge was created by the deed. [p. 764, col. 2.]

S. A. from appellate decree of the Court of the Additional District Judge, Raipur, dated April 22, 1938.

Mr. M. R. Bobde with Mr. R. G. Rao, for the Appellants.

Rai Bahadur M. B. Kinkhede, and Rai Bahadur D. N. Choudhari, for the Respondents.

Judgment.—This appeal raises a question under s. 100, T. P. Act. It is concerned with the construction of Ex. P-1. Does that document, which was duly registered, create a charge?

Essentially by that document one J admits liability. In respect of that liability he undertakes to execute a charge bond over a specified share and rights in a village called Nawagaon together with the *sir* land.

Sir land being involved there can, under the law applicable in the Central Provinces, be no effective transfer without the sanction of a certain administrative officer.

Accordingly the next undertaking is that J will obtain the necessary sanction. That is followed by a promise to execute the above mentioned charge bond within a month of obtaining sanction. The charge bond is to be registered.

Then the agreement in question provides:—

"Unless (until) the writing and the registration have been effected with respect to *mouza* Nawagaon, *sir* land and houses according to the terms laid down above, I will not assign in any way to anybody, my

decree obtained from the Court of the Judicial Commissioner (Nagpur) in Cases Nos. 16 and 34 of 1929 nor will I transfer any property whatsoever, which I have acquired from the said Court by virtue of the decree. And I will fully abide myself with the terms of the agreement. If I act in contravention of any term whatsoever, the said creditors will be at liberty to file a suit immediately against me in respect of their claim and recover their amount due, by attachment and sale of my entire property which I have described above. I will further stipulate in the charge bond that in case the entire claim of the creditors is not satisfied by attachment and sale of the property that will be laid down in the charge bond, they will be entitled to recover their remaining claim from my any other property, movable or immovable, which they may desire."

The sanction was never sought; the charge bond was never given. Does the above create a charge separate from the charge that was going to be created by the charge bond?

A large number of cases have been cited before us by each side but in a matter such as the present turning on the construction of a document, cases are not very helpful except to clear one's mind as to the essence of the transaction which the agreement is said to effect.

There is little doubt what a charge (when within s. 100 of the T. P. Act) is in India. It cannot usefully be compared with a charge, legal or equitable, in England because in India such a charge is defined by statute.

Section 100 of the T. P. Act provides that "Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property."

What is essential is that immovable property must be made a security for the payment of money in such a way that the transaction does not amount to a mortgage in the Indian law sense. Now in that sense a mortgage is a transfer of an interest in specific immovable property for the purpose of securing (various things which include the payment of money). See s. 58, T. P. Act.

Of course if the transaction falls within s. 58 it is outside s. 100. So a charge is something other than a transfer of an interest in specific immovable property.

Khajah Solehman Quadir v. Salimulla Bahadur (1), gives an example of a charge. Settlement of Blackacre to certain uses with direction to pay out of income certain periodic and ascertained sums to X. No interest in Blackacre is transferred but Blackacre is, so to speak, segregated, so as to make it secur-

(1) 49 C 820 (835, 836); 69 Ind. Cas. 138; A I R 1922 P C 107; 31 M L T 79; 4 U P L R (P C) 70; 43 M L J 385, 24 Bom. L R 1257; 27 C W N 101; 21 A L J 1; 37 C L J 56; 49 I A 153 (P C).

ity for the payment to X of the indicated sums. Anybody buying Blackacre or an interest in Blackacre with knowledge of the charge would be bound by it. It will be seen that there the charge arises out of a transaction that belongs to the law of trusts rather than to conveyance or contract.

In *Aditya Prasad v. Ram Ratan Lal* (2) the Privy Council applying the provisions of the T. P. Act, as expressing the principle of equity, justice and good conscience to a transaction of 1881 expressed the following opinion at p. 368* :

"It appears to them clear.....that the parties intended that the original village should remain in the possession of the mortgagees until the second debt was paid off, and intended, therefore, that the property should be security for the debt."

Cases relating to debentures, at any rate where, as in *Imperial Bank of India v. Bengal National Bank* (3), they turn on circumstances quite outside the present case, are not helpful. So cases like *Sundarlal v. Ramjilal* (4), do not assist. The facts there are complicated but narrow down to this: If A has two villages X and Y and he keeps one (X) and hands one (Y) to B to enjoy on terms that B has the revenue and A pays the Govt. revenue, has B a charge over X in order to secure the payment of Govt. revenue to A on Y? The answer was, of course, no. It was pointed out that A's obligations to B were purely contractual:

".....there is not a word (in the award under consideration which resulted in the above arrangement) to suggest that (A) agreed to the creation of a 'charge' on his estate (X) or to hypothecate it for the revenue of (Y) granted to (B)."

Makbul Ali v. Ali Ahmad (5), which was relied on by the respondent for the proposition that no charge can be created by implication (the observations in *Kuttiumma v. Madhava Menon* (6), being relied on) is not a very clear case and is concerned with quite different facts from the present. It does not purport to decide that before one can hold that a document on its proper construction creates a charge it must be express-

ly stated that a charge is created. No one doubts that before there can be a charge so created the document must operate to make immovable property security for the payment of money. What we are concerned with in this case is whether this document on its true construction has that effect.

In *Sivanna v. Venkatakrishna* (7), the clause that was being construed was "until the said amount is paid (Blackacre) should not be dealt with by the 1st and 2nd defendants in any manner." That clause appeared in a compromise decree. The Court observed:

"The promise contained in the compromise not to alienate the property to third persons with (out) the payment of the plaintiffs' debt is only a covenant not to create any interest in it in favour of others. There is no expression of an intention to create an interest in the plaintiffs' favour."

It will be noted that if the transaction amounted to a transfer of an interest it would not be a charge but a mortgage. We, with respect, consider, therefore, that it is not a question whether there is an expression of an intention to create an interest but whether, on its true construction, the document makes immovable property security for the payment of money. The learned Judges in *Sivanna v. Venkatakrishna* (7) rely on *Gunoo Singh v. Latafut Hussain* (8), as deciding that a covenant not to alienate "was regarded as insufficient to create a charge". Their Lordships could hardly have referred to *Gunoo Singh v. Latafut Hussain* (8), which decides that such a covenant does not amount to a mortgage.

Nevertheless in *Rangampudi v. Venkateswarin* (9), a decision to which one of us (Stone, C. J.) was a party, *Sivanna v. Venkatakrishna* (7), was cited with approval. *Rangampudi v. Venkateswarin* (9), is distinguishable from the present case. It was concerned with registration. There were also questions about admitting further evidence. The evidence sought to be introduced was a letter addressed to a bank by the defendant's father undertaking not to alienate certain properties. At the date of the letter there was no money payable to the bank which commenced its advances some time later. It was held that the letter did not amount to a charge, and following *Imperial Bank of India v. Bengal National Bank* (10), on appeal to Privy Council *Imperial*

(7) 24 M L J 474; 19 Ind. Cas. 478; (1913) M W N 337.

(8) 3 C 336; 1 C L R 91.

(9) A I R 1934 Mad. 713; 152 Ind. Cas. 772; 40 L W 677; 7 R M 286.

(10) 58 C 136; 131 Ind. Cas. 689; A I R 1931 Cal. 223; 34 C W N 605; 53 C L J 269; Ind. Rul. (1931) Cal. 481.

(2) 5 Luck. 365; 123 Ind. Cas. 191; A I R 1930 P C 176; 57 I A 173; Ind. Rul. (1930) P C 175; (1930) A L J 616; 34 C W N 625; 52 C L J 49; 32 L W 14; 7 O W 700; 59 M L J 342 (P C).

(3) 59 C 377; 134 Ind. Cas. 651; A I R 1931 P C 245; 38 I A 323; 35 C W N 1034; 54 C L J 117; (1931) A L J 804; (1931) M W N 910; 33 Bom. L R 1338; 34 L W 569; 61 M L J 589; Ind. Rul. (1931) P C 299 (P C).

(4) 24 C W N 929; 76 Ind. Cas. 680; A I R 1920 P C 16; 47 C 932; 47 L A 149; 16 N L R 114; (1920) M W N 447; 2 U P L R (P C) 109; 28 M L T 319 (P C).

(5) 40 C 514; 18 Ind. Cas. 80.

(6) 11 M L J 186.

*Page of 5 Luck.—[Ed.]

Bank of India v. Bengal National Bank (3), that effectively to create a charge it would have to be registered. It was also observed: "We agree with the decision in *Sivanna v. Venkatakrishna* (7)."

Sivanna v. Venkatakrishna (7), was dissented from in *Narain Das v. Murlidhar* (11) which follows *Jawahir Lal v. Indomati* (12).

As in *Imperial Bank of India v. Bengal National Bank* (10) so in *Narain Das v. Murlidhar* (11), it was stressed that the law does not prescribe any particular form of words as necessary to create a charge. The determination of the question in all such cases rests upon the intention to make the particular property a security for the payment of money.

We do not find that the other cases cited before us are very helpful. The learned Judge has referred to *Madho Misser v. Sidh Binaik Upadhyaya* (13), (and the appellants have cited *Murat Singh v. Pheku Singh* (14), as being a case dissenting from *Madho Misser v. Sidh Binaik Upadhyaya* (13)). What *Madho Misser v. Sidh Binaik Upadhyaya* (13), decides is that the document to effect a charge must effect it at once and not *in futuro*. Assuming for the sake of argument that that is so (it is not very obvious why) no one doubts that if the part of this document under consideration creates a charge at all it creates it at once. The argument before the lower Court doubtless was that as *J* had agreed to give a charge bond and do this and that the charge did not operate at once. In our opinion the undertaking, which either does or does not amount to a charge, was an undertaking binding from the moment the document was executed.

Without going so far as to say that a mere bare undertaking not to alienate property necessarily creates a charge we are clearly of the opinion that this document creates a charge. It has been urged that this might be so had the passage above quoted (ended?) at "with the terms of the agreement." But it goes on to describe what is to happen if *J* fails to carry out his promises. That, it is urged, imposes the sanction and that is the only sanction. We do not think so. Anybody reading this document would know—

(11) A I R 1929 Oudh 539; 121 Ind. Cas. 81; 6 O W N 903.

(12) 36 A 201; 22 Ind. Cas. 973; A I R 1914 All. 187; 12 A L J 290.

(13) 14 C 687.

(14) 7 Pat. 584; 110 Ind. Cas. 526; A I R 1928 Pat. 587; 9 P L T 743.

(1) that *J* had undertaken to give a charge bond,

(2) that *J* had undertaken to get sanction for the transfer of *sir*,

(3) that *J* had undertaken not to assign certain property until the above were carried out.

In our opinion the only possible purpose of the last undertaking was to segregate this property so that it would be answerable in the hands of *J* should he fail to give the charge bond, and that we think makes this property a security for the payment of money.

The appeal is accordingly allowed with costs. The decree will incorporate the clauses of the trial Judge's decree together with a provision relating to the costs in the lower Appellate Court and here which will be the plaintiffs'.

It should be added that the Court raised a question of the appropriate stamp. By the Stamp Act, s. 2 (17) mortgage deed is so defined as probably to include a document creating a charge. This document is not so stamped. The document has, however, been admitted and no party has raised this point probably for that reason.

D.

Appeal allowed.

CALCUTTA HIGH COURT

Appeals Nos. 194 and 195 of 1938

July 8, 1940

DERBYSHIRE, C. J. AND

B. K. MUKHERJEA, J.

JNANENDRA NARAYAN BAGCHI AND

OTHERS—APPELLANTS

versus

BHOLA NATH MONDAL AND OTHERS—

RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Execution of rent decrees—Judgment-debtors pleading adjustment—Alleged deed of adjustment appointing one of decree-holders as manager in respect of share of 11 annas judgment-debtors, to manage their property and to distribute surplus profits among decree-holders—Other decree-holders and judgment-debtors not parties to deed, held not bound by deed—Deed held not adjustment within meaning of O. XXI, r. 2—Fact that other decree-holders were paid portion of rents in accordance with terms of deed held did not make them parties to it—Landlord and tenant—Rent suit—Purchaser of share of mahal pending suit, whether personally liable for rent—Patni and darpadni already sold at superior landlord's instance—Personal liability of purchaser.

Two rent decrees were obtained by the same decree-holders against the same judgment-debtors. In execution proceedings objections were raised by some of the judgment-debtors on the ground that there was an arrangement under a registered deed between the decree-holders and the judgment-debtors which had

the effect of an adjustment of the decree within the meaning of O. XXI, r. 2, Civil P. C. By this instrument one of the decree-holders was appointed a manager of the interest of the 11 annas judgment-debtors and he was to manage the property on their behalf. This deed contained provisions as to how the property was to be managed and how after meeting the collection expenses, paying out commissions to the manager and the current rents due in respect of the tenure, the surplus that remained were to be distributed among decree-holders. To this document the other decree-holders as well as the remaining judgment-debtors were no parties :

Held, that the document was not a deed of adjustment of the decrees within the meaning of O. XXI, r. 2. The decree-holders and the judgment-debtors who were not parties to it were not bound by it and the fact that the other decree-holders were paid some portion of the rents that subsequently fell due under the terms of the deed, did not make them parties to the deed, nor could they be presumed to have expressly or impliedly authorised the manager decree-holder to enter into any such agreement with the judgment-debtors on behalf of them all.

Held, further that the 11 annas judgment-debtors were entitled to credit to the extent of the amounts paid on their behalf under the arrangement embodied in the deed.

A purchaser of a share of a *mahal* pending the hearing of the rent suits is not personally liable for any amount of the rent ; and if the *patni* and the *darpatni* have already been sold at the instance of the superior landlord he cannot be made personally liable.

As. from the original order of the Sub-Judge, Birbhum, dated March 21, 1938.

Messrs. *Jatindra Mohan Chowdhury* and *Amarendra Narayan Bagchi*, for the Appellants.

Messrs. *Chandra Sekhar Sen*, *Hari Prosanna Mukherji* and *Monohar Chatterjee*, for the Respondents.

B. K. Mukherjea, J.—These two appeals arise out of certain proceedings in execution of two rent decrees which were obtained by the same decree-holders against the same judgment-debtors. The rent suits were instituted in the year 1929 and decrees were obtained by the appellants decree-holders for sums of Rs. 9,000 odd and Rs. 13,000 odd respectively. In the present execution proceedings objections were raised by some of the judgment-debtors and these objections were of a twofold character. In the first place it was contended that there was an arrangement between the decree-holders and the judgment-debtors which had the effect of an adjustment of the decree within the meaning of O. XXI, r. 2, Civil P. C. In the second place it was argued that by reason of a compromise petition which was filed in this Court in connection with appeal from Original Decree No. 178 of 1931, the decretal dues were payable in six yearly instalments and consequently the decree-holders were

not entitled to take out execution for the whole amount. The executing Court has given effect to both these contentions urged on behalf of the judgment-debtors and has dismissed the applications for execution. It is against these two orders that these appeals have been preferred.

On hearing the learned Advocates on both sides we are of the opinion that the decision of the Court below is wrong and cannot be sustained. So far as the first point is concerned, the case of the objecting judgment-debtors rests really upon a registered deed which is marked Ex. A in this case and which according to them embodies the terms of adjustment between the parties. The document has been read out to us by the learned Advocate appearing for the appellants. It purports to be a deed of appointment of a manager in respect of the share of the 11 anna judgment-debtor in the tenure in arrears. One Fakir Chandra Bagchi, who was one of the decree-holders and has since died, was, by this instrument appointed a manager of the interest of the 11 annas judgment-debtors and he was to manage the property on their behalf. There are detailed provisions in this deed of appointment as to how the property was to be managed and how after meeting the collection expenses, paying out commissions to the manager and the current rents due in respect of the tenure, the surplus that remained were to be distributed. To this document the other decree-holders as well as the remaining judgment-debtors were no parties. It is conceded on behalf of the respondents that the other judgment-debtors who were no parties to this instrument could not possibly be bound by it. But it is argued that so far as the other decree-holders are concerned they having taken benefit under this instrument were estopped from disputing its validity. As I have said above the document does not purport to be a deed of adjustment at all and says nothing from which we can infer that the decree was adjusted in any way within the meaning of O. XXI, r. 2, Civil P. C. It may have contained certain arrangements between the parties as regards the payment of the decretal dues that were due under these two rent decrees, but from the simple fact that the other decree-holders were paid some portion of the rents that subsequently fell due we are unable to say that they became impliedly parties to the instrument and it could not be presumed that they expressly or impliedly authorized Fakir Chandra Bagchi to enter into any such agreement with the judgment-debtors on behalf of them.

all. That being the position we are of the opinion that Ex. A does not stand in the way of the decree-holders seeking to execute their decrees.

As regards the other ground it appears that there was an appeal taken to this Court by the judgment-debtors not against the actual decision in the rent suits, but against certain observations made by the trial Judge as regards the way in which rents are to be paid in future. There was a compromise petition put in in this Court and one of the terms of the compromise was that the amount payable under the rent decrees would be paid off in six yearly instalments. It was also stated that the terms relating to the payment of the instalments mentioned above would be embodied in a separate petition to be filed in the execution proceedings in the Court of the Subordinate Judge at Suri. It is admitted on both sides that no such separate petition was filed before the executing Court and we do not know the terms according to which these instalments were to be paid. It appears from the records that this objection was taken in an earlier execution proceeding, but it was overruled by the executing Court. The decree-holders have mentioned this petition of compromise in their application for execution and have stated also that no instalment had been paid in accordance with the same. Under these circumstances we are of the opinion that there was no concluded agreement between the parties as regards the payment of the decretal dues by instalments and if as a matter of fact none of the instalments were paid by the judgment-debtors the decree-holders are at liberty to execute the decree. The learned Advocates who appear on behalf of the respondents also do not press this point.

The result therefore is that the appeals are allowed, the orders passed by the executing Court in both the miscellaneous proceedings are set aside and the cases are remitted to the executing Court in order that the decree-holders might be allowed to proceed with the execution of the decrees. It has been brought to our notice by Mr. Hari Prosanna Mukherjee who appears on behalf of the 11 annas judgment-debtors that the account books filed by Fakir Chandra Bagchi have actually been produced before the Court and on a proper investigation of these accounts it will be found that a considerable sum of money has been paid on their behalf. The executing Court will certainly go into these accounts and will give credit to the judgment-debtors for any sums that

might have been paid on their behalf as disclosed by these accounts.

Respondent No. 9 Ka, Tarak Brahma Roy, is represented in this Court by Mr. Chandra Sekhar Sen. We are of the opinion that as he was a purchaser of an eight annas share of the *mahal* pending the hearing of the rent suits he is, not personally liable for any amount of the rent; and if the *patni* and the *darpatni* have already been sold at the instance of the superior landlord he cannot be made personally liable. The appeals are therefore allowed and the cases remitted to the Court below to be dealt with according to law. The appellants are entitled to their costs in these appeals—the hearing-fee being assessed at one gold *mohur* in each appeal.

Derbyshire, C. J.—I agree.

D.

Appeals allowed.

MADRAS HIGH COURT

Appeal No. 188 of 1937

February 29, 1940

LEACH, C. J. AND KRISHNASWAMI

AYYANGAR, J.

MADINA BIBI SAHIBA—APPELLANT

versus

ISMAIL DURGA ASSOCIATION

AND ANOTHER—RESPONDENTS

Transfer of Property Act (IV of 1882), s. 53—Objection by wife claiming property attached in execution of decree against husband as her, by reason of sale-deed, allowed—Suit by creditor for cancellation of sale-deed as being executed with intent to defeat and delay creditors held one under s. 53—Court's permission under O. I, r. 8, Civil Procedure Code (Act V of 1908), held essential for its competency—O. XXI, r. 63, Civil Procedure Code (Act V of 1908), held not incompatible with s. 53, Transfer of Property Act (IV of 1882)—Issue as to competency of suit raised in trial Court—Plaintiff not trying to amend plaint by turning suit as one in representative capacity—Amendment held could not be allowed in appeal.

In execution an objection was raised by the wife of the judgment-debtor that the property attached belonged to her by reason of a sale-deed executed by her husband in her favour. The objection was allowed. The decree-holder thereupon instituted a suit under s. 53, T. P. Act for cancellation of the sale-deed on the ground that it was executed with intent to defeat and delay creditors. The defendant's objection that the suit was incompetent for want of permission of the Court under O. I, r. 8, Civil P. C., was put in issue and disallowed. In appeal by the defendant the plaintiff sought to amend the plaint and turn the suit into a representative one:

Held, that the suit fell within the purview of s. 53, T. P. Act and, therefore, for want of Court's permission under O. I, r. 8, Civil P. C., was incompetent and that the provisions of O. XXI, r. 63, were not incompatible with s. 53, T. P. Act.

[Case-law relied and referred to.]

Held, further that having gone to the trial on issue of competency of suit it was far too late for the plaintiff to ask for leave to amend. It would be opposed to principle and accepted authority to allow the amendment. The course which the plaintiff should have adopted when the question was raised was to apply to the Court for permission to sue on behalf of all creditors. [p. 769, col. 1.]

A against the decree of the Sub-Judge, Madura, in O. S. No. 31 of 1936.

Mr. K. V. Sreenivasa Iyer, for the Appellant.

Messrs. K. Bhashyam and V. Minakshisundaram, for the Respondent.

Leach, C. J.—The appellant is the wife of respondent No. 2. In 1931 the respondent association obtained two money decrees against respondent No. 2 for an aggregate sum of Rs. 894. In 1934, in execution of these decrees, the association attached five houses in Madura as property belonging to the judgment-debtor. The appellant objected to the attachment and her objection was successful. The appellant claimed title to the houses and other properties under a deed of sale executed in her favour by her husband on September 16, 1932. As the result of the removal of the attachment the association filed in the Court of the Subordinate Judge of Madura the suit out of which this appeal arises for a declaration that the deed of sale was executed in fraud of creditors "nominally and colourably." In the meantime respondent No. 2 had been adjudicated an insolvent and permission of the Official Receiver was sought and granted, for the institution of the suit. The association, however, did not apply for an order under the provisions of O. I, r. 8, Civil P. C., permitting it to sue on behalf of all the creditors and in spite of objection proceeded with the suit for its own benefit and not for the benefit of the creditors generally. The association based its claim for the relief on two grounds. In the first place it said that the transaction was a sham and in the second place that the transfer was a fraudulent transaction, entered into with a view to defeat and delay the creditors. The alleged consideration for the sale deed was a sum of Rs. 10,000. The Subordinate Judge held that the transaction was not a nominal one as the appellant had given consideration to the extent of Rs. 8,000, but he considered that the transaction constituted a fraud on the creditors as the properties were worth Rs. 18,000. In accordance with this finding he granted the association a declaration that the sale deed was invalid, being a fraud on the creditors, and directed that it be annul-

led. He also vacated the order passed in favour of the appellant in the execution proceedings, but allowed her to rank as a creditor of her husband to the extent of Rs. 8,000 which she had paid.

The appellant has persisted in her contention that the suit as framed did not lie and she disputes the finding of the Subordinate Judge that the transaction was a fraud on the creditors. If her first contention is sound, it will not be necessary for the Court to consider the merits of the case. The appellant says that it was incumbent upon the association to sue on behalf of itself and all the other creditors of respondent No. 2 and relies on the provisions of s. 53, T. P. Act. That section says that every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed. By the T. P. (Amendment) Act, 1929, the following provision was added to the section :

"A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors."

The appellant says that as this provision has not been complied with, the suit must fail. On the other hand, the association says that O. XXI, r. 63, Civil P. C., gives to a decree-holder whose attachment has been disallowed the right to have the question decided by suit and the rule must be read entirely independent of the provisions of s. 53, T. P. Act. The suit clearly falls within the purview of s. 53, T. P. Act. It is not a suit merely for a declaration that the transaction is a bogus one but a suit in which the association also seeks to have the transaction set aside on the footing that it is a fraud on the creditors. The association accepts this and does not challenge the finding of the Subordinate Judge that consideration passed from the wife to the husband to the extent of Rs. 8,000. As the suit admittedly falls within s. 53, it can only be maintained if the association has obtained the permission of the Court under O. I, r. 8, Civil P. C., to sue on behalf of all the creditors. The words "on behalf of, or for the benefit of, all the creditors" in s. 53, T. P. Act, are taken from O. I, r. 8, Civil P. C., which provides that where there are numerous persons having the same interest in one suit, one or more of them may, with the permission of the Court, sue or be sued

or defend on behalf of or for the benefit of all persons interested. If a suit has to be brought in a representative capacity, it can only be maintained when it has been instituted in compliance with the provisions of this rule. This was laid down by the Privy Council in *Kumarabelu Chettiar v. Ramaswami Aiyar* (1).

Before s. 53, T. P. Act, was amended there was a conflict in India on the question whether a decree-holder who was compelled to file a suit as the result of a successful objection to the attachment was compelled to sue on behalf of himself and all the other creditors. This Court was of opinion that it was not necessary for him to sue in a representative capacity: see *Pokker v. Parkum Chandrankandu* (2) and *Ramaswami Chettiar v. Mallappa Reddiar* (3). The decision in the latter case was that of a Full Bench. The Calcutta and the Bombay High Courts were of the opinion that it was necessary for the plaintiff to sue in a representative capacity: see *Hakim Lal v. Moorshahar Sahu* (4). The decisions of this Court and that of the Calcutta High Court arose out of suits which followed unsuccessful proceedings in execution. The Bombay cases are *Burjorji Dorabji Patel v. Dhunbai* (5) and *Ishwar Thimappa v. Devar Venkappa* (6). These cases did not arise directly out of execution proceedings, but the Court indicated that a suit of the nature of the present one should be brought in a representative capacity. It seems to me that the amendment of s. 53, T. P. Act by the insertion of the provision that a suit instituted by a creditor shall be instituted on behalf of, or for the benefit of, all the creditors must have been intended to put an end to this controversy. The words in brackets "which term includes a decree-holder whether he has or has not applied for execution of his decree" which follow the word "creditor" in the section, in my opinion, makes this clear. If this is the case the association is clearly out of Court.

But even if the question had to be decided on the reading of s. 53, without taking into consideration what has gone before, it would still be difficult to accept the association's

argument. As the suit admittedly is one of the nature contemplated by s. 53, T. P. Act, surely the provisions of that section must be applied, especially as there is nothing in the section incompatible with O. XXI, r. 63; Civil P. C. Section 53, does not take away from the disappointed decree-holder the right to sue. His right to sue is left unaffected. All the section says is that he must sue on behalf of all the creditors; not for himself alone, and this implies no hardship. If the suit is successful and the judgment-debtor has not become insolvent, he has still the right to attach the property. If the judgment-debtor has become insolvent, then the right to attach is gone entirely and the decree-holder can only look to the Insolvency Court for payment. The requirement of s. 53, saves the filing of unnecessary suits and saves the judgment-debtor from being harassed by other creditors. I hold that it was necessary for the association to sue in a representative capacity and that, not having done so the suit must fail. The same view of the law has been taken by the Calcutta High Court in *Ekkari Ghose v. Sidheswar Ghose* (7) and by the Rangoon High Court in *Chidambaram Chettiar v. R. M. A. R. S. Firm* (8), *Maung Tun Thein v. Maung Sin* (9) and *Asgar Ali v. C. V. R. M. Firm* (10).

Mr. Bhashyam has asked that the Association be allowed to amend the plaint and turn the suit into a representative one. In support of this application Mr. Bhashyam has pointed to the fact that before the suit was instituted, the association had obtained leave from the Official Receiver and the leave was conditional on the Association depositing in Court to the credit of the insolvent's estate any amount realized by him as the result of the suit. Mr. Bhashyam has also pointed out that the declaration asked for was a declaration that the disputed transaction was a fraud on the creditors. If the failure to sue in a representative capacity was the result of oversight, the Court might have been disposed in these circumstances to allow the amendment, but that is not the case. The appellant in her written statement raised this very question and an issue was framed on it. The Association preferred to contest the validity of the appel-

(1) 56 M 657; 143 Ind. Cas. 665; A I R 1933 P. C. 183; 60 I A 278; Ind. Rul. (1933) P C 176; 57 C L J 528; 37 C W N 853; (1933) M W N 7c8; 65 M L J 87; 38 L W 16; (1933) A L J 762; 35 Bom. L R 827 (P C).

(2) 42 M 143; 51 Ind. Cas. 714; A I R 1919 Mad. 257; 36 M L J 231.

(3) 43 M 760; 59 Ind. Cas. 947; A I R 1920 Mad. 748; 39 M L J 350 (F B).

(4) 34 C 999; 11 C W N 889; 6 C L J 410.

(5) 16 B L.

(6) 27 B 146; 5 Bom. L R 19.

(7) 62 C L J 548; 167 Ind. Cas. 208; A I R 1936 Cal. 783; 9 R C 678.

(8) 12 R 666; 152 Ind. Cas. 555; A I R 1934 Rang. 302; 7 R Rang. 172.

(9) 12 R 670; 153 Ind. Cas. 942; A I R 1934 Rang. 332; 7 R Rang. 238.

(10) 14 R 81; 161 Ind. Cas. 887; A I R 1936 Rang. 117; 8 R Rang. 522.

lant's averment and succeeded in the argument before the Subordinate Judge. Having gone to the trial on this issue it is now far too late in the day for the Association to ask for leave to amend. It would be opposed to principle and accepted authority to allow the amendment. The course which the Association should have adopted when the question was raised was to apply to the Court for permission to sue on behalf of all the creditors. This the Association did not do and it has only itself to blame for the failure of the suit. The appeal will be allowed with costs in this Court and below.

Krishnaswami Ayyangar, J.—I agree.

N.-D.

Appeal allowed.

MADRAS HIGH COURT

Appeals Nos. 352 and 353 of 1937 and Civil Miscellaneous Petitions Nos. 2268 and 2269 of 1939

April 5, 1940

PANDRANG ROW AND HORWILL, JJ.
KUPPU GOVINDA CHETTIAR—

APPELLANT

versus

UTTUKOTTAI CO-OPERATIVE
SOCIETY—RESPONDENT

Civil Procedure Code (Act V of 1908), ss. 2 (17) (h), 80—Word "service" in s. 2 (17) (h)—Liquidator appointed by Registrar of Co-operative Societies, whether public servant—Madras Co-operative Societies Act (VI of 1932), s. 48—Liquidator appointed—Suit against society without leave of Registrar, if maintainable—Membership—Resignation of—When takes effect—Restoration to membership—Resigning member subsequently attending meeting, effect of—Co-operative Societies Act (II of 1912), s. 42 (2) (b) and (6)—Contribution payable by past member—Determination of, by liquidator—If can be questioned in Civil Court—Pleadings—Amendment—Arguments in appeal before High Court heard—Amendment of cause title of plaint cannot be allowed.

The word "service" must necessarily mean something more than being merely subject to the orders of Govt. or to control by Govt. A liquidator who is appointed by the Registrar of Co-operative Societies to liquidate a private Co-operative Society is not an officer in the service of the Govt. and therefore is not a public servant. Even if the liquidator is appointed by the Govt. it cannot be said that because the liquidator is given quasi-judicial powers, the duties which he performs must necessarily be regarded as being public duties. Nor can every person who is appointed by the Govt. to perform public duties be a public officer. 148 Ind. Cas. 714 (1), explained 182 Ind. Cas. 516 (2), not approved. [p. 771, col. 1.]

In view of the clear provisions of s. 48, Mad. Co-operative Societies Act, a suit against a Co-operative Credit Society instituted without the leave of the Registrar when a liquidator has been appointed must be dismissed.

The membership of a Co-operative Society of a person ceases immediately his letter of resignation reaches the Society. There is thus an immediate cessation of

his membership, and there being no provision for withdrawal of any resignation in the Act or in the by-laws, he can become a member again only by complying with the provisions relating to membership. The mere fact that he refused to receive the copy of the resolution not accepting his resignation and that he attended a meeting of the Society some six or seven months later has no legal effect so far as this question is concerned in the sense that these subsequent circumstances could not possibly restore him to his membership or make him a member after he had ceased to be one. *Finch v. Oake* (4), *Glossop v. Glossop* (5), relied on. *Kuppu Govinda Chetti v. Secretary Co-operative Central Bank Conjeevaram* (7), 76 Ind. Cas. 813 (6) and *Reg v. Corporation of Wigan* (8), distinguished. [p. 773, col. 2.]

Where the liquidator passes an order determining the amount of contribution payable by a past member to the Co-operative Society, the order can be questioned in a Civil Court.

[Case-law referred to.]

It would be highly undesirable from every point of view to allow applications of the cause title of the plaint which are made after the whole case is argued and the parties have an opportunity of knowing or at least guessing with some degree of accuracy what is going to happen to their case. [p. 770, col. 1.]

As. and C. Misc. Ps. against the decrees of the District Court, Chingleput, in O. S. Nos. 1 and 12 of 1935, respectively.

Messrs. K. Bhashyam Ayyangar and T. R. Srinivasan, for the Appellant.

Messrs. C. S. Venkatachariar and D. Ramaswami Ayyangar, for the Respondent.

Pandrang Row, J.—These are appeals from the decree in two connected suits O. S. Nos. 1 and 12 of 1936, on the file of the District Court of Chingleput. The plaintiff was the same in both the suits and the defendant also was the same. The plaintiff is the appellant and the defendant, who is the respondent in these appeals, was described as the Uttukottai Co-operative Society by its liquidator. The suits were for a declaration that certain orders made in 1933 and 1932 by the liquidator of the Co-operative Credit Society in question determining the contribution payable by the plaintiff in the suits at Rs. 8,000 and Rs. 2,000 respectively were illegal and void and of no effect whatever as against the plaintiff. The suits were resisted on various grounds and they were tried together and disposed in one and the same judgment by the District Judge. It is an unfortunate feature that in this case judgment was pronounced by the Court below more than a year after case had been closed. On all the points except one, the findings of the Court below were in favour of the plaintiff. But the suits were dismissed, though without costs, on the sole ground that no notice had been given as required by s. 80, Civil P. C. In other words, it was only on the ground of want of notice that

the suits were found to be not maintainable, and in other respects the findings were in favour of the plaintiff.

The only point therefore argued in these appeals in the first instance, so to say, on behalf of the appellant is that the finding of the lower Court on the question of notice is wrong. Section 80, Civil P. C., requires that unless notice is given at least two months before the suit, no suit can be instituted against the Crown or against any public officer in respect of any act purporting to be done by him in his official capacity. In this case no notice whatever was given, and the contention on behalf of the plaintiff-appellant is that no notice is required because the defendant in the suit is not a public officer as defined in the Civil P. C., *vide* s. 2 (17).

It has been contended that even assuming that the defendant in the suit is the liquidator and not the society, he cannot be regarded as a public officer within the meaning of the Civil P. C. In this connection perhaps it is desirable first to deal with two applications presented at a very late stage, namely, after the hearing of the appeal was over and just before judgment was to be delivered, one application in each appeal to amend the cause title so as to show the defendant as "the liquidator of the Society" instead of "the Society by its liquidator." It is enough to say as regards the oral application for permission to withdraw the suits, that it is now withdrawn, and there is no need to pass any other order on it except to dismiss it as it is withdrawn. As regards the first application for amendment of the cause title of the plaint, it would be highly undesirable from every point of view to allow applications of this kind which are made after the whole case is argued and the parties have an opportunity of knowing or at least guessing with some degree of accuracy what is going to happen to their case. It is not as if this objection to the maintainability of the suit in view of s. 48, Co-operative Societies Act, was not raised in the trial Court, and the application to amend the cause title should have been put in much earlier. There is really no explanation forthcoming for the delay in making the present application. We are therefore not prepared to allow that application and it is accordingly dismissed. We may add however that the application to amend is absolutely contrary to what is alleged in the grounds of appeal, where it is contended that the defendant in the suit was the Co-operative Society and not the liquidator and therefore the question of notice did not arise at all. In other words, the main ground

on which the finding of the Court below, which is against the appellant, was attacked was that the Court below failed to notice that the defendant in the suit was the Co-operative Society and not the liquidator, and of course, it was nobody's case that the Co-operative Society is a public officer.

Apart from the fact that the suit is really directed against the Society who is represented by the liquidator because the Society has been ordered to be wound up and a liquidator has been appointed by the Registrar, the question remains whether even a liquidator appointed by the Registrar can be regarded as a public officer within the meaning of the Civil P. C. It is contended that he is a public officer because he is an officer in the service of the Crown. It is obvious however, that *qua* liquidator he is not an officer in the service of the Crown, and it is not the case of either side that the liquidator as such receives any pay from the Crown or receives any remuneration for his duties as liquidator. The liquidator in this case is the Deputy Registrar of Co-operative Societies who of course, in that capacity is a public officer. But that does not mean that when he is actually acting in the capacity of a liquidator of a Co-operative Society, he is an officer in the pay of the Crown or in the service of the Crown.

The only decision which has been relied upon by the Court below is the one reported in *Yedha Society, Namar v. Prag Das Mahesri* (1). Apart from the fact that in that decision it is merely stated without any discussion that a liquidator should no doubt be considered a public officer within the meaning of s. 2 (17), Civil P. C., the actual facts of the case show that it was not necessary in that case to give any notice to the liquidator because the suit was not brought against the liquidator, in respect of any action of his. In other words, the observation was an *obiter dictum*. Another case which has been cited to us is the one reported in *Sangakheda Kalan Co-operative Bank, Hoshangabad v. Ayodhyaprasad Shiamlal* (2), in which Pollock, J. refers to the earlier decision of the Nagpur Court as one in which it was assumed without discussion that a liquidator is a public officer as defined in s. 2 (17), Civil P. C. The reason given by Pollock, J. for holding that the liquidator is a public officer is that the liquidator was appointed by the Govt. and his duties are *quasi-judicial*. In

(1) A I R 1934 Nag. 201; 148 Ind. Cas. 714; 30 N L R 240; 6 F N 196; 17 N L J 47.

(2) A I R 1939 Nag. 232; 162 Ind. Cas. 514; 1939 N L J 215; 12 R N 8.

other words, the proposition as put forward in the case is that as the liquidator is appointed by the Govt. and performs public duties, he is an officer in the services of the Govt. when acting as the liquidator and therefore a public officer as defined in the Civil P. C.

In the present case the liquidator is not appointed by the Govt. but by the Registrar of Co-operative Societies. Even otherwise, we find it difficult to accept the general proposition that because the liquidator is given quasi-judicial powers, the duties which he performs must necessarily be regarded as being public duties; Nor are we prepared to accept the proposition that every person who is appointed by the Govt. to perform public duties is a public officer. If that view were accepted, it would follow that even a member or chairman of a local body appointed by Govt. would be a public officer. The words "service" must necessarily mean something more than being merely subject to the orders of Govt. or to control by Govt. We are unable to accept the view that a liquidator who is appointed by the Registrar of Co-operative Societies to liquidate a private Co-operative Society is an officer in the service of the Govt.; and this is the only ground on which it has been sought on behalf of the respondent to support the finding of the Court below. We are therefore of opinion that the present suits cannot be rightly defeated on the plea that no notice was given as required by s. 80, Civil P. C. The decrees however of the Court below dismissing the suits have been supported on the ground that the findings on other points by the Court below in favour of the plaintiff-appellant are wrong. The main point is whether the suit is maintainable in view of the provisions of s. 48, Co-operative Societies Act, which runs as follows:

"Save in so far as is expressly provided in this Act, no Civil Court shall take cognizance of any matter connected with the winding up or dissolution of a society under this Act, and when a liquidator has been appointed no suit or other legal proceeding shall lie or be proceeded with against the society except by leave of the Registrar and subject to such terms as he may impose."

Considerable reliance is placed on behalf of the appellant on the Bench decision in *Vaikunta Bhat v. Sarvothama Rao* (3). That however, was a case which had to consider a similar provision in the Imperial Act, namely s. 42 (6) which runs as follows:

"Save in so far as is hereinbefore expressly provided no Civil Court shall have any jurisdiction in respect of

any matter connected with the dissolution of a registered society under this Act."

In construing that provision, it was held by the learned Judges that the liquidator in the case before them acted without jurisdiction and that therefore the Civil Court's jurisdiction was not ousted by s. 42 (6), Co-operative Societies Act of 1912. That was a case which is otherwise on all fours with the present case, because there also the question arose whether a person who had once been a member of a Co-operative Society could be rightly made to pay a contribution by an order of the liquidator when he had not admitted his liability. In the case before them the contention was that the appellants had ceased to be members five years before the liquidation and it was held that it cannot be said that they had no right to ask the Civil Court to decide whether they were under any liability to contribute at all. That decision as well as the other decisions which have been mentioned to us were all of them with reference to the Act of 1912 and s. 42 (6) thereof. As will be seen from the words of the provisions of the law with which we have to deal, namely s. 48 of the Mad. Act VI of 1932, cl. (2) thereof is far more precise in its language than the provisions in the earlier Imperial Act. For, it says that when a liquidator has been appointed (as in this case) no suit or other legal proceeding shall lie or be proceeded with against the society except by leave of the Registrar. There was no provision of this kind in the earlier Imperial Act for a suit being filed with the leave of the Registrar against a society after a liquidator was appointed.

In this case it is admitted that the Registrar refused leave when leave was asked for, and we find it impossible to find any reason for ignoring the plain words of the provisions of law which are applicable to the present case and in particular cl. (2) of s. 48 of the Act which is as clear as possible. It says that no suit can be instituted against a society when a liquidator has been appointed except by leave of the Registrar. This provision appears to us to stand in the way of the present suits, and though this point was not prominently placed before us in the argument and was certainly not referred to in the Court below, we are not able to find any way out of the situation created by the new law. This finding, namely that the suits are not maintainable in view of the provisions of s. 48 of Mad. Act, VI of 1932, is sufficient to dispose of these appeals. Nevertheless, as the other point, namely the

(3) 59 M 895; 170 Ind. Cas. 312; A I R 1936 Mad. 574; 70 M L J 604; (1936) M W N 470; 43 L W 730; 10 R M 181.

question of liability of the plaintiff-appellant has been argued at considerable length before us, it is perhaps desirable that we should briefly express our opinion thereon and all the more so because a special request has been made on behalf of the appellant that we should express our opinion on this point.

The point really is a simple one because the facts are practically undisputed. The plaintiff-appellant sent his resignation on June 4, 1930, to the Secretary of the Society and there is no doubt that resignation was received by the Society and a meeting was held in the next month to consider the resignation. A copy of the letter of resignation appears also to have been sent to the Co-operative Department. The Society in its resolution dated July 1, 1930 (*vide* Ex. 2) resolved that the resignation should not be accepted. A copy of the resolution was sent to the plaintiff-appellant by registered post, but he appears to have declined to receive it. There can be no doubt that he was aware of the contents or at least of the fact that his resignation had not been accepted. On January 24, 1931, at a general body meeting of the Co-operative Society the plaintiff was present as a member and took part in it for some time, though he later on was asked to go out by the Chairman who presided at the meeting. It is argued on behalf of the respondent that these facts show that the resignation did not take effect and that the plaintiff-appellant really continued to be a member in spite of the letter of resignation sent by him on June 4, 1930. This argument assumes first that unless a resignation is accepted, it does not take effect in a case of this kind, and secondly, that the subsequent conduct of the plaintiff-appellant amounts to a withdrawal of his letter of resignation. As regards the first assumption, it appears to be really without foundation. In the case of an office in a private body like a Co-operative Society the law does not require that resignation should be accepted by the Society or anyone else before it takes effect. The bye-laws of the Society are altogether silent as regards the mode in which a member ceases to be a member, and there is no reference to resignation in the Act or in the bye-laws. There are one or two references in the Act to the withdrawal of members from the Society, and it is not contended that there can be no withdrawal or cessation of membership by means of resignation of membership.

On the side of the plaintiff-appellant reliance has been placed on two English cases,

Finch v. Oake (4) and *Glossop v. Glossop* (5). *Finch v. Oake* (4), was a case which related to the membership of the Bermondsey and Totherhithe Licensed Victuallers and Beer Sellers' Trade Protection Association and though the member who had resigned wanted subsequently to withdraw his resignation, the Society declared that he had ceased to be a member by reason of the resignation and it was held that he had really ceased to be a member as soon as his letter of resignation had been received by the Committee of the Association. In that case also the rules of the Association contained nothing as to the right of members to retire, this matter being left to be governed by the ordinary principles of law. In those circumstances, it was held that he could withdraw from the Association at any moment of his own pleasure and without the consent of his fellow members or the Association and therefore that immediately the letter of resignation reached the Association, the member who sent in his letter of resignation ceased to be a member and he could again become a member only by following the rules regarding election of members framed by the Association and not by any withdrawal. In the latter case *Glossop v. Glossop* (5) it was a director of a limited company who resigned his office as managing director. On the very day on which the letter of resignation came up for consideration before the special meeting of the directors an attempt was made to withdraw the resignation. But the meeting resolved that the office of managing director had been vacated. In this case, however, the matter of resignation was provided for in two articles of the company, which provided that the office of managing director should be vacated on the happening of any of the contingencies mentioned therein, where by the office of director should be vacated. The provision regarding the latter subject was to this effect:

"The office of director shall be vacated (*inter alia*)—if by notice in writing to the company he resigns his office, provided that, the vacation of office shall not take effect unless the directors shall pass a resolution to the effect that he had vacated his office within six months from the happening of the event whereby such director had vacated his office."

In these circumstances, it was held that the managing director could not withdraw his resignation without the consent of the company and that he had vacated his office.

(4) (1896) 1 Ch. 409; 65 L J Ch. 324; 73 L T 716; 6 J P 309.

(5) (1907) 2 Ch. 370; 76 L J Ch. 610, 97 L T 372; 14 Manson 246; 51 S J 606.

by his letter of resignation and that the resolution of the Board at the special meeting was effective and valid. On the side of the respondent, reliance has been placed on two decisions, namely, those in *Sudarsana Rao v. Christian Pillai* (6) and *Kuppu Govinda Chetti v. Secretary Co-operative Central Bank, Conjeevaram* (7). The latter case does not contain any discussion of the question but is important in view of the fact that it deals with the very letter of resignation with which we are concerned in this case, though the decision therein was in respect of the resignation of the office of the president of the Society, the petitioner being also the president of the Society and the letter of resignation being in respect of both his office as president as well as his membership.

We are not concerned in the present case with the office of president but only with the question of membership and therefore the decision in *Kuppu Govinda Chetti v. Secretary Co-operative Central Bank, Conjeevaram* (7) is not very helpful. The discussion of the point is contained in *Sudarsana Rao v. Christian Pillai* (6) where the same learned Judge, namely, Sir Vepa Ramesam, relies to a great extent on certain passages from the text books on elections. The case with which the learned Judge had to deal was one in which the question for decision was whether a certain person had ceased to be an Honorary Magistrate prior to a certain date on which he was elected as a member of a local body. In that case it was held that an Honorary Magistrate does not cease to hold his office by his resignation but only on the acceptance of his resignation. That decision is certainly supported by the extracts from the text books on elections which relate to public offices or offices in local bodies in England which cannot be ordinarily given up without either the consent of some authority or the payment of a fine for non-acceptance. That case was one similar to *Reg. v. Corporation of Wigan* (8) which was decided in the light of the statutory provision in s. 36 of the Municipal Corporation Act, 1882, which provided that a person elected to a corporate office may, at any time, by writing signed by him and delivered to the town clerk, resign the office, on payment of the fine provided for non-acceptance thereof. The reasoning which would apply

to resignation of a public office of this kind cannot be applied to resignation of the membership of a society with which we have to deal in the present case. We are therefore inclined to the view that the membership of the plaintiff-appellant ceased immediately his letter of resignation reached the Society, that is to say, early in June 1930. There was thus an immediate cessation of his membership, and there being no provision for withdrawal of any resignation in the Act or in the bye-laws, he could become a member again only by complying with the provisions relating to membership. The mere fact that he refused to receive the copy of the resolution sent to him in July 1930 and that he attended a meeting of the Society some six or seven months later has no legal effect so far as this question is concerned in the sense that these subsequent circumstances could not possibly restore him to his membership or make him a member after he had ceased to be one. It follows from this that the plaintiff-appellant ceased to be a member more than two years prior to the orders complained of in the present suits and to the liquidation.

The only other point which perhaps deserves some reference is the question whether the liquidator acted within his jurisdiction in these circumstances. So far as this point is concerned the decision of the Bench in *Vaikunta Bhat v. Sarvothama Rao* (3) appears to us to hold the field and, being a case clearly in point, has to be followed unless it is declared not to lay down the law correctly. Reliance has also been placed on two decisions of the Lahore High Court which are to the same effect, namely *Mukund Lal v. Malhotra Bank, Hafizabad* (9) and *Anjman Imdad Qarza Bahami Bafindgan Amritsar v. Mehr Din* (10). In view of the fact that these decisions relate exactly to the present point, whereas the other cases, and in particular *Secretary of State v. Mayyappa Chettiar* (11) and cases of that description, deal with other enactments, it does not seem necessary for us to consider in detail the question whether the cases dealing with other enactments really affect the present question having regard to the decisions which deal with the exact point which arises in these cases. On these points we are inclined to decide in favour of the plaintiff-appellant.

(9) A I R 1933 Lah. 442; 144 Ind. Cas. 264; 14 Lah. 703; Ind. Rul. (1933) Lah. 427; 34 P L R 717.

(10) 18 Lah. 649; 175 Ind. Cas. 840; A I R 1937 Lah. 931; 40 P L R 422, 11 R L 71.

(11) A I R 1937 Mad. 241; 170 Ind. Cas. 49; I L R (1937) Mad. 211; (1936) M W N 1056; 44 L W 808; 10 R M 117.

(6) 45 M L J 798; 76 Ind. Cas. 813; A I R 1924 Mad. 396; 33 M L T 215.

(7) (1932) M W N 18.

(8) (1885) 14 Q B D 908; 54 L J Q B 338; 52 L T 435; 33 W R 547; 49 J P 372.

Nevertheless his appeals must fail and the suits must stand dismissed because of the absence of leave from the Registrar for the institution of the suits which, in our opinion, is required by the provisions of s. 48, Madras Co-operative Societies Act, VI of 1932. Having regard to the circumstances of these cases, we think the just course to follow with regard to costs is to direct the parties to bear their own costs in this Court, the appeals being dismissed and the memorandum of cross-objections also.

N.D.

Appeals dismissed.

MADRAS HIGH COURT

Appeal No 21 of 1936

November 16, 1939

VENKATARAMANA RAO AND

ABDUR RAHMAN, JJ.

Rajah TADAKAMALLA

SEETHARAMACHANDRA RAO—

APPELLANT

versus

Sree Rajah KOTAGIRI

SATYANARAYANA RAO AND OTHERS—

RESPONDENTS

Riparian rights—Proprietors of estate on partition stipulating to keep watercourse joint and agreeing not to interfere with supply channels—Either party can restrain other from erecting bund and causing interference without showing damage.

Under the partition of an estate it was stipulated that the mountains, watercourses and certain other properties should be kept joint and none of the parties should cause obstruction to the supply channels and water channels flowing as per *mamool* till that date to the tanks from one part of the estate to another:

Held, that the putting up of a *bund* interfering with the common watercourse by one party was an infraction of the right of the other party and the latter had every right to have it removed without showing any damage. *Bickett v. Norris* (1), *Kanakayya v. Narasimhulu* (2) and 90 Ind. Cas. 198 (3), relied on. [p. 777, col. 1.]

A. against the decree of the Sub-Judge, Bezwada, dated April 11, 1935.

Messrs. Ch. Raghava Rao, M. S. Ramachandra Rao and D. R. Krishna Rao, for the Appellant.

Messrs. B. Sitanama Rao and P. Sivarama Krishnayya, for the Respondents.

Venkataramana Rao, J.—The facts necessary for the disposal of this appeal lie in a narrow compass. The question in dispute is between two neighbouring proprietors in relation to a natural watercourse known as Durgadevi *cheruvu* which flows between the two estates of North Vinagadapa and the South Vinagadapa. The

plaintiff is the owner of the estate of South Vinagadapa and defendants Nos. 1 and 2 are the owners of North Vinagadapa. Both these estates formed part of one estate which belonged to two brothers who partitioned it in 1844 by a deed of partition dated August 29, 1844 (Ex. N). Under the said partition it was stipulated that the mountains, watercourses and certain other properties should be kept joint and none of them should cause obstruction to the supply channels and water channels flowing as per *mamool* till that date to the tanks from one part of the estate to another. The Durgadevi *vagu* rises in a forest in the north-east of both the estates and flows in a westerly direction and empties itself into the Durgadevi tank within the limits of Vinagadapa south. It is the case of the plaintiff that no portion of the Durgadevi *vagu* flows through the estate of North Vinagadapa. But it is the case of the defendants that a portion of the *vagu* flows through a *donka* which is common to both parties and that the said *donka* forms part of the boundary of both the estates. That the *donka* belongs in common to the proprietors of both the estates cannot be disputed. This was not controverted by the plaintiff or his witnesses. Issue No. 1 was raised on the basis of the joint ownership of the *donka*. It is also the defendants' case that the course of the *vagu* is in the form of a big curve marked as *BCA* in the plan Ex. C when it traverses the *donka* and not in a straight course.

It is the case of the plaintiff that the course of the *vagu* has always been straight falling within the limits of the plaintiff's estate and that no portion of it goes through the common *donka*. The necessary for the action has according to the plaintiff been occasioned by the demolition of a *bund* marked *AB* in Ex. C which is at the southern extremity of the *donka* by the defendants in July 1929 after it was repaired by the plaintiff. The plaintiff alleges that in 1925 there was a cyclone which caused an erosion in the Durgadevi *vagu* and diverted the water in a circular course in the *vagu* preventing the water reaching the Durgadevi tank and a *bund* was built in order to prevent such a diversion and the said *bund* existed from 1925 to July 1929 when the defendants demolished it. Certain criminal proceedings were started in consequence and the parties were ultimately referred to a regular suit. The defendants denied that there was any such *bund* erected in 1925, and alleged that the *bund* was newly erected in 1929 because the defendants constructed a channel called

the Gopavaram *vagu* to lead water from Gopavaram tank which is in the extreme east of their estate to the Durgadevi *vagu* to increase the water supply of Durgadevi tank, that by reason of the *bund* having been erected water which was naturally flowing from the *donka* into the tank known as Rallacheruvu was interfered with and they suffered damages thereby.

The main question in controversy between the parties is whether Durgadevi *vagu* was flowing in a straight course or in a bent course through the common *donka*. The suit is in substance for a declaration that the plaintiff is entitled to put up a *bund* to the Durgadevi *vagu* at the portion marked AB and for an injunction restraining the defendants from interfering with the plaintiff when he raises any such *bund* or when repairs are effected for the same. In fact all the issues relate solely to this question. A larger question as to the water of Durgadevi *vagu* flowing into the Rallacheruvu *vagu* was also raised in the pleadings. But no issues were framed in regard to that matter though some evidence was let in on this question also. The main question for decision is only as to the right of the plaintiff to put up a *bund* in the Durgadevi *vagu* as alleged by him. This is again dependent upon the question whether the *vagu* runs in a straight course or in a bent course. The plaintiff can only succeed if it runs only in a straight course. If the finding is that it goes in a bent course the plaintiff's suit fails. The learned Subordinate Judge has found that the Durgadevi *vagu* was flowing in a bent course and not in a straight course at the disputed locality and that the *vagu* does not lie exclusively in the estate of the plaintiff. It is this finding which Mr. Raghava Rao attacks on behalf of the plaintiff. The evidence relating thereto has been elaborately discussed by the learned Subordinate Judge and in view of the fact that we are agreeing with his conclusion we think it unnecessary to deal with the evidence at length. We propose to refer only to a few salient features which render the plaintiff's case improbable.

There are five plans filed in this case. Exhibit A is a plan prepared by the All India Survey Authorities in 1924-25. Exhibit B is a plan prepared by Mr. Rangachari in the early stages of the case in March 1930. Exhibit C is a plan prepared by an expert Mr. Varadachariar, a few months thereafter in September 1930. Exhibit D is a plan of the suit locality prepared by P. W. No. 3 during the course of the criminal proceedings

in August 1929 just before suit which was filed in November 1929. Exhibit R is a plan prepared by P. W. No. 8 in O. S. No. 271 of 1910, a suit which arose with reference to the extension of the *bund* of Rallacheruvu in consequence whereof the plaintiff who is the owner of a portion of the Vinagadapa estate complained that his lands were submerged. A careful study of these plans taken in conjunction with the evidence of the witnesses who prepared them supports the defendants' case. The survey plan Ex. A is important. It shows that the Durgadevi *vagu* takes a bent course towards the west touching Rallacheruvu *vagu* almost and then flows downward into the Durgadevi tank. Exhibit C is very clear that the *donka* and Durgadevi *vagu* are one and the same in one portion of it after the *vagu* passes the bend and that a portion of the bent course of the *vagu* lies in the defendants' estate beyond the *donka* on the north. In Ex. C-1 the Commissioner remarks that from the appearance of the course and the physical features, water must have flowed through this course for a number of years as this *vagu* also is well defined and appears to be old. There is one other fact which is relied upon to show in this connexion that a portion of the water of Durgadevi *vagu* in certain seasons would flow into the Rallacheruvu *vagu* over surplus weir which has been constructed, within the limits of the plaintiff's estate when there is surplus water on the Rallacheruvu and this could not be unless the water was flowing over in a bent course. This topographical feature is admitted by the plaintiff's own witnesses P. Ws. Nos. 3 and 8 and the Commissioner in Ex. C-1 remarks that if there was water more than 2 feet in the *vagu* it would flow to Rallacheruvu over the surplus weir between A and the *bund* of Rallacheruvu.

There is consistent testimony given by the defendants' witnesses that the water used to overflow to the Rallacheruvu *vagu* from the Durgadevi *vagu*. Considerable reliance was placed by Mr. Raghava Rao on the plan prepared by P. W. No. 8 in the former litigation and the statement by P. W. No. 8 in the deposition in the present case that he would have shown the bent course of the *vagu* in the plan prepared by him if such was the course of the *vagu*. But he had to admit that he noted in his plan only the relevant points that were necessary for the suit O. S. No. 271 of 1910 and omitted the points that were not relevant and that the length of the *vagu* was shown in the plan only to the extent that was necessary

then, and that any curve in the *vagu* was not relevant to the suit. Therefore his evidence is not of much value on the questions in dispute. The oral evidence of the plaintiff has been throughout to show that in 1925 there was an erosion which diverted the straight course of the *vagu* into a curved one at the disputed locality by reason of the breaches caused therein and that a *bund* consequently had to be put up by P. W. No. 1 at the instance of P. W. No. 4 who agreed to purchase the estate from the then owners of the *zamindari*. The learned Judge on a consideration of the evidence on this point was very clearly of the opinion that no such erosion took place and no such *bund* was erected.

It is the case of the plaintiff that P. W. No. 1 sent information to P. W. No. 4 about the breach in the *vagu* and thereupon P. W. No. 4 directed him to erect a *bund*. Two letters (Exs. H and J) are sought to be relied upon in support. The learned Judge declined to act on the said letters and rightly so. It is admitted by P. W. No. 4 and P. W. No. 1 that accounts were maintained in regard to the repairs and that P. W. No. 1 submitted the account of the repairs but no such account was produced. At the time when the repairs were executed P. W. No. 4 was not the owner but long after the repairs were executed the sale deed of the estate was executed in favour of P. W. No. 4 but no claim for repairs of this *bund* was made by him and the explanation given by him is unconvincing. That there could be no such erosion is also clear from Ex. T-1, the report sent by the Village Munsif on May 18, 1925, a day after the cyclone. He mentioned breaches in the Rallacheru *vagu* but did not mention that there was an erosion in the Durgadevi *vagu*. The evidence of other witnesses who speak with reference to this is unreliable. P. W. No. 2 was not in a position to say how long after the cyclone he went and saw the damaged portion. He says that after P. W. No. 1 strengthened the *bund* he saw it once and that he did not see it ever afterwards at any time, that at the time when the repairs were carried on, he did not see them. P. W. No. 3 also says that he had no opportunity to inspect when the *vagu* was flowing along its course. He was the engineer who prepared the plans for the Gopavaram *vagu* and he clearly says that he did not think of any *bund* erection at the point AB, when he made the scheme and he carried out the scheme, but it is significant that he was not consulted about the breach and how

the *bund* should be erected and that he only saw it after it was built.

It is hardly likely that on such an important matter as the erection of the *bund* which is very material in connexion with the Gopavaram scheme he would not have been consulted at all if the fact of erosion were really true. Though P. W. No. 5 is a *karnam* for over 25 years he saw the suit *vagu* only once and he was the person who put the mark of the Village Munsif in Ex. T-1 and he did not see the *vagu* after erosion. P. Ws. Nos. 6 and 7 do not give any useful evidence except merely reiterating that the *bund* came into existence only in 1925. But all the witnesses clearly admit that if the *bund* was erected at the point AB water would not overflow into Rallacheruvu. P. W. No. 5 clearly says that if the *bund* at AB was in existence no water from the *vagu* can flow into Rallacheruvu even in high floods. But I think it is very plain even from the plaintiff's witnesses that water from the Durgadevi *vagu* used to overflow and go into Rallacheruvu *vagu*. As already stated the evidence of the defendants' witnesses was that to their knowledge there was the bent course for over 40 or 50 years and water was flowing through that bent course and during high floods or when the water reaches a certain height it used to overflow from the Durgadevi *vagu* to Rallacheruvu *vagu*. The learned Judge who heard the witnesses has believed them and Mr. Raghava Rao has not been able to point to anything to show that the opinion formed by the learned Judge of these witnesses is wrong. It is admitted by all the witnesses on behalf of the plaintiff that no such *bund* ever existed before 1925. From a consideration of the entire evidence we are of the opinion that the finding of the learned Judge that no such *bund* at AB existed, that the water did not run in a straight course but in a bent course as alleged by the defendants and that the *bund* was newly erected only in 1929 is correct. The question is whether the plaintiff is entitled to erect a *bund*. The *donka* being common property, its bed belongs to both the plaintiff and defendants Nos. 1 and 2. Mr. Sitarama Rao has contended that it is not open to the plaintiff to put up the *bund* and interfere with the enjoyment of the common property and that defendants Nos. 1 and 2 have a right to prevent the putting up of the *bund* even though they are not able to show any damage or the likelihood of any damage. It seems to us that this contention

is well founded. In *Bickett v. Norris* (1), Lord Westbury enunciated the principle at p. 62* thus :

"It is wise, therefore, to lay down the general rule, that, even though immediate damage cannot be described, even though the actual loss cannot be predicted, yet, if an obstruction be made to the current of the stream, that obstruction is one which constitutes an injury which the Courts will take notice of, as an encroachment which adjacent proprietors have a right to have removed. In this sense, the maxim has been applied by the law of Scotland that where you have an interest in preserving a certain state of things in common with others, and one of the persons who have that interest in common with you desires to alter it, you have a right to preserve the state of things unimpaired and unprejudiced in which you have that existing interest.

Applying this principle it was held in *Kanakayya v. Naresimhulu* (2), that one of the two tenants in common of a party wall could not raise the party wall with a view to building a superstructure on his own tenement without the consent of the other tenant though he might suffer no inconvenience therefrom. The principle laid down in *Bickett v. Norris* (1), has been approved by their Lordships of the Judicial Committee in *Moung Bya v. Maung Kyi Nyo* (3): vide the observations of Lord Atkinson at pp. 500 and 501†. Therefore, the putting up of a bund AB in this case is an infraction of the right of the defendants and the defendants have every right to have it removed without showing any damage. But in this case it is admitted by the plaintiff's witnesses themselves as already stated that the bund would prevent any water from overflowing the *vagu* and reaching the Rallacheruvu. The defendants have this right even under Ex. N which clearly provides that no obstruction should be caused to the water flowing as per *mamool* in the channels from one estate to another.

But there remains another question which was raised by Mr. Raghava Rao. He has asked for an injunction restraining the defendants from interfering with the Durgadevi *vagu*. The defendants asserted a right to take water from the *vagu* through certain passages which according to Mr. Raghava Rao were newly dug after the institution of the suit as will appear from the several applications made by his client in the lower

Court for the appointment of a Commissioner to inspect the locality and prepare a plan of the existing topographical features. Unfortunately, an issue was not raised relating thereto but there is no doubt, that the question whether any water would overflow from the Durgadevi *vagu* in its natural condition having regard to the situation of the *vagu* and the defendant's lands did arise and the evidence establishes that during the time of high flood or when water reaches a certain height in Durgadevi *vagu* it would overflow into Rallacheruvu *vagu*. In fact in the written statement the claim that was put forward by the defendants was that the water of the *vagu* has been flowing uninterruptedly into the Rallacheruvu *vagu* from time immemorial and the plaintiff had no legal right to impede the usual flow of the *vagu*. All that the defendants can claim in this case is that the plaintiff should not do anything which would prevent the overflow of the water in its natural state from the Durgadevi *vagu* into the Rallacheruvu *vagu* either during high floods or when the water reaches a particular level which would cause an overflow of the water. Once the water falls on the defendants' land, the defendants can take such steps as they may to conserve it. If the defendants have got any other right, it is open to them to take such appropriate proceedings as they may be advised to have: it declared and safeguarded and it cannot be gone into in this suit. In the result the appeal fails and is dismissed with costs.

N.-D.

Appeal dismissed.

CALCUTTA HIGH COURT

Criminal Revision Petition Nos. 784 and

785 of 1940

September 3, 1940

ROXBURGH, J.

FAKIR MAHAMMAD AND ANOTHER—

ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY

Bengal Excise Act (V of 1909), ss. 54, 83 (b)—Offence under s. 54 (b)—Cognizance taken on challan submitted by Inspector of Police—Proceedings held did not comply with s. 83 (b) and were, therefore, void.

Police reported an offence under s. 54 (b), Ben. Excise Act to the Collector of Excise who wrote to the Deputy Commissioner of Police, saying that he sanctioned the prosecution of the two accused and that he authorized an officer of the Police department to investigate the cases and to submit a report to the Magistrate under s. 83 (b) of the said Act. The Magistrate took cognizance on a *challan* submitted by the Inspector of Police :

(1) (1865) 1 H L (s o) 47; 12 Jur. (N s) 803; 14 L T 835;

(2) 19 M 38.

(3) 3 R 494; 90 Ind. Cas. 198; AIR 1925 P C 236; 52 I A 385; 42 C L J 156; 49 M L J 282; 27 Bom. L R 1427; (1925) M W N 894; L R 6 A (P C) 209; 30 C W N 218 (P C).

*Page of (1865) 1 H. L. (s. c.)—[Ed.]

†Pages of 3 R.—[Ed.]

Held, that it could not be said that the Police Officer who filed the *challan* of which cognizance was taken answered to the description required by s. 83, namely "an excise officer authorized by the Collector in this behalf." In the circumstances, the whole proceedings were void.

Messrs. S. C. Talukdar and Kiron Mohan Sarkar, for the Accused.

Mr. Hamidul Huq, for the Crown.

Order.—In these two cases the two accused have been convicted under s. 54 (b), Bengal Excise Act, 1909, for keeping a licensed premises open after hours. The proceedings arose out of searches by the Police during which no Excise Officer was present. The matters were reported to the Collector of Excise who wrote to the Deputy Commissioner of Police, North District, on November 24, 1939, saying that he sanctioned the prosecution of the two accused and that he authorized an officer of the Police department to investigate the cases and to submit a report to the Magistrate under s. 83 (b) of the said Act. The accused in each case have been fined Rs. 60. These rules have been issued on the ground that there has been no complaint or report by the Collector of Excise or any excise officer authorized by him as required by s. 83 (b), Excise Act, and that therefore the Police Magistrate who tried the cases had no jurisdiction to take cognizance of the offences and the entire proceedings are wholly *ultra vires*.

In my opinion the rules must be made absolute. It appears that the Magistrate took cognizance in each case on a *challan* submitted by the Inspector of Police, Belghatta Police Station. He never saw the letter of the Collector of Excise dated November 24, until this was exhibited in the proceedings in the following February. Even if by any stretch it could be contended that this letter amounted in itself to a complaint or report as described in s. 83 (b), Excise Act, it is quite certain that the trying Magistrate did not take cognizance on such complaint or report. It cannot be said that the Police Officer who filed the *challan* of which cognizance was taken answered to the description required by s. 83, namely "an Excise Officer authorized by the Collector in this behalf." In the circumstances I must hold that the whole proceedings in each of the cases are void. The convictions and sentences are therefore set aside. It will be open to the excise department to proceed properly according to law if they are so advised.

D.

Rules made absolute.

MADRAS HIGH COURT Special Bench

Original Petition No. 160 of 1939

March 4, 1940

LEACH C. J., KING AND KRISHNASWAMI
AYYANGAR, JJ.

COMMISSIONER OF INCOME-TAX,
MADRAS—PETITIONER

versus

HARVEYS LTD., TUTICORIN—

RESPONDENTS

Income Tax Act (XI of 1922), s. 10.—Benefit received by company held represented profits—Fact that gain was not in money but shares, held immaterial—Original cost of asset is question of fact—Price mentioned therein, whether conclusive proof of original cost—Price seeming fictitious—Income-tax authorities, if can go behind contract and ascertain true value.

The assessee company entered into a ginning contract with the mills. It undertook to mill cotton for the mills for a period of ten years at a reduced rate and as a consideration the mill exchanged their 20,000 shares for the 1,000 shares of the company. The assessee company contended that the exchange shares and the benefit of the ginning contract must be regarded as one transaction and, entirely of a capital nature and since the mills had been allowed to treat it as being a transaction of a capital nature, the company must be allowed to treat it in the same way.

Held, that the arrangement by which a proportion of the shares of the mills was issued to the company in respect of the ginning contract was not a transaction of a capital nature and the benefit received by the company represented profits received in the year of payment. The difference between the values of the exchanged shares must be allocated to the ginning contract and as such was profit in the hands of the company assessable to the tax. The fact that the gain was not in money but in money's worth, viz., shares, was immaterial. *Van Den Berghs Ltd. v. Clark* (3), explained, *Howley v. Commissioner of Inland Revenue* (2) and *Short Brothers Ltd. v. Commissioners of Inland Revenue* (4), distinguished, *Commissioners of Inland Revenue v. North Fleet Coal and Ballast Co. Ltd.* (6), relied on. [p. 784, col. 2.] Held, also that the income-tax authorities were right in adopting the market-value in respect of the 20,000 shares of the mills allotted to the company. [*ibid.*]

The original cost of any particular asset is entirely a question of fact and like any other question of fact depends upon the evidence produced to prove it. The mere production of documentary evidence showing that a contract has been made for purchasing assets at a certain price does not conclusively establish the correctness of a claim made by an assessee that for the purpose of s. 10 (2) (vi) the original cost is the amount shown in the document. Where the circumstances show that an assessee has arranged to put an entirely fictitious price on his assets it is open to the Income-tax Authorities to refuse to accept that price and to ascertain what the true value is. *Aron Salomon v. Salomon & Co.* (1), distinguished. [p. 781, col. 2.]

O. P. reference made by the Commissioner of Income-tax, Madras.

Mr. K. V. Sesha Ayyangar, for the Petitioner,

The Advocate-General and Mr. Subbaroya Ayyar, for the Respondents.

Leach, C. J.—The assessee company is a private company having been incorporated in British India in May 1933. The capital is Rs. 5,00,000 divided into 5,000 shares of Rs. 100 each and all the shares have been issued. The share-holders and their holdings are as follows: (i) the firm of A. and F. Harvey, 3,998 shares; (ii) the Madura Mills Co. Ltd., 1,000 shares and the Comorin Investment and Trading Co. Ltd., two shares. For the sake of brevity I will refer to the assessee company as "the Company" to the firm of A. and F. Harvey as "the Firm" and to the Madura Mills Co. Ltd., as the "Madura Mills." The firm consists of three partners, namely, Mr. A. Harvey, Mr. J. C. Harvey and the Tuticorin Co. Ltd., the share-holders of which are mostly certain employees of the firm. Mr. A. Harvey and Mr. J. C. Harvey are brothers. The profits of the firm are divisible between the partners in the following proportions: Mr. A. Harvey: 63/128; Mr. J. C. Harvey: 63/128; and the Tuticorin Co. Ltd.: 2/128. The capital of the Comorin Investment and Trading Co. Ltd., is divided into 10,000 shares of which Mr. A. Harvey and Mr. J. C. Harvey hold between them 9,999 shares.

In April 1933, it was arranged that on incorporation the Company should purchase for Rs. 15,00,000 the assets of a cotton ginning business owned by Messrs. A. and J. C. Harvey as individuals and not as members of the firm. The assets consisted of lands, buildings, plant and machinery. Of the purchase consideration Rs. 4,71,383 was allocated to the lands and buildings, and Rs. 10,28,617 to the plant and machinery. For several years Messrs. A. and J. C. Harvey had ginned cotton for the Madura Mills. The rates charged for the years 1930, 1931 and 1932 averaged Rs. 12-8-0 per candy. Before the incorporation of the Company negotiations took place between Messrs. A. and J. C. Harvey and the Madura Mills for the conclusion of an arrangement under which the Madura Mills should allot 20,000 shares to the company and as consideration the company should allot to the Madura Mills 1,000 shares and enter into a contract under which the company should agree to gin cotton for the Madura Mills at a flat rate of Rs. 8 per candy for a period of ten years from April 1, 1933. An agreement was arrived at on this basis after the incorporation of the company and 1,000 of its shares were allotted to the Madura Mills

on July 24, 1933. The formal contract with the Madura Mills was executed on August 26, 1933, and the allotment to the company of the 20,000 shares of the Madura Mills duly followed. The Company paid no cash for the assets which it had acquired from Messrs. A. and J. C. Harvey. Of the Rs. 15,00,000 stated to be the consideration, Rs. 5,00,000 was satisfied by the issue of shares and the balance of Rs. 10,00,000 by the issue of debentures. On June 2, 1933, the company passed the following resolution:

"Resolved unanimously that the sum of Rs. 10,00,000 be raised by the issue of two debentures for Rs. 5,00,000 each bearing interest at 7 per cent. per annum charged upon its undertaking and all its property whatsoever and wheresoever both present and future including its uncalled capital if any and goodwill in the form now submitted to the meeting and that in consideration of the Finchley Investments Limited, and the Kochadai Investments Limited, having each paid to the company the sum of Rs. 5,00,000 that the above mentioned two debentures be sealed and issued to the above companies."

The Finchley Investments Limited and the Kochadai Investments Limited are two private companies registered in Canada and controlled by Messrs. A. and J. C. Harvey through their wives. The Finchley Investments Limited has an authorized capital of \$50,250, divided into 50 Class A Cumulative Preferred shares of \$5 each, and 10,000 Class B shares of \$5 each, of which all the Class A shares and 5,990 of the Class B shares have been issued. All the Class B shares are held by Mrs. A. Harvey. This company has taken authority to issue debentures to the value of \$10,00,000 and has in fact issued \$99,000, all of which are also held by Mrs. A. Harvey. The Kochadai Investments Limited has an authorized capital of \$25,250 made up of 50 Class A Cumulative Preferred shares of \$5 each and 5,000 Class B shares of \$5 each, of which all the Class A shares and 1,990 of Class B shares have been issued. Mrs. J. C. Harvey is the holder of the 1990 Class B shares. This company has authority to issue debentures to the amount of \$5,00,000. Of these debentures \$1,99,000 have been issued and \$6,000 of them have been redeemed. The outstanding debentures are all held by Mrs. J. C. Harvey. Of the debentures issued by the Finchley Investments Limited the amount of \$169,000 was issued on October 17, 1933, and of those issued by the Kochadai Investments Limited a similar amount was issued on October 12, 1933.

On the passing of the resolution, which I have just quoted, two cheques for Rs. 5,00,000 each were drawn by the firm in favour of the

company, but it was not intended that they should be presented for payment. In the course of explanations given on behalf of the company in answer to questions put by the income-tax authorities, it was stated that the two cheques were issued by the firm on behalf of the Canadian Companies in pursuance of an oral arrangement between Messrs. A and J. C. Harvey on the one side, and the agents of the Canadian Companies on the other with a view to avoiding costly cross-remittances. It was also stated that Mrs. J. C. Harveys had received Rs. 5,00,000 from the Kochadai Investments Limited and that Mrs. A Harveys had received an equal sum from the Finchley Investments Limited. It turned out that the payments to these ladies did not represent cash but merely the issue to them of debentures by the Canadian companies. Therefore the position was that instead of the vendors receiving Rs. 10,00,000 in cash the Canadian Companies which they controlled received debentures for this amount and the Canadian companies in turn issued their own debentures to the wives of the vendors. The fact that the vendors received by this roundabout way debentures in lieu of cash will not affect the legal position if the transaction is a genuine one, but the Income-tax authorities say that it is not. They contend that the issue of debentures represents an artificial transaction undertaken to give an appearance of reality to the inflation in the value of the assets acquired by the company and a scheme to defeat the payment of income-tax.

It is made abundantly clear by the Commissioner of Income-tax in the statement of the case that the Rs. 15,00,000 representing the purchase consideration is in fact a highly inflated figure. All the assets of the business had been purchased by Messrs. A and J. C. Harvey between the years 1897 and 1931 for about Rs. 10,50,000. The following statement shows the dates of construction or purchase of the various assets, their original cost, their written down value according to the accounts of the firm, and the values placed upon them at the time of the sale to the assessee:

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It is not necessary to examine these figures in detail to show that Rs. 15,00,000 was out of all proportion to the real value of the assets. It will be sufficient if attention is drawn to the machinery statement. The press at Sattur was purchased in 1914 for Rs. 101,411-13-2 and 19 years later was sold for Rs. 2,06,250. The gins at Sattur were purchased between 1905 and 1915 for

Rs. 1,05,683-14-2 and were sold for Rs. 2,06,250. The press at Dindigul was acquired during the years 1928 and 1929 for Rs. 84,944-13-10, and was also sold for Rs. 2,06,250. The gins at the same place were purchased during these years for Rs. 60,892-10-11 and they were sold for Rs. 2,06,250. The total assets stood in the books of firm at Rs. 5,00,000 and notwithstanding that there must have been considerable depreciation they were passed on to the company at the figure of Rs. 15,00,000. It has not been suggested by the company that the value of the assets had increased owing to special circumstances. On the contrary, it had to be admitted to the income-tax authorities that the value of ginning factories had been seriously affected by the depression prevailing in the textile trade. Indication of the extent of depression may be gathered from the fact that a factory built by another company at Sattur at a cost of over Rs. 2,00,000 was acquired by the company in 1934 for Rs. 40,000.

The company was assessed by the Income-tax Officer, Tuticorin, for the year 1934-35 on a total income of Rs. 82,643. The previous year was the year ended March 31, 1934, and the assessment was completed on August 31, of that year. In arriving at the figure of Rs. 82,643, the Income-tax Officer allowed a deduction of Rs. 61,130 as interest on the debentures which were issued to the Canadian companies. The true nature of the transaction with those companies had not then been realized, but further investigations carried out by the Income-tax Officer led to the disclosure of the position which I have stated. It was also discovered that the company had not declared any dividend out of the profits of the year ended March 31, 1934 and that out of the total book profits amounting to Rs. 85,225 during the two years ended March 31, 1935 only Rs. 25,000 had been distributed by July 1935. The explanation given on behalf of the company was that the year 1933-34 was the first year of its working and that having regard to the world depression the directors had decided on the ground of prudence not to pay a dividend in respect of that year. Not being satisfied with this explanation and being of the opinion that the real object of not distributing profits was to enable Messrs. A and J. C. Harvey to avoid a large amount of super-tax, the Income-tax Officer asked the Assistant Commissioner to give his approval under s. 23-A (2), Income Tax Act, 1922 to an order being passed that the sum payable as income-tax by the company

should not be determined and that the proportionate share of each member in the profits and gains should be included in the total income of the member for the purpose of assessment to tax. After giving the company an opportunity of being heard the Assistant Commissioner passed the order asked for by the Income-tax Officer. The Income-tax Officer then computed the income of the company for the year 1933-34 which had escaped assessment in 1934-35 at Rs. 7,11,316. This figure included the following major items:

- “(a) Rs. 48,149 ...depreciation allowed in excess of the original assessment.
- (b) Rs. 61 130 ...interest on debentures allowed in the original assessment.
- (c) Rs. 6,00,000 ...advance received on account of ginning charges”.

The Income-tax Officer regarded the transaction between the company and the Madura Mills as involving a payment on account of ginning charges of Rs. 6,00,000. This figure was arrived at after allowing the company to treat the allotment of 1,000 of its shares to the Madura Mills as a capital transaction. The market value of the 20,000 shares of the Madura Mills which the company acquired was Rs. 7,00,000. The 1,000 shares of the assessee which the Madura Mills received in exchange in consequence of the arrangement had no market value, but the Income-tax Officer took the nominal value of Rs. 1,00,000 to be their true value. The difference between Rs. 7,00,000 and the Rs. 1,00,000 represented the payment by the Madura Mills to the company on account of ginning charges for the period of ten years. The company appealed to the Assistant Commissioner against this new computation of income and objected to the inclusion of the three items (a), (b) and (c) in the total income. The Assistant Commissioner accepted the Income-tax Officer's computation and dismissed the appeal. The company then applied to the Commissioner of Income-tax for revision of the Assistant Commissioner's order under s. 33 and asked in the alternative that certain questions of law be referred to this Court under s. 66 (2). Messrs. A. and F. Harvey also appealed against the order passed under s. 23-A. That appeal is pending but the question of the validity of the order does not arise in the present proceedings. The Commissioner acceded to the request of the company for a reference and has asked the Court to decide the following questions:

“1. Whether the Income-tax authorities were justified in law in going behind the contract for the sale

of the assets of the Harvey Brothers to the petitioner company for Rs. 15,00,000?”

2. If the answer to the above is in the affirmative, (a) whether there was any material before the Income-tax Authorities to justify their finding that the original cost of those assets to the petitioner Company was not Rs. 15,00,000 and (b) if there was such material was there any material for their finding that the cost of the assets was Rs. 5,00,000?

3. Whether there was any material before the Income-tax Authorities to justify their conclusion that the debenture loan of Rs. 1,00,000 was illusory and colourable and that the interest paid thereon is not therefore allowable as a deduction?

4. Whether the transaction of exchange of the Madura Mills shares with the shares of the petitioner Company is an isolated transaction and of a capital nature?

5. Whether on the facts of the case the difference if any between the values of exchanged shares could be said to be profit in the hands of the petitioner assessable to tax?

6. Whether the Income-tax Authorities were correct in adopting the market value in respect of the 20,000 Madura Mills shares allotted to the petitioners?

7. Whether there was any material before the Income-tax Authorities to justify their finding that the difference in value between the 20,000 shares of the Madura Mills Ltd. received by the petitioners and the 1,000 shares of their own Company allotted by the petitioners to the Madura Mills amounted to 6,00,000?”

Question No. 1.—By virtue of s. 10 (2) (vi), Income Tax Act, 1922, an assessee is entitled to an allowance on account of depreciation in respect of buildings, machinery or furniture which belong to him and are used for the purposes of his business. The Commissioner rightly observes that the original cost of any particular asset is entirely a question of fact and like any other question of fact depends upon the evidence produced to prove it. The mere production of documentary evidence showing that a contract has been made for purchasing assets at the certain price does not conclusively establish the correctness of a claim made by an assessee that for the purpose of s. 10 (2) (vi) the original cost is the amount shown in the document. I also agree with the statement of the Commissioner that where the circumstances show that an assessee has arranged to put an entirely fictitious price on his assets it is open to the Income-tax Authorities to refuse to accept that price and to ascertain what the true value is.

On behalf of the Company the learned Advocate General has contended that the Court cannot go behind the contract, and in support of this argument has quoted the decision of the House of Lords in *Aron Salomon v. Salomon & Co.* (1) but I fail to see what bearing that case has here. A leather merchant and a boot manufacturer

(1) (1897) A C 22.

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 sold his business to a limited company which had a nominal capital of 40,000 shares of 1½ each. Before the incorporation of the Company the vendor entered into a contract with the trustee of the future Company settling the terms upon which the transfer was to be made. One of the conditions was that part payment might be made to the vendor in debentures of the Company. The memorandum of association was signed by the vendor, his wife, a daughter and four sons all of whom subscribed for one share each. In part payment of the purchase consideration debentures were issued to the vendor to whom was allotted 20,000 shares which were paid for out of the purchase money. The total number of shares issued was 20,007 and with his 20,000 shares the vendor had complete control of the company. At the time of the sale the business was solvent, but bad times came and the company was forced to go into liquidation. The question was whether the vendor as the holder of the debentures was entitled to preference over the other creditors of the company. Overruling the Court of Appeal, the House of Lords held that it was not contrary to the true intent and meaning of the Companies Act, 1862, for a trader to sell his business to a limited liability company consisting of himself and the members of his family, the business then being solvent, all the terms of sale being known to and approved by the share-holders, and all the requirements of the Act being complied with. There had been no fraud upon the creditors or share-holders and the liquidator was not entitled to rescission of the contract of purchase.

In the present case the Court is not considering a situation analogous to the situation in *Aron Salomon v. Salomon & Co.* (1), and it is not considering the provisions of the Companies Act but the provisions of the Income Tax Act. To accept the argument of the learned Advocate-General would mean that where an assessee had placed a fictitious value on his assets he would be entitled to the statutory allowance for depreciation on the fictitious figure and consequently would escape payment of income-tax. Therefore, to accept the argument would be to go against the true intent and meaning of the Income Tax Act. As I hold that the income-tax authorities have the right to look behind the contract of sale it follows that my answer to the first question is in the affirmative.

Question No. 2.—I have shown the basis on which the company says that the figure of Rs. 15,00,000 is arrived at and I am of the

opinion that there was material to justify the finding of the income-tax authorities that the original cost of the assets acquired was not Rs. 15,00,000. The purchase consideration was the allotment of shares of the face value of Rs. 5,00,000 and debentures of the nominal value of Rs. 10,00,000 but the shares and the debentures had no value beyond the value of the assets acquired. The company adduced no evidence of the value of the assets. It relied entirely on the figure stated in the contract of sale. In these circumstances the income-tax authorities took the true value to be the figure at which the assets stood in the books and as this was the only evidence before them I consider that they were justified in their conclusion, especially in view of the age of most of the assets. If the company had placed before the income-tax authorities evidence to show that the assets stood in the books of the firm at a lower figure than their true value the position would have been different. But it did not do so and the inference is that it was not in a position to show that the assets were of higher value. I would answer both parts of the second question in the affirmative.

Question No. 3.—I have already stated the facts relating to the debenture issue and I consider that these facts provide material amply sufficient to justify the conclusion that the debenture loan of Rs. 10,00,000 was illusory and colourable. It follows that in my opinion the interest paid on the debentures is not allowable as a deduction.

Questions Nos. 4, 5, 6 and 7.—These questions may be dealt with conveniently together. The learned Advocate-General has contended that the exchange of the shares of the Madura Mills for the shares of the company and the benefit of the ginning contract must be regarded as one transaction and entirely of a capital nature. He has also said that as the Madura Mills has been allowed to treat it as being a transaction of a capital nature the company must be allowed to treat it in the same way. I am unable to accept either of these propositions. The main part of the consideration which the Madura Mills received for its Rs. 20,000 shares was the benefit to be derived from the ginning contract. For ten years the company has to mill cotton for the Madura Mills at a price far below the market price. I consider that the income-tax authorities were justified in regarding the transaction of a capital nature only to the extent of Rs. 1,00,000, represented by the shares of the company allotted to the Madura Mills.

The company in return for an immediate gain of Rs. 6,00,000 agreed to reduce its probable annual gains over a period of ten years. In other words instead of getting a probable income of Rs. 6,00,000 spread over ten years it obtained a lump sum payment in one year. Nor do I regard the fact that this gain was not in money but in money's worth, namely shares, makes any difference.

In my opinion the income tax authorities were also justified in taking the value of the 20,000 shares which the company received from the Madura Mills to be the market value at the date of the transaction. It has been argued by the learned Advocate-General that to place on the market at once a block of 20,000 shares would mean a depression in the price. As the Commissioner has remarked the shares were not put on the market and were not intended to be put on the market. In support of his argument that the answers to these four questions should be in favour of the company, the learned Advocate-General has quoted to us *Howley v. Commissioner of Inland Revenue* (2), *Van Den Berghs Ltd. v. Clark* (3), *Short Brothers Ltd. v. Commissioner of Inland Revenue* (4) and *Commissioners of Income Tax v. Shaw Wallace* (5), but I can find no support for him in these judgments.

In *Howley v. Commissioner of Inland Revenue* (2), the facts were these. In consideration of an advance of £7,000 made by the assessee to a company in 1905, he received debentures of the nominal value of £7,000 repayable after December 1914, by half yearly instalments of £500 and from a director 5,600 £1 ordinary shares of which he was to transfer 400 shares on receiving each payment of £500 in respect of the debentures. He was also to receive one-fifth of the profits each year upto December 1914, and thereafter a share of the profits corresponding in effect to the proportion of the debentures remaining unpaid from time to time. The assessee received no share of the profits for the year 1915, 1916 and 1917 until 1920 when he received a sum of £6,000 in settlement of what was due to him by way of profits for those years. In May 1921, he was paid £10,000 in full settlement of the liability under the agreement upto Decem-

ber 1921, the prospective date of its termination. The sums of £6,000 and £10,000 were assessed to super-tax for the years 1920-21 and 1921-22 respectively as forming part of his total income for the years 1919-20 and 1920-21. It was held that he was entitled under the original contract to have his share of the profits paid to him each year and that for the purpose of computing his income for super-tax the £6,000 and £10,000 must be spread over the years in respect of the profits of which they were paid, subject to the entire exclusion from liability to super-tax of such part of the sum of £10,000 as represented a composition of his right to receive a share of the profits of the year 1921. In the case now before us there was no arrangement by which the payment was to be spread over a period of years. The contract was one under which the company got an immediate gain in consideration of its reducing its charges. It must be regarded as a contract entered into in the ordinary course of its ginning business and nothing else. *Van Den Berghs Ltd. v. Clark* (3), was a decision of the House of Lords. The facts are even further away from the facts in the present case but an observation of Lord Macmillan has application here, not in favour of but against the argument of the learned Advocate-General. An English company carried on a large business in the manufacture of margarine, another substitute for butter. In 1908 the company entered into an agreement with a Dutch company of rival manufacture under which the two companies undertook to share profits and losses in the proportion which, on an average of five years, the profits of the rival trading in margarine bore to each other. In 1913 there was an extension of the agreement which was to be prolonged till the end of 1940. The two companies carried on their business separately until the end of 1913. During the last war the agreement could not be observed, but in 1920 a third agreement was entered into by which the former agreements were amended. One of the terms of the amended agreement was that the results of trading in the year 1914, and later years should be ascertained by accountants on each side and that any dispute arising under the agreements should be settled by arbitration. Disputes did arise and there was a submission to arbitration. The arbitration proceedings were however settled on terms by which the agreements were rescinded and the Dutch Company paid the English Company a sum of £4,50,000 as damages. The question was whether the

(2) (1925) 9 Tax Cas. 331.

(3) (1935) A C 431; 164 L J K B 345; 153 L T 171; 19 Tax Cas. 390; 51 T L R 593.

(4) (1928) 12 Tax Cas. 955; 136 L T 689.

(5) 59 I A 206; 136 Ind. Cas. 742; A I R 1932 P C 138; 59 C 1343; Ind. Rul. (1932) P C 156; 9 O W N 515; 36 C W N 653; (1932) M W N 618; 55 C L J 386; (1932) A L J 588; 34 Bom. L R 1033; 36 L W 63; 63 M L J 124 (P C).

£4,50,000 was in the nature of a capital asset or a receipt of income to be included in the profits of the English Company. It was held that the payment was in the nature of a capital asset. The passage in the judgment of Lord Macmillan which has bearing in the present case is this :

"Now what were the appellants (the English company) giving up? They gave up their whole rights under the agreements for 13 years ahead. These agreements are called in the stated case 'pooling agreements', but that is a very inadequate description of them, for they did much more than merely embody a system of pooling and sharing profits. If the appellants were merely receiving in the sum down the aggregate of profits which they would otherwise have received over a series of years the lump sum might be regarded as of the same nature as the ingredients of which it was composed."

Lord Macmillan's judgment was accepted by all the members of the House of Lords who heard the appeal and therefore we have here authoritative indication, that if a payment represents a lump sum payment of profits which would otherwise be received over a series of years it may be regarded as representing income. The decision in *Short Brothers Ltd. v. Commissioner of Inland Revenue* (4) was that the compensation paid in cancellation of certain contracts was chargeable to excess profits duty as a receipt of profits in the course of the company's ordinary trade, and must be included in the profits for the accounting period in which it became payable and was in fact paid. This case certainly does not help the company. *Commissioner of Income Tax v. Shaw Wallace* (5), was quoted because the Privy Council there said that the word "income" connotes a periodical monetary return coming in with some sort of regularity, or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. It cannot be suggested that the allocation of the 20,000 shares of the Madura Mills was in the nature of a windfall. The contract fell within the scope of the memorandum of association of the company and it seems to me that the resulting benefit of the company must be classed as income.

A decision which is far more in point is that of Rowlatt, J., in *Commissioner of Inland Revenue v. North Fleet Coal and Ballast Co. Ltd.* (6). A Company owned a chalk quarry and contracted to supply a purchaser with a specified quantity of chalk yearly for ten years. The contract also included in

its terms that the quarry company should build a wharf at which the purchaser's ships could load the chalk. As the result of the war of 1914 the agreement was suspended and after the war the purchaser did not wish to take further deliveries. It was then agreed between the quarry company and the purchaser that in consideration of a payment of £900 a year for the remaining four years of the term the purchaser should be relieved of his liability under the contract. Subsequently, the quarry company accepted a lump sum payment of £3,000 in lieu of the four annual payments of £900 and the £3,000 was applied by the quarry company in writing down the cost of the wharf. It was held that the £3,000 was chargeable to excess profits duty as a trading profit of the quarry company and therefore must be included in the profits of the year in which it was agreed to be paid. Rowlatt, J. refused to graft a distinction upon the decision of the Court of Appeal in *Short Brothers Ltd. v. Commissioners of Inland Revenue* (4). He considered that if a sum represented profits in a new form then that was income and income in the year in which it was received.

The answers which I would give to the four questions are these: No. 4: The arrangement by which a proportion of the shares of the Madura Mills was issued to the company in respect of the ginning contract is not a transaction of a capital nature and the benefit received by the Company represents profits received in the year of payment. No. 5. On the facts of the case the difference between the values of the exchanged shares must be allocated to the ginning contract and such is profit in the hands of the Company assessable to the tax. No. 6 The Income-tax authorities were right in adopting the market value in respect of the 20,000 shares of the Madura Mills allotted to the Company. No. 7. There was material before the Income-tax authorities to justify their finding that the difference between the 20,000 shares of the Madura Mills received by the Company and the 1,000 shares of the Company allotted to the Madura Mills amounted to Rs. 6,00,000.

The result is that the Income-tax authorities have succeeded on all the questions raised and therefore are entitled to their costs, which we fix at Rs. 250.

King, J.—I agree.

Krishnaswami Ayyangar, J.—I agree.

N.-D.

Order accordingly.

RANGOON HIGH COURT

Special Second Appeal No. 162 of 1940

August 9, 1940

MACKNEY, J.

MA E THWE—PLAINTIFF—APPELLANT
versus

U THA YIN—DEFENDANT—RESPONDENT

Minor—Marriage—Contract of, between minor girl and major person—Breach of promise—Minor, if can sue for compensation—Father's consent to contract, whether makes it valid.

Where a person who is major has entered into a contract of marriage with a minor girl, she cannot sue for compensation for breach of promise of marriage. The fact that her father consented to her making the contract does not make it any the more a valid contract although it might have made the marriage a valid marriage if it had taken place. 181 Ind. Cas. 755 (1) and 49 Ind. Cas. 59 (3) relied on. *Purshomtamas Tribhovandas v. Purshomtamas Mangaldas* (2), not approved.

Sp. S. A. against the decree of the District Court, Tharrawaddy in Civil Appeal No. 4 of 1940.

Mr. Sein Tun Aung, for the Appellant.

Mr. W. Heck, for the Respondent.

Judgment.—The plaintiff-appellant is a minor girl. She has sued the defendant-respondent U Tha Yin for compensation for breach of promise to marry. Her suit was allowed in the Township Court and a decree for Rs. 200 was granted. On appeal to the District Court, this decree was set aside and the plaintiff's suit was dismissed. The learned District Judge has pointed out that in *Ma Pwa Kywe v. Maung Hmat Gyi* (1), it was held that a minor was not competent to enter into a valid or binding contract to marry and the minor could not sue for damages for breach of promise of marriage. The plaintiff now appeals to this Court taking the ground that the minor appellant could sue for breach of promise to marry because the promise was made not only to herself but to her parents also. This is a strange form of argument and, in my opinion, it betokens great confusion of mind. No doubt, according to Burman Buddhist Law to constitute a valid marriage with a person under the age of 20 that person's parents must have given their consent. But we must distinguish between what is necessary for a valid marriage and what is necessary for a contract. It is the minor who is suing for breach of contract presumably because the contract was made with her. I fail to see how she could sue for breach of a contract which was made with her father, nor do I understand how the father

could be sued or could sue on a breach of contract to marry his daughter.

The learned Counsel relied on *Purshomtamas Tribhovandas v. Purshomtamas Mangaldas* (2), which was a case where the plaintiff who had been betrothed to the defendant's daughter sued for a declaration that unless the defendant was willing that the marriage should be performed before a certain date the contract for the marriage should no longer be binding on the plaintiff and that the betrothal was void, and for Rs. 25,000 damages for breach of the contract of betrothal and marriage. It was expressly pointed out in that case that the marriage of Hindu children in a contract made by the parents and the children themselves exercise no volition; if this were true of the marriage, it was equally true of betrothal and there could be no implied condition that fulfilment of the contract must depend upon the willingness of the girl at the time of marriage. In *Maung Po Thaw v. Maung Tha Hlaing* (3), this decision was commented upon, and it was observed:

"It would be difficult to imagine circumstances more widely opposed to the conditions of marriage between Burmese Buddhists."

The consent of the parties is essential to a marriage and consequently the appellants it was held could not be made liable for damages for breach of the promise given by them. If they could not be liable for damages for breach of promise, neither could they sue. In the present case they have not sued. It is the minor who has sued. It is obvious that her suit must fail. The fact that her father consented to her making the contract does not make it any the more a valid contract although it might have made the marriage a valid marriage if it had taken place. The learned Counsel for the appellant asks that this case should not be decided here but be referred to a Bench for decision. It does not appear to me that there is any necessity for this course. The appeal is dismissed. In the circumstances of the case, however, I am not disposed to make any order as to costs.

s.

Appeal dismissed.

(2) 21 Bom. 23.

(3) 3 U B R 106; A I R 1919 U B 24; 49 Ind. Cas. 59.

(1) A I R 1939 Rang. 86; 181 Ind. Cas. 755; 1938 Rang. 667; 11 R Rang. 483.

MADRAS HIGH COURT

Letters Patent Appeal No. 13 of 1939

January 2, 1940

BURN, OFFG. C. J. AND KRISHNASWAMI

Ayyangar, J.

N. K. R. M. N. NAGAPPA CHETTIAR

AND OTHERS—APPELLANTS

versus

Raja SRIMANTHU MUTHU VIJAYA

RAGHUNATHA DORAISINGAM,

ZAMINDAR OF SIVAGANGA AND ANOTHER

—RESPONDENTS

*Madras Court of Wards Act (I of 1902), s. 49—
Suit by managers of temple—Notice under s. 49 giving
name and address of temple and not those of mana-
gers—S. 49, if complied with.*

A Hindu idol is founded upon the religious customs of the Hindus and is a 'juristic entity.' It has a juridical status with the power of suing and being sued. Although the managers are often described as trustees they are not trustees in law as the Devasthanam properties are not vested in them in trust. A notice, which complies with the requirements of s. 49, Mad. Court of Wards Act so far as the temples are concerned, cannot therefore be said to be open to objection for the reason that the names and addresses of the managers have not been stated if in the notice in question the names of the temples and also the village in which they are, are mentioned.

L. P. A. against the judgment and decree of Wadsworth, J. in S. A. No. 1076 of 1936 dated January 12, 1939.

Mr. S. V. Venugopalachari, for the Appellants.

Mr. M. E. Rajagopalachari, for the Respondents.

Krishnaswami Ayyangar, J.—This is an appeal under the Letters Patent from the judgment of Wadsworth, J., who confirmed on second appeal the decision of the District Judge, Ramnad, reversing the judgment of the Subordinate Judge of Devakottah in O. S. No. 131 of 1929 on his file. The suit had been instituted by the trustees and *hukhdars* of three temples in the village of Naganathapuram, for a declaration that the boundaries fixed by the survey authorities between the village of Veeriyandal belonging to the temples, and the adjacent village of Senjai belonging to the Zamindar of Sivaganga were wrong and for the rectification of those boundaries in accordance with the true rights of the parties. At the time of the survey, and at the date of the suit the Sivaganga *zamindari* was under the management of the Court of Wards and the latter were accordingly joined as defendant No. 1 in the suit. The Court of Wards however dropped out of the litigation after the disposal of the suit in consequence of the *zamindar* having assumed possession of the estate. The *zamindar* stepped into their place

in the lower Appellate Court and has since been contesting the claim of the plaintiffs. The Subordinate Judge decreed the suit disallowing all the contentions raised by the Court of Wards. One of those contentions was that the suit was incompetent as the condition precedent to the institution of a suit against the Court of Wards, namely the issue of a proper notice under s. 49, Mad. Court of Wards Act, had not been fulfilled. A registered notice, Ex. M, in the case, had been given to the Court of Wards before suit, but it was attacked as being defective in material particulars and therefore invalid. Differing from the trial Court, the learned District Judge on appeal upheld that contention and accordingly dismissed the suit. A second appeal was preferred to this Court and it came on before Wadsworth, J. He concurred with the decision of the learned District Judge and dismissed the second appeal. Leave was however given by the learned Judge for preferring a Letters Patent appeal against his judgment and the appeal accordingly now comes before us. The notice in question is as follows :

"To,

1. The District Collector of Ramnad and Agent of the Court of Wards, Sivaganga estate, at Madera.

2. The Estate Collector, Court of Wards, Sivaganga Estate, Sivaganga.

Sir,

On behalf of the Devasthanams of Perumal Koil, Sivan Koil and Pillayar Koil, etc. in Naganathapuram and the trustee thereof, V. N. Venkatachalam Chettiar and others; I hereby give you notice under the provisions of the Court of Wards Act as follows:—

The notice then proceeds to set out the cause of action and the relief claimed. The only defect in the notice which is said to invalidate it is that it does not contain a proper description of the names of and the places of abode of the intending plaintiffs. In particular, it is said that whereas there are five plaintiffs who joined in instituting the suit, the name of one of them alone, namely, Venkatachalam Chettiar, is mentioned in the notice and the names of the others have been entirely omitted; nor has the address even of Venkatachalam Chettiar been given. It is clear that if the suit is to be regarded as a suit by the trustees, the notice must be held defective as the requirements of s. 49, have not been satisfied. In the light of the decision of the Privy Council in *Bhagachand Dagadusa v. Secretary of State* (1), full effect must be given to the language of the statute and it is not permissible to put a

(1) 51 B 725; 104 Ind. Cas. 257; A I R 1927 P C 176; 54 I A 338; 53 M L J 81; 25 A L J 641; 29 Bom. L R 1227; (1927) M W N 561; 46 C L J 76; 1 Luck Cas 291; 32 C W N 61; 26 L W 809 (P C.)

liberal construction upon that language or to say that it will be enough if there is a substantial compliance with the conditions of the section. The statute has laid down certain definite formalities to be observed as a preliminary to a suit against the Court of Wards, and we cannot whittle down the effect of s. 49, by adopting a liberal or beneficent interpretation. The appellants have however placed before us an argument which to our mind appears to have great force. They contend that the notice fully complied with the requirements of s. 49, inasmuch as the names and address of the Devasthanams which are the real plaintiffs are mentioned which, it is urged, is all that is required by the statute. In the case of such temples, it is now settled that the presiding deity is a juristic entity having itself the right to sue and be sued. In *Pramatha Nath Mullick v. Pradyumna Kumar Mullick* (2), Lord Shaw delivering the judgment of the Privy Council laid down the law on the point in these terms :

"A Hindu idol is, according to long established authority, founded upon the religious customs of the Hindus, and the recognition thereof by Courts of Law, a 'juristic entity'. It has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir. It is unnecessary to quote the authorities, for this doctrine, thus simply stated, is firmly established."

It follows that the real plaintiffs in the suit are the presiding deities of the Devasthanams mentioned. Although the managers are often described as trustees they are not trustees in law as the Devasthanam properties are not vested in them in trust. A notice, which complies with the requirements of s. 49, so far as the temples are concerned cannot therefore be said to be open to objection for the reason that the names and addresses of the managers have not been stated. In the notice in question the names of the temples are mentioned as also the village in which they are situate. This, in our opinion, is a sufficient compliance with s. 49, even on a strict construction.

It is true that in the cause-title to the plaint the names of the managers are mentioned as plaintiffs without reference to the temples or the presiding deities. In para. 3 of the plaint it is however stated that the plaintiffs are some of the trustees and *hukhdars* of the Devasthanam consisting of the Perumal Koil, Sivan Koil and Pillayar Koil etc., in Naganathapuram, Karaikudi. In (2) 52 C 809; 87 Ind. Cas. 305; A P R 1925 P C 139; 52 I A 245; 23 A L J 537; 49 M L J 30; (1925) M W N 431; 41 C L J 551; 2 O W N 557; 27 Bom. L R 1064; 22 L W 492; 30 C W N 25; 3 Pat. L R 315 (P C.)

para. 4 the further statement occurs that the village of Veeriyandandal belongs to and is in the enjoyment of the said Devasthanam. Looking at the plaint as a whole it is absolutely clear that no personal rights of the plaintiffs were asserted in the suit. Although the names of the managers are mentioned as the plaintiffs and although they have been described in the plaint as trustees, it is clear in the eye of the law that they are merely the managers, the deities themselves being the true plaintiffs in fact. The proper form of a suit where a deity figures as party has been the subject-matter of consideration by a Full Bench of the Allahabad High Court in *Jodi Rai v. Basdeo Prasad* (3). The proposition was there laid down that inasmuch as an idol is a juristic person capable of holding property, a suit in respect of property in which an idol is interested is properly brought or defended in the name of the idol, although *ex necessitate rei* the proceedings in the suit must be carried on by some person who represents the idol, usually the manager of the temple in which the idol is installed.

Regarding the suit, as we must regard it, as a suit instituted by the presiding deities of the three temples, we must hold that a notice issued on behalf of the Devasthanams stating their names and the village in which they are situate is a proper notice within s. 49, Mad. Court and Wards Act. It follows that the appeal must be allowed and the decree of the learned Subordinate Judge restored except in regard to the portion of S. No. 3 in Veeriyandandal village claimed in the suit but not referred to in the notice. The respondents must pay the costs of the appellants both in this Court as well as in the District Court.

N.-D.

Appeal allowed.

(3) 33 A 735; 11 Ind. Cas. 47; 8 A L J 817 (F B.)

LAHORE HIGH COURT

Second Appeal No. 861 of 1940

October 17, 1940

BECKETT, J.

JALAL-UD-DIN—PLAINTIFF—APPELLANT
versusMIRAN BAKHSH AND ANOTHER—
DEFENDANTS—RESPONDENTS

Transfer of Property Act (IV of 1882), s. 54—Mortgagor entering into contract with third person to sell property before mortgaging it but sale completed after mortgage—Mortgagee, when entitled to precedence over purchaser.

An agreement of sale gives the purchaser an equitable title as owner in the property concerned. But, ordinarily, this is good only against the vendor himself, and does not operate against a person who obtains a legal interest in the same property in good faith without notice of the equitable title. Hence where the mortgagor enters into an agreement with a third person to sell property before mortgaging that property and the sale is completed after the mortgage, the mortgagee is entitled to precedence over the purchaser, if he had acted in good faith and had no notice of the agreement of sale.

S. A. from a decree of the Senior Sub-Judge, Hoshiarpur, dated March 21, 1940.

Mr. Shamair Chand, for the Appellant.

Mr. D. N. Aggarwal, for Respondent No. 1.

Judgment.—Only two points have been urged by Mr. Shamair Chand in this case. The suit was brought for recovery of rent said to be due from the defendant in respect of certain land which the defendant himself claims to be occupying as mortgagee. In respect of part of the land this defence has been upheld. Its validity, however, depends on whether the mortgage can have precedence over a sale of about the same time in favour of the person under whom the plaintiff claims. The mortgage took place on December 4, 1929. The sale is not shown to have been completed before October 24, 1930, but there was a preliminary agreement to sell on October 12, 1929, and Mr. Shamair Chand claims that this gives the sale precedence over the mortgage. An agreement of sale gives the purchaser an equitable title as owner in the property concerned. But ordinarily, this is good only against the vendor himself, and does not operate against a person who obtains a legal interest in the same property in good faith without notice of the equitable title. It is not suggested in this case that the mortgage did not create a legal interest or that the interest was not obtained in good faith, or that the mortgagee had notice of the agreement of sale. The other point relates to a question of calculation, which was not raised in the grounds of appeal. The appeal accordingly fails and is dismissed with costs.

S.

Appeal dismissed.

MADRAS HIGH COURT

City Civil Court Appeal No. 23 of 1937

March 27, 1939

SOMAYYA, J.

• RAHMAT BI SAHEBA AND OTHERS—
APPELLANTS

versus

R. KRISHNA DOSS LALA—RESPONDENT

Madras City Tenants' Protection Act (III of 1922), ss. 11, 5—Notice under s. 11, if condition precedent to filing of suit—Notice, whether must be served to all joint tenants and their assignees—Defect of non-service, if cured by subsequently making them parties—Compensation—How, determined—Civil Procedure Code (Act V of 1908), O. VI, r. 18—Amendment for adding more defendants allowed but not embodied in plaint—Court after delivering judgment ordering its officers to carry out amendment—O. VI, r. 18 held sufficiently complied with.

It is clear from s. 11, City Tenants' Protection Act that the issue of the necessary notice is a condition precedent to the filing of the suit itself. *Prima facie*, when the section talks of notice to the tenant, it must include all the tenants if there are several tenants in respect of the same land. Hence all the joint tenants and their assignees must be served with a notice and a notice sent to one joint tenant only, is not sufficient to found suit for ejectment against all the tenants. Particularly in the case of the City Tenants' Protection Act there is greater reason to hold that the plaintiff must serve notice upon the persons who are entitled to the leasehold interest at the time when he seeks to eject. The defect of non-service cannot be cured by adding some of them as defendants later on. 120 Ind. Cas. 455 (2), 87 Ind. Cas. 708 (3) and 18 Ind. Cas. 632 (6), relied on, 179 Ind. Cas. 328 (4) and 122 Ind. Cas. 20 (5), distinguished, 48 Ind. Cas. 277 (1), explained and distinguished. [p. 790, col. 1; p. 792, col. 1.]

What has to be decided in determining under the City Tenants' Protection Act is the lowest value that prevailed within seven years before the date of the decree or of the order in ejectment. [p. 792, col. 2.]

An application for amendment of the plaint by adding some more defendants, made by the plaintiff was allowed. The amendment was not, however, embodied in the plaint till the date of the judgment. After delivering the judgment the Court ordered its officers to carry out the amendment:

Held, that the provisions of O. VI, r. 18, Civil P. C., were sufficiently complied with.

C. A. against the decree of the Principal City Civil Judge of City Civil Court, Madras, dated October 8, 1936.

Mr. R. Krishna Iyer, for the Appellants.

Mr. S. A. K. Shah, for the Respondent.

Judgment.—Defendants Nos. 1 to 4 are the appellants in this appeal which is directed against the decree of the City Civil Judge in O. S. No. 728 of 1935. The suit was filed by the plaintiff to eject the defendants from the land and superstructure bearing Door No. 46, Fakir Sahib Second Lane, Triplicane. The suit was originally filed against defendant No. 1 only on the footing that she alone was the tenant of the suit property on a monthly rent of Rs. 2. The plaintiff averred that the tenancy was terminated by

a notice dated March 9, 1935, in which the plaintiff offered compensation for the value of the superstructure under the provisions of the Mad. City Tenants' Protection Act. Defendant No. 1 filed a written statement pleading that she was not interested in the property in suit and that three other persons, who were later on added as defendants Nos. 2, 3 and 4, were the persons entitled to the suit property as tenants. She stated that under a sale-deed dated June 10, 1912, she, her husband, the late Dawood Saheb, and her son Abdul Wahab had purchased the leasehold interest together with the superstructure from the previous tenant, that her husband's one third share now vested in defendant No. 4, that the one-third share belonging to herself was sold by her to defendant No. 3 Zulaika Bi by a deed dated December 4, 1934, and that the tenants who were really interested are defendants Nos. 2, 3 and 4. After the statement was filed, an application was made to the City Civil Judge to implead the three persons mentioned by defendant No. 1 as party defendants to the suit. The lower Court granted this application by its order dated October 7, 1935, but it would appear that the amendment was not incorporated in the plaint until the date of the judgment. Nevertheless, summonses were taken to the newly added defendants and they pleaded among other things that they were not served with the requisite notice under the Mad. City Tenants' Protection Act, and that, therefore, the suit was not maintainable against them under s. 11 of the Act. They also stated that the plaint disclosed no cause of action against them and that in any event they were entitled to protection under the Mad. City Tenants' Protection Act, and that they were prepared to pay the value of the land and to buy the same and requested the Court to fix the value in accordance with the terms of the Act. Three issues were raised, (1) whether the suit was bad for want of proper notice to quit, (2) whether the suit was maintainable as framed and (3) what is the amount of compensation payable to the plaintiff in case the defendants desire to acquire the land.

On Issue No. (1) the lower Court held that the suit was not bad for want of proper notice. On Issue No. 2 it held that the suit was maintainable as framed and, on Issue No. 3 it fixed compensation originally at the rate of Rs. 1,800 per ground and varied the same on a review application made to it increasing it to Rs. 2,050 per ground. Defendants appeal to this Court. It is argued, on their behalf that the view of the lower Court

on Issues Nos. 1 and 2 is wrong and that the finding of the Judge on Issue No. 3 is vitiated by a consideration of number of documents which are irrelevant and not really admissible for the purpose of determining the value of the suit land in accordance with the terms of the Act.

On the first question, the view expressed by the learned Judge is that when a tenant dies or assigns his interest, there is no need to give notices to all the heirs in the former case or to the assignee in the latter case. He finds that the plaintiff had no notice of the claim of the other defendants and that, therefore, he was entitled to proceed with his suit for ejectment after notice only to defendant No. 1. The question is, whether the notice given to defendant No. 1 alone is enough under the circumstances of this case. The leasehold interest in the land appears to have been originally held by one Mahomed Azeemuddin Sahib. He sold the site and the superstructure (he had only a leasehold interest in so far as the site is concerned) to three persons under Ex. 1 dated June 10, 1912. The vendees were (1) Dawood Saheb, (2) his wife Rahamat Bi Ammal and (3) his minor son Abdul Wahab Sahib. Rahamat Bi is defendant No. 1 in the suit and Abdul Wahab is defendant No. 2; he is now said to be a lunatic. By Ex. 2 dated January 21, 1915, Dawood Sahib gifted away his interest in the site and superstructure to Abdul Sukkur Sahib, his son by his senior wife, and to Fatima Bi, his daughter who is defendant No. 4. It is common ground that the right of Abdul Sukkur Sahib has vested in defendant No. 4. In 1934, defendant No. 1 conveyed her one-third share to defendant No. 3 by a registered deed.

From 1912, the date of Ex. 1, the rent due to the landlord seems to have been paid by the husband and wife, namely Dawood Sahib and Rahamat Bi and receipts were given in their names. Even after the death of Dawood Sahib which occurred in or about 1917 rent receipts were issued in the names of both Dawood Sahib and defendant No. 1. Exhibit 4 series which take us up to 1931 are all in the names of these two. It is said that even afterwards down to 1935 receipts were issued in the names of defendant No. 1 and Dawood Sahib, her deceased husband. Of defendants Nos. 2, 3 and 4, defendant No. 2 is a lunatic; defendant No. 3 is a minor and defendant No. 4 is a major daughter. There is a dispute as to whether defendant No. 4 is married and is living with her husband or whether she is unmarried and is living with defendant

No. 1. It seems to me to be unnecessary to decide which version is true. In either case she cannot be represented by defendant No. 1. The question that arises for decision is whether notice was necessary to defendants Nos. 2, 3 and 4 under s. 11, City Tenants' Protection Act. It is clear from that section that the issue of the necessary notice is a condition precedent to the filing of the suit itself. Section 11 runs thus :

"No suits in ejectment or applications under s. 41, Presidency Small Cause Courts Act, 1882, shall be instituted or presented against a tenant until the expiration of three months next after notice in writing has been given to him requiring him to surrender possession of the land and building, and offering to pay compensation for the building and trees, if any, and stating the amount thereof."

The prohibition contained in the section is against the institution itself. Under the analogous provisions of s. 28, cl. 2, Prov. Inso. Act, it has been held that leave of the Insolvency Court is a condition precedent to the filing of a suit by a creditor and that subsequent sanction cannot cure the initial defect. In this particular case, beyond adding them as parties later, it is not pretended that the requisite three months notice was given to them before they were sought to be impleaded as party defendants. Hence if they are entitled to notice it is clear that the suit must fail for want of requisite notice and the defect cannot be cured by their being added as defendants later on. So we go back to the question whether notice is necessary.

It is argued that the defendants are all joint tenants and that notice to one of them is enough. *Prima facie*, when the section talks of notice to the tenant, it must include all the tenants if there are several tenants in respect of the same land. The policy of the Act is to give the tenants a right to acquire the land itself at a proper value. It is obvious that while one joint tenant may not be in a position to acquire the land another might be in a position to do so and obviously the reason of the rule requires that notice should be given to all of them. The appellant relies upon the decision of the Judicial Committee reported in *Harihar Banerjee v. Ramshashi Roy* (1). There the Judicial Committee was concerned with the question whether there was proof of service of notice to quit upon all the joint tenants. There the notices were addressed to all the joint tenants and were actually sent to each and every one of the joint tenants. What was

wanting was only proof that these notices reached the various addressees who were all joint tenants. Dealing with such a case the Judicial Committee held that proof of service of notice on one joint tenant would be *prima facie* evidence that the notice reached the other joint tenants. It is not an authority for the proposition contended for that no notice need be sent to all the joint tenants and that if a notice is sent only to one joint tenant it would be enough to found a suit for ejectment against all the tenants. This distinction is pointed out in two decisions of the Calcutta High Court. It is one thing to say that where notices were actually sent proof of service on one may be enough but it is another thing to say that no notice at all need be sent to each and every one of the joint tenants. In *Bodardoja v. Ajijuddin* (2) at p. 15, this distinction is pointed out. Referring to a prior decision of the Calcutta High Court, *Bejoy Chand v. Kali Prasanna* (3), the learned Judges state :

"On examination of the facts of that case however it appears that all that has been laid down in that case is that the notice, in order to give rise to this presumption, must be addressed to all the joint tenants and that, where the notice was addressed to one of the joint tenants, the mere service of the notice on the other joint tenants is not sufficient notice to quit according to law. In the present case the notices that were issued were addressed to all the joint tenants."

In the decision reported in *Bejoy Chand v. Kali Prasanna* (3), it was laid down, that in order to bind a joint tenant the notice to quit must be addressed to and served on him. They also held that the question whether service of notice on one joint tenant is sufficient service on the other joint tenants is a question of fact to be decided on the facts of each case having regard to the presumption laid down in *Harihar Banerji v. Ramshashi Roy* (1). The decision in *Harihar Banerji v. Ramshashi Roy* (1), was referred to in the judgment and it was pointed out that in the case that went up to the Privy Council the notices were addressed to all the joint tenants (*vide pp. 622 and 623**). I therefore hold that as the notice served on defendant No. 1 was addressed only to her, it is not enough to sustain the present action. In the present case after the assignment under Ex. 1, Daudood Sahib, defendant No. 1, and defendant No. 2 all were tenants-in-common. It is not pretended that defendant No. 2 was given any notices at all. Defendant No. 1's hus-

(1) 46 C 458; 48 Ind. Cas. 277; A I R 1918 P C 102; 45 I A 222; 23 C W N 77; 16 A L J 969; 35 M L J 707; 29 C L J 117; 9 L W 148; 25 M L T 159; 21 Bom. L R 522; (1919) M W N 471; 1 U P L R (P C) 56 (P O).

(2) 57 C 10 (15); 120 Ind. Cas. 455; A I R 1929 Cal. 651; 33 C W N 559; 49 C L J 555; Ind. Rul. (1930) Cal. 39.

(3) 29 C W N 620; 87 Ind. Cas. 708; A I R 1925 Cal. 752.

* Pages of 29 C. W. N.—[Ed.]

band's interest devolved by successive transactions on defendant No. 4, and defendant No. 1's right devolved upon the 3rd. The notice was addressed only to defendant No. 1, and was not addressed to any of the other defendants. Hence, this suit is not maintainable against defendants Nos. 2, 3 and 4.

It is then argued that defendants Nos. 2, 3 and 4 were all living with defendant No. 1, that defendant No. 2, being a lunatic and defendant No. 3, a minor, notice could only be given to defendant No. 1, under whose protection they are living, and that even as regards defendant No. 4, on the footing that she is an unmarried girl living with defendant No. 1, notice to defendant No. 1 would be enough. Whatever the position may be as regards defendants Nos. 2 and 3, whether the omission to state that the notice is given to defendant No. 1 as also representing defendants Nos. 2 and 3, it is clear that so far as defendant No. 4, is concerned, since she is a major, notice to defendant No. 1, is not enough. Merely because she is living with defendant No. 1, her right to have a proper notice issued to her cannot be gainsaid.

It is then urged that an assignee of a lessee is not entitled to notice to quit under the general law. It is said that an assignment of a lease operates only as a sub-demise under the Indian law and that therefore notice is unnecessary. Reliance was placed on the decisions of the Judicial Committee in *Ram Kinker v. Satyacharan* (4), and *Hunsraj v. Bejoy Lal Seal* (5). Neither of these decisions lays down any such proposition. What is laid down is that a sub-demise of the whole of the unexpired term does not operate as an assignment of the lease under the Indian law though under the English Law the position would be otherwise. In the decision reported in *Hunsraj v. Bejoy Lal Seal* (5), the facts are these: The suit was brought to enforce forfeiture of a leasehold interest for an alleged breach of a covenant not to assign contained in the lease. The lessee executed a mortgage by way of a sub-lease for the whole of the unexpired term. It was contended that this amounted to a breach of the covenant against assignment and that the lessor was entitled to enforce the forfeiture.

(4) A I R 1939 P C 14; 179 Ind. Cas. 328; 66 I A 50; I L R (1939) 1 Cal. 283; I L R (1939) Kar. 78; 43 C W N 281; 49 L W 229; 1939 O L R 46; 5 B R 258; 11 R P C 134; 1939 O W N 43; 1939 I R D 144; (1939) 1 M L J 544; 69 C L J 254; 41 Bom. L R 672; (1939) M W N 601 (P C).

(5) 57 C 1176; 122 Ind. Cas. 20; A I R 1930 P C 59; 57 I A 110; (1930) A L J 131; Ind. Rul. (1930) P C 100; 31 L W 309; 34 C W N 342; 32 Bom. L R 550; 51 C L J 120; 58 M L J 293; (1930) M W N 334 (P C).

The suit was to recover possession of the property on the ground of forfeiture. Sir John Wallis, delivering the judgment of the Board held that a sub-lease by a lessee for the unexpired residue of the term does not operate as an assignment of the lease. He pointed out that in this respect the Indian law differs from the English Law. The prohibition was only against an assignment and so it was held that there was no forfeiture.

In *Ram Kinker v. Satyacharan* (4), the lessee created a mortgage of his leasehold interest by way of sub-lease of the whole of unexpired term of the mortgage. This was done by means of what is known as an English mortgage as defined by s. 58, cl. (c), T. P. Act. The lessor filed a suit for rent impleading the mortgagees as well as the mortgagors and wanted a decree against both. The mortgagees resisted the suit by pleading that they had not taken possession of the property and that they were not liable for the suit claim. The question that had to be decided was whether the document by which the mortgagees claimed their right was an absolute assignment. If it was an absolute assignment the assignee would, by the doctrine of privity of estate, be liable to the lessors for rent even though the original lessee (if he happens to be the person who entered into contract of lease) may continue to be liable on his contract. The Judicial Committee pointed out that even though an English mortgage is in the form of absolute sale, still it is not an absolute assignment of the lease itself because the mortgagor has still a legal interest in the property mortgaged. They therefore held that the mortgagees were not the absolute legal owners of the leasehold interest and that therefore they were not liable to the lessor for rent. They referred to the earlier decision in *Hunsraj v. Bejoy Lal Seal* (5) and held that the principle of that decision governed the case before them. Neither of these decisions in an authority for the proposition contended for by the appellant that an assignment of a leasehold interest operates only as a sub-demise. A sub-demise of the whole of the unexpired portion may not amount to an assignment and will not be so under the Indian law, but that is not the question with which we are concerned.

It is then urged that the plaintiff had no notice at all of the original assignment by Dawood Sahib and that therefore the lessor was entitled to treat Dawood Sahib as his tenant. If so, the plaintiff is met with the

difficulty, that Dawood Sahib died in the year 1917 or so, and the landlord seeking to eject, is bound to seek out the heirs and to serve the necessary notice on the person who at the time of the notice is actually entitled to the leasehold interest. If therefore, the plaintiff was not bound to give notice to the assignees of Dawood Sahib and was entitled to treat Dawood Sahib as his tenant in spite of his having assigned away the interest, then after Dawood Sahib's death the plaintiff did not give notice to his heirs who are defendants Nos. 1 to 4, defendant No. 1 being the widow and defendants Nos. 2 to 4 the children of Dawood Sahib. The view expressed by the lower Court that if the tenant happens to be a Muhammadan and he died, there would be a number of persons who would be entitled to fractional interests and that therefore the landlord is not bound to serve notices on all is begging the question. If the landlord is bound under the law to serve notices on the heirs it is no answer to say that there might be a number of heirs and that it would be difficult to find out and serve all of them.

Particularly in the case of the City Tenants Protection Act there is greater reason to hold that the plaintiff must serve notice upon the persons who are entitled to the leasehold interest at the time when he seeks to eject. As regards the right of an assignee of a lessee it was laid down in *Kesavaswami Ayyar v. Narayanan Chetti* (6) that the landlord was bound to implead the assignee or the heir-at-law in a proceeding which he takes either for recovery of the land or for sale of the holding. It is pointed out that without impleading the assignee or the heir-at-law the proceeding would not bind the assignee or the heir-at-law: see also *Muthukaruppa Pillai v. Annamalai Chettiar* (7). As regards the second issue whether the amendments not having been carried out in the original plaint the suit is bad against defendant Nos. 2 to 4, O. VI, r. 18, Civil P. C., has got to be considered. That Rule provides that where an amendment has to be carried out in the plaint within the time limited by the order or if no time is fixed within 14 days of the order unless the Court extends the time later on. In this case the plaintiff was absolutely indifferent and no amendments were actually embodied in the plaint.

(6) 24 M L J 228; 18 Ind. Cas. 632; 13 M L T 95; (1913) M W N 93.

(7) 69 M L J 297; 157 Ind. Cas. 896; A I R 1935 Mad. 785; (1935) M W N 884; 8 R M 173; 42 L W 585.

But my attention is drawn to an application made on the date of the trial, that is October 2, 1936, on which date the plaintiff applied by C. M. P. No. 2534 of 1936, for extension of time to carry out the amendment in the plaint. It does not appear whether notice of this application was given to the other side but an order was passed on that date that orders will be passed along with the judgment and when the judgment was delivered on October 8, the Court said "amendment will be made by the Court." The Judge directed the officers of the Court to carry out the amendment and this appears to have been done. It is possible to view this as a sufficient compliance with the provisions of O. VI, r. 18. I am not disposed to interfere with the judgment of the lower Court on this question.

On the third question the decision of the lower Court is very unsatisfactory. What has to be decided under the Act is the lowest value that prevailed within seven years before the date of the decree (in the case of suits) or of the order in ejectment (in the case of applications under s. 41, Presidency Small Cause Courts Act). In this case the point of time is October 1936; hence the standard fixed is the lowest value that prevailed between October 1929 and October 1936. Various documents have been relied upon by the lower Court which consist of decrees and judgments showing what values were fixed under the Act in 1930 and in other years. The value fixed in those suits would be the lowest value that prevailed between 1923 and 1930 and so on; it is of no use whatever when we have to see what was the lowest value that prevailed between 1929 to 1936. It is well known that prices of lands fell considerably between 1930 and 1934. For this suit the lowest value that prevailed during this period is the standard. Thus, Exs. E, F, J, K and L, would all be irrelevant. Then the Judge refers generally to suits that came before him within the last ten years and refers to the prices fixed in those suits. Great caution has to be observed in referring to the values fixed in other suits in view of the provisions of the Act. In the view I take on the first question, I do not think it necessary to examine fully the relevant documentary and oral evidence that bears on this question. If it were necessary to decide it I would fix the value at Rs. 1,750 a ground. On my finding on the first question the appeal is allowed and the suit is dismissed with costs throughout.

N.-S.

Appeal allowed.

PATNA HIGH COURT

Criminal Revision No. 3 of 1941

January 27, 1941

DHAVLE, J.

DWARKA SINGH AND OTHERS—

PETITIONERS

versus

Babu JAMUNA SINGH AND OTHERS—

OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 147—Dispute relating to right exercisable only at particular seasons—Magistrate starting proceeding under s. 147 cannot drop it when season is over and cannot pass order which could only be properly passed after hearing all evidence.

When the dispute relates to a right exercisable only at particular seasons, it cannot be the law that it is open to the Magistrate to start a proceeding under s. 147 not only to drop it when the season is over but in addition to pass an order against one of the parties which could only be properly passed after hearing all the evidence that the parties may desire to produce in the case. Where a Magistrate is satisfied that a dispute requiring to be dealt with under the ss. 144, 145 and 147 does exist, it is clearly necessary that he should proceed with the matter in accordance with the law, and the High Court cannot permit him to abuse the procedure by dropping the proceedings on an untenable ground and indirectly passing an order which he could not directly have passed without hearing all the evidence.

Cr. R. against an order of the Sub-Divisional Officer, Jamui, dated November 8, 1940.

Mr. K. K. Banerji, for the Petitioners.

Mr. N. K. Prasad II, for the Opposite Party.

Order.—This is an application in revision on behalf of the first party in a proceeding under s. 147, Criminal P. C., which was drawn up on June 4; last on a Police report of April 9, reporting that there was an apprehension of a breach of the peace between the parties as the second party desired to make *pucca* a *bund* of stream called the Nata, so much so that the Sub-Inspector had had to depute a constable to the spot to preserve the peace pending the orders of the Magistrate. Upon this report the Magistrate first passed orders under s. 144, Criminal P. C., restraining both parties from going to the site. The proceeding under s. 147 went on for sometime and then on August 13 the learned Magistrate noted that the

"parties again say that the question may be decided by local inspection alone and it may not after all be necessary to examine all the witnesses some of whom are not readily available."

The Magistrate held a local inspection as desired by the parties the results of which were noted in the order sheet. In his next order the Magistrate said that there was again a talk of compromise through the intervention of the Court, that both parties

agreed to the terms and that they promised to file "petitions" to that effect. On the next date the second party filed a petition accordingly, but the first party raised further disputable points. The Magistrate remarked that this was very unfortunate, and he dropped the proceedings on the ground that there was no imminent danger of a breach of the peace as the river Nata runs only during the rainy season and that therefore he was not competent to decide the question on the merits. He added that the first party, since they refused to compromise, would have ample time to go to the Civil Court and get their rights defined there.

It has been contended by the learned Advocate for the petitioners that the order of the Magistrate calls for interference on more than one ground. In the first place it was not correct for the Magistrate to say that he was no longer competent to decide the question on the merits because there was no imminent danger of a breach of the peace. Section 147 does not require such imminent danger for its application, for "a dispute likely to cause a breach of the peace regarding any alleged right of user of any land or water" is enough for initiating proceedings under the section. The learned Advocate has further pointed out that as the river Nata runs only during the rainy seasons, the dispute was of the kind specifically referred to in the proviso to sub-s. (2) of the section—namely a dispute regarding a right exercisable only at particular seasons or on particular occasions. The *bund* would only be required in the rains and could only be made *pucca* in the dry season, and proceedings had in fact been commenced under s. 144 in April and under s. 147 in June. Nothing had happened since then to improve the relations of the parties; on the contrary the willingness of the second party to accept the compromise suggested by the Magistrate and the failure of the first party to do so could only have aggravated the situation. In dropping the proceedings moreover, the learned Magistrate indirectly made an order against the first party by observing that since they refused to compromise, they would have ample time to go to the Civil Court and get their rights defined there.

The inquiry under s. 147 is to be conducted in the manner provided in s. 145, and sub-s. (5) of s. 145 provides that nothing in the section shall preclude any party from showing that no such dispute as led to the initiation of the proceedings exists or has existed and that in such case the Magistrate

shall cancel his initial order. It cannot be said that the order passed by the Magistrate was in the spirit of this provision at all. The learned Advocate who appears for the second party has endeavoured to support the order by urging that the Magistrate was entitled to drop the proceedings at any time if he was satisfied that no breach of the peace was likely at the time. But it is to be remembered that the dispute in the present case relates to a right exercisable only at particular seasons and it cannot be the law that when such a dispute arises it is open to the Magistrate to start a proceeding under s. 147 not only to drop it when the season is over but in addition to pass an order against one of the parties which could only be properly passed after hearing all the evidence that the parties may desire to produce in the case. It is true, as contended by the learned Advocate for the second party, that whether a dispute is likely or not is a matter for the Magistrate and not for this Court. That is clear from the terms of such sections as 144, 145 and 147 but where a Magistrate is satisfied that a dispute requiring to be dealt with under these sections does exist, it is clearly necessary that he should proceed with the matter in accordance with the law, and this Court cannot permit him to abuse the procedure by dropping the proceedings on an untenable ground and indirectly passing an order which he could not directly have passed without hearing all the evidence. The order in question must therefore be set aside and the Magistrate directed to proceed in accordance with the law and pass a proper order under the section under which he was exercising his jurisdiction.

D.

*Order set aside.***ALLAHABAD HIGH COURT**

Criminal Appeal No. 1125 of 1940

March 3, 1941

GANGA NATH, J.

CHHALLU—APPELLANT

versus

EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), ss. 304-A, 326—S. 304-A must be read with ss. 336 to 338—Accused while using spear against his assailants accidentally striking deceased who had intervened to separate fighting persons—Accused is guilty under s. 326 and not under s. 304-A.

Section 304-A, Penal Code, must be read along with ss. 336, 337 and 338, of the Code. All the sections are confined in their operation to acts done without any criminal intent, apart from the rashness or negligence which is their essential ingredient. Reading s. 321, with s. 322, it is obvious that the guilt of an accused

person remains just the same whether in seeking to inflict simple hurt or grievous hurt, as the case may be, upon one person he actually causes the intended hurt to that person or to some other.

Where in using his spear against his assailants the accused accidentally struck the deceased who had intervened to separate the fighting persons:

Held, that the accused was guilty under s. 326 and his conviction under s. 304-A was illegal.

Cr. A. from an order of the Additional Sessions Judge, Meerut at Muzaffarnagar, dated November 18, 1940.

The Assistant Govt. Advocate, for the Crown.

Judgment.—This is an appeal by Chhallu against his conviction and sentence under s. 304-A, I. P. C. He has been sentenced to six months rigorous imprisonment. A fight took place between the appellant and Raja Ram on one side and Shankar and Kala on the other. Girwar deceased came and intervened. The prosecution evidence shows that the appellant had a spear in his hand with which Girwar was stabbed, and he died after some time. It has been found by the learned Sessions Judge—and I think rightly—that the appellant did not intend to strike Girwar and it was by accident that he was struck while he was intervening in separating the persons who were fighting with one another. The learned Sessions Judge has convicted the appellant under s. 304-A, I. P. C. Section 304-A must be read along with ss. 336, 337 and 338, I. P. C. All the sections are confined in their operation to acts done without any criminal intent, apart from the rashness or negligence which is their essential ingredient. In this case there can be no doubt that the appellant was using his spear against his assailants. Where a man strikes at another with a spear, he is committing a criminal offence independently altogether of any element of rashness which may be involved in his striking by chance another person who might come to intervene. Reading s. 321, I. P. C., with s. 322, I. P. C., it is obvious that the guilt of an accused person remains just the same whether in seeking to inflict simple hurt or grievous hurt, as the case may be, upon one person he actually causes the intended hurt to that person or to some other. The appellant must therefore be held guilty under the provisions of s. 326, I. P. C. His conviction under s. 304-A is illegal. I therefore set aside his conviction under s. 304-A, I. P. C., and in lieu thereof convict him under s. 326, I. P. C. The sentence of six months rigorous imprisonment in a case like this cannot be regarded as severe. It is therefore maintained.

D.

Order accordingly.

MADRAS HIGH COURT

Appeals Nos. 303 and 304 of 1938

January 4, 1940

PANDRANG ROW and HORWILL, JJ.

MANTHIRI GOUNDAN—APPELLANT

versus

ARUNACHALAM GOUNDAN

AND ANOTHER—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. IX, r. 13, O. XXI, r. 90, O. XXVI, r. 1—Application to restore petition to set aside sale which has been dismissed for default is not maintainable—Application to set aside sale, if can be dismissed on ground that applicant is adjudicated insolvent—O. XXVI, r. 1, applicability of, to execution proceeding—Practice—Adjournment—Illness of party—Court's duty.

An application to restore to file the petition to set aside sale which had been dismissed for default is not maintainable. 134 Ind. Cas. 806 (1), relied on.

The words "whose interests are affected by the sale" in O. XXI, r. 90 must be construed in their ordinary sense. It is too much to say that merely because a person is adjudicated insolvent his interests are not adversely affected by the sale of property that belonged to him before adjudication. The insolvency of the judgment-debtor does not *per se* render it incompetent for him to continue proceedings initiated by him under O. XXI, r. 90. 146 Ind. Cas. 521 (2) and 145 Ind. Cas. 855 (3), followed, 180 Ind. Cas. 267 (4), relied on, 94 Ind. Cas. 642 (6) and 154 Ind. Cas. 96 (7), distinguished.

The provisions relating to the issue of a commission do not apply to execution proceedings.

Ordinarily a party is entitled to be given a reasonable opportunity for being physically present himself when his case is being heard, and if his physical presence is made impossible by reason of illness, justice requires that he should be given an adjournment for the purpose of enabling him to be present.

As against the orders of the Sub-Judge, Coimbatore, dated December 9, 1937.

Mr. S. Thayagaraja Ayer, for the Appellant.

Mr. V. C. Viraraghavachari, for the Respondents.

Pandrang Row, J.—These appeals are connected. One is from an order dismissing the application of the appellant to restore to file the petition to set aside a sale presented by him which had been dismissed for default; and the other is an appeal from the order dismissing the petition to set aside the sale. The appellant who was the first defendant in O. S. No. 18 of 1934 had been adjudicated an insolvent and the application was made by him to set aside the sale on various grounds. That application was dismissed for default on December 9, 1937. An application to restore the petition to file was made on the next day and that also was dismissed. As a result we have two appeals from the two orders which were passed

against the appellant. So far as the application made on December 10, 1937 to restore the petition to file is concerned it is not seriously argued that such a petition was competent. The learned Subordinate Judge relied on the Full Bench decision in *Arunachalam v. Veerappa Chettiar* (1) and his finding to the effect that the petition to restore the application to set aside the sale is not maintainable is obviously right. It follows from this that C. M. A. No. 304 of 1938 has no substance and must be dismissed. It is accordingly dismissed with costs.

The other appeal which is from the order dismissing the application to set aside the sale is pressed mainly on the ground that the finding of the Court below that such an application made by the appellant is not competent because he had been adjudicated as an insolvent is wrong, and further on the ground that on the merits it had been held that the appellant was really disabled by illness from attending Court when his application came on for hearing and therefore, the application for adjournment that was made to the Court below on this ground of illness ought to have been allowed instead of being rejected. The first point, namely, the appellant's right to apply to have the sale set aside is governed by the provisions of O. XXI, r. 90, Civil P. C., under which the application was made. That rule provides that any person whose interests are affected by the sale may apply to set aside the sale. The question therefore, for decision is whether the appellant is not a person whose interests are affected by the sale of the properties in question. Those properties were undoubtedly his properties which had been mortgaged and which had been sold in execution of the mortgage decree. His adjudication as an insolvent and the vesting of these properties and all his other properties in the Official Receiver no doubt deprived him of all interest in the property *in presenti*. But does this mean that he ceased to be a person whose interests are affected by the sale of the properties?

The point is really concluded in our opinion by the Full Bench decision in *Subbaraya Goundan v. Veerappa Chettiar* (2). That was also a case of an insolvent and it

(1) A I R 1931 Mad. 656; 134 Ind. Cas. 806; (1931) M W N 533; 34 L W 360; 61 M L J 348; Ind. Rul. (1931) Mad. 854; 55 M 17 (F B).

(2) 65 M L J 719; 146 Ind. Cas. 521; A I R 1933 Mad. 851; 57 M 89; (1933) M W N 920; 38 L W 745; 8 R M 269 (F B).

was held that the insolvency of the judgment-debtor did not *per se* render it incompetent for him to continue proceedings initiated by him under O. XXI, r. 90, and that he had also a right to prefer an appeal from an order dismissing such an application. There is an earlier case reported at p. 359 of the same volume of the Madras Law Journal decided by a single Judge namely *Swaminatha Udayar v. Kalyanarama Iyengar* (3). We have also been referred to the latest Full Bench decision in *Ayyappa Naicker v. Kasiperumal Nayakar* (4) in which it is pointed out by the learned Chief Justice that the narrower meaning given to the phrase "whose interests are affected by the sale" in certain decisions is not the correct meaning to be given to those words but that the words should be taken to mean any person whose pecuniary interests are immediately and directly affected and that the decision in *Kathiresan Chettiar v. Ramasami Chettiar* (5) which interpreted the words to mean "having an interest in the property sold" was wrong, and that decision was overruled expressly by the Full Bench.

In these circumstances it is obvious that the learned Subordinate Judge was not right in coming to the contrary conclusion relying on the cases reported in *Hari Rao v. Official Assignee, Madras* (6) and *Arrepa Venkata Ramanayya v. Bali Bangarayya* (7) which were not concerned with the words with which we are now concerned, namely the words found in O. XXI, r. 90, but with the word "aggrieved" found in the Insol. Acts. It seems to us that the words "whose interests are affected by the sale" must be construed in their ordinary sense, and it is too much to say that merely because a person is adjudicated insolvent his interests are not adversely affected by the sale of property that belonged to him before adjudication. For instance, if the insolvent's property is really worth a lakh of rupees and is sold fraudulently for Rs. 10,000, his interests are clearly affected by such a sale. There is no reason why these words should be interpreted in a narrow sense; on the other hand,

as observed already, the point is concluded by authority which is binding on us and we would follow it even if it was not so binding because we take the same view. We find therefore, that the lower Court's finding on the right of the appellant to present the application to set aside the sale is wrong and that he is entitled to present the application and to ask the Court to adjudicate upon it.

The only other question that remains is whether the petitioner had a reasonable opportunity of being heard when his application came on for hearing. This would turn on the question of the propriety of the order of the Court below refusing to grant an adjournment which was applied for on December 9, 1937. It is not now seriously disputed that the appellant was really too ill to be present in Court on that day as he had undergone an operation for fistula. There is the evidence of the doctor who attended on him and there is really no room for doubt on the point; and it may therefore be taken as established that the appellant was really disabled by his illness from being present in Court when his application to set aside the sale came on for hearing. In these circumstances the Court below ought to have granted the adjournment that was applied for because the appellant was entitled to have a reasonable opportunity of being present in Court when his application was being heard on its merits. It is said that what the appellant wanted was merely to have his evidence taken on commission and this he could have done in spite of his illness which did not prevent his giving evidence in his own house. This loses sight of the fact that the appellant was not entitled as a matter of course to have a commission taken out because the provisions relating to the issue of a commission do not apply to execution proceedings.

Even otherwise, though there is this reference to examination of the appellant on commission for the purpose of obtaining his evidence, it does not mean that the appellant was not also anxious to exercise his right and privilege of being present himself in Court when his case was being taken up. Ordinarily a party is entitled to be given a reasonable opportunity for being physically present himself when his case is being heard, and if his physical presence is made impossible by reason of illness, justice requires that he should be given an adjournment for the purpose of enabling him to be present. In the present case the Court below was made aware of the illness which prevented

(3) 65 M L J 359; 145 Ind. Cas. 855; A I R 1933 Mad. 694; (1933) M W N 646; 38 L W 382; 6 R. M 140.

(4) I L R (1939) Mad. 374; 180 Ind. Cas. 267; A I R 1939 Mad. 250; 49 L W 110; (1939) 1 M L J 163; (1939) M W N 131; 11 R M 684 (F B).

(5) 27 M L J 302; 26 Ind. Cas. 93; A I R 1915 Mad. 541; (1914) M W N 871.

(6) 49 M 561; 94 Ind. Cas. 642; A I R 1926 Mad. 556; 50 M L J 358; 23 L W 599; (1926) M W N 364 (F B).

(7) 67 M L J 942; 154 Ind. Cas. 96; 40 L W 864; A I R 1935 Mad. 107 (1); 7 R M 412 (1).

the appellant from being present in Court and an application for adjournment had been made on this ground. In the circumstances we are of opinion that the lower Court erred in refusing to grant an adjournment and it follows that the appellant should be given a fresh opportunity of establishing his case. This appeal is therefore allowed and the order of the Court below dismissing the application to set aside the sale is set aside and the application is remanded to the Court below for fresh disposal on the merits according to law. The costs of this appeal will abide the event and should be provided for in the revised order to be passed by the Court below.

*N.-D.

Appeal allowed.

PATNA HIGH COURT

Appeal No. 27 of 1937

August 22, 1939

HARRIES, C. J. AND MOHAMMAD NOOR, J.
ANTARJYAMI NAIK AND OTHERS—

APPELLANTS

versus

B. S. RATH—RESPONDENT

Madras Hereditary Village Offices Act (III of 1895), ss. 5, 3—Service inam lands—Crops growing on, if can be attached—Inam holder ceasing to be useful—Whether ground for depriving him of aforesaid protection—Question as to how much of profits of inam land is necessary to maintain inam-holder—Courts, if can enter into—Madras Government, regarding inam lands as falling under Act—Patna Courts, if bound by it—Party conceding at trial and in first appeal that inam lands were protected—Party, if can resile from his admission in second appeal.

Growing crops on service inam lands cannot be attached in execution of a decree held against the holder of the inam lands. *Kannam Naidu v. Latchamma Dhora* (1) and 162 Ind. Cas. 1008 (2), relied on., 5 Ind. Cas. 125 (3), distinguished. [p. 798, col. 2.]

The fact that the holder of the inam lands has long since the grant, ceased to be useful, is no ground upon which a Court can hold that he is not entitled to the protection which the law gives to his property. 109 Ind. Cas. 730 (4), relied on. [p. 799, col. 2.]

The Court cannot go into the question as to how much of the profits of the inam lands is necessary to maintain the holder thereof. [p. 799, col. 1.]

The fact that the Madras Govt. regarded the inam lands as falling within the Mad. Hereditary Village Offices Act is not binding on the Patna Court. But where a party concedes at the trial and also in first appeal that the inam lands in question were protected under the aforesaid Act, it is not open to him in second appeal to resile from his admission and to contend that it was not established that the lands in question were protected under the Act. [p. 798, col. 2.]

A. from the appellate order of the District Judge, Ganjam Puri, dated August 4, 1937.

Messrs. L. Panigrahi and H. Mahapatra for the Appellants.

Mr. B. K. Roy, for the Respondent.

Harries, C. J.—This is an appeal by certain insolvents against an order of the learned District Judge of Cuttack made in an insolvency matter. The respondent who is the Official Receiver of Ganjam petitioned the Insolvency Court under ss. 4 and 5, Provincial Insolvency Act, 1920, praying: (1) for a declaration of the right of the Official Receiver to receive the usufruct arising from certain lands set out in Schs. A and B which were held by the insolvents from year to year including the crops then standing on the said lands, (2) for an injunction to restrain the insolvents from misappropriating the usufruct from the said lands including the crops then standing thereon.

The petition came before the learned Subordinate Judge of Berhampore and he held that the crops in question did not vest in the Official Receiver and accordingly dismissed the petition. On appeal the learned District Judge reversed the decision of the learned Subordinate Judge and held that these crops did vest in the Official Receiver. He remanded the case to the Court below to deal with the question of the injunction. Against that order this present second appeal has been preferred. The appellants were adjudicated insolvent and it appears that their debts amount to Rs. 50,000. Appellant No. 1 is the owner of certain land which is *sadar inam* and appellant No. 2 is the owner of a *naik inam*. These *inam* lands, it is alleged on behalf of the appellants, cannot be attached in execution of a decree and cannot vest in the Official Receiver on insolvency. The learned Subordinate Judge held that these *inam* lands were protected from attachment by s. 5, Mad. Hereditary Village Offices Act, 1895 (Act III of 1895) and as the land could not be attached in execution it could not vest in the Official Receiver by reason of s. 28 (5), Prov. Insol. Act. That section deals with what property vests in the Official Receiver when a person is adjudicated insolvent and sub-s. (5) is in these terms:

"The property of the insolvent for the purposes of this section shall not include any property (not being books of account) which is exempted by the Civil P. C. 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree."

Applying this sub-section, the learned Subordinate Judge held that the crops did not vest in the Official Receiver and dismissed the petition. The learned District Judge appears to have been of opinion that the protection afforded to these *inam* lands had ceased to exist when the holders of the

inam lands had ceased to perform any useful functions. He points out that the protection was given originally on the ground of public policy but in his view public policy of the present time demanded that the insolvent holders of these lands should pay their debts. He accordingly reversed the decision of the learned Subordinate Judge and held that the crops on these lands vested in the Official Receiver. On behalf of the appellants, it has been contended that the present case is clearly within the protection afforded by s. 5, Mad. Hereditary Village Offices Act, 1895. The Act applies to a number of offices which are enumerated in s. 3, and s. 5 is in these terms :

"The emoluments of village offices, whether such offices be or be not hereditary, and, in the scheduled districts as defined in the Scheduled Districts Act, 1874, all such emoluments and other emoluments granted or continued in remuneration for the performance of duties connected with the collection of the revenue or the maintenance of order, shall not be liable to be transferred or encumbered in any manner whatsoever and it shall not be lawful for any Court to attach or sell such emoluments or any portion thereof."

The learned District Judge came to the conclusion that there was a difference between the crops on the land and the land itself. He appears to have thought that though the land itself might be protected by this section the crops which were grown yearly on it would not be within the protection. Land, apart from the produce or the income to be derived from it, is of no value to an office-holder. If land is given as an emolument for the office then clearly what is intended is that the holder of the office should have the crops or the profits arising from the land year by year in payment for the duties which he has performed. In my view, it is impossible to separate the land from the crops growing thereon when dealing with this section. In fact the matter has been considered by the High Court of Madras in a number of cases and it must be remembered that this case comes from the Ganjam district which was within the jurisdiction of the Madras High Court until the new province of Orissa was created. In *Kannam Naidu v. Latchanna Dora* (1) it was held by a Bench that an attachment by a decree-holder of a crop growing on certain lands in a *zamindari* which were the *inam* service lands held by the judgment-debtor as a village servant, was illegal and was rightly set aside by the Court below. That case has been expressly approved in a later Full Bench case of the same High Court, namely

(1) 23 M 492.

Gokavarapu Swami v. Setheyya (2). In that case it was held that the attachment in execution of a decree of growing crops on pottor service *inam* lands is prohibited by the Mad. Hereditary Village Offices Act, 1895. It appears to me that we are bound to follow the Madras decision having regard to the fact that this case comes from the ex-Madras area.

Mr. Ray who appeared on behalf of the respondent has contended that the decisions of the Madras High Court have not been consistent and he has relied upon the case in *Khetrabaro Nawanagaram v. Sobhanapuram Harikrishna* (3), in that case it was laid down that s. 5 of the Act in question only prohibits the transfer of ownership and that a permanent lease of land forming the emoluments of an office did not amount to a transfer of ownership and was not prohibited under the Act. It appears to me that this case is clearly distinguishable from the other Madras cases which I have cited. If the holder of a service *inam* land leases the land he obtains the rent which is the emolument of his office. On the other hand, if he retains the land then the only way in which he can obtain the yearly emoluments is by appropriating the crops of the land which is in his possession. In my view, the law has been clearly and consistently laid down that growing crops on service *inam* lands cannot be attached in execution of a decree held against the holder of the *inam* lands.

On behalf of the respondent, Mr. Ray has argued that it was not established in this case that the land in question was service *inam* land and further that it had not been established that it was land protected by the Mad. Act, 1895. It is clear that the Govt. of Madras had recognized these particular service tenures as falling within the purview of the Act though it is not clear from the standing orders of the Board of Revenue, Madras, why they were so regarded. The fact that the Madras Govt. regarded them as falling within the Act would not bind this Court, but unfortunately for the respondent he has conceded expressly before the District Judge that these lands are lands which are protected by the Mad. Act of 1895. The only point which the respondent has made throughout this case is that the standing crops are not protected from attachment though the land itself is. In my view, it

(2) 59 M 354; 162 Ind. Cas. 1008; A I R 1936 Mad. 283; (1936) M W N 88; 43 L W 235; 8 R M 1074 (F B).

(3) 33 M 340; 5 Ind. Cas. 125; 20 M L J 417; 7 M L T 94.

is not open to the respondent in second appeal to take this point because it has been conceded in both Courts that the land is protected by this Act and by reason of that admission the appellants have not adduced any evidence showing precisely why the land does come within the purview of the Act. It was unnecessary for them to establish that having regard to the admission made on behalf of the Official Receiver.

It has been further contended by Mr. Ray on behalf of the respondent that even if the crops are protected by s. 5 of the Act then only such portion is protected as would be necessary to maintain the Sardar and Naik. This is a point that was never investigated in the Court below and there is no finding as to what would be necessary to maintain these two persons. In any event it appears to me that the Court cannot go into that question. These lands were granted to the predecessors of the insolvents in order that the profits arising therefrom should be their emoluments. Presumably the Govt. which granted these lands had come to the conclusion that the profits would provide only a sufficient remuneration for the services which they were called upon to perform. It is too late now to go into the question and to ask the Court to hold that very little is sufficient to remunerate the Sardar and Naik for any services which they may have to perform. Lastly, it was contended on behalf of the respondent that no services are in fact now rendered and that being so the whole purpose of this tenure has disappeared. Accordingly it was urged that the District Judge was right in holding that public policy now demand that the crops should be made available for the creditors. If this argument were sound then the land also should be made available for the creditors but in my view the contention which is put forward on behalf of the respondent has no force. The very same point was urged before their Lordships of the Privy Council in *Ashutosh Deo Ghatwal v. Bansidhar Shroff* (4). In that case it was found by the High Court that the service which the holder of a service tenure had to perform had long since ceased to be performed and the necessity for such service had long since disappeared. Accordingly the High Court held that the protection which the law had afforded to such a tenure no longer existed and that it was alienable. Dealing with that argument Lord Sumner who delivered the judgment of the

Board observed at p. 751* :

"The maxim *cessante ratione legis cessat ipsa lex*, or any corresponding rule has no application to the present case. The contention really amounts to a claim that a Court of law can inquire into the present utility of an ancient incident of tenure and annul it and its enjoyment by the ruling power, whenever in its opinion the incident has survived its usefulness. This is a matter of policy, not of interpretation of a legislative instrument or of application of general law, and is beyond judicial powers."

It may well be that these Sardars and Naiks have long since ceased to be useful, but that is no ground upon which a Court can hold that they are not entitled to the protection which the law gives to their property. In my judgment, the order of the learned District Judge cannot be sustained. The crops in question cannot be attached in execution of a decree and that being so they did not vest in the Official Receiver when the present appellants were adjudicated insolvent. Accordingly the Official Receiver had no right to the declaration sought for or an injunction. For these reasons I am satisfied that the order of the Court below must be reversed and accordingly I would allow this appeal, set aside the order of the Court below and restore the order of the learned Subordinate Judge. The appellants must have their costs in this Court and in the Courts below.

Mohammad Noor, J.—I agree.

D.

Appeal allowed.

*Page of 7 Pat.—[Ed.]

CALCUTTA HIGH COURT

Criminal Revision Petition No. 806 of 1940.
December 3, 1940

BARTLEY AND LODGE, JJ.

RAM RENU CHATTORAJ—ACCUSED

—PETITIONER

versus

EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), ss. 182, 211—False complaint against unknown persons, whether offence under s. 182 or s. 211—Complaint by Police, if competent.

An offence, constituted by a false complaint against unknown persons is not one under s. 211, Penal Code, but one under s. 182 of the Code. It is, therefore, within the competence of the Police authorities concerned to complain of that offence and within the competence of the Magistrate, on receiving that complaint, to issue summons under s. 182.

Messrs. *Satindra Nath Mookerjee* and *Samarendra Nath Mookerjee*, for the Petitioner.

Mr. *Sudhansu Sekhar Mukerjee*, for the Crown.

(4) 7 Pat. 744; 109 Ind. Cas. 730; A I R 1928 P C 177; 48 C L J 64; 55 M L J 7; 32 C W N 880; 9 P L T 549; 28 L W 798 (P C).

Order.—This rule must be discharged. The petitioner informed the Police that he had been assaulted and robbed by certain persons unknown. Before the conclusion of the Police investigation which was started the petitioner filed a *naraji* petition before the Magistrate. This complaint was enquired into and a number of witnesses examined after which the complaint was dismissed under s. 203, Criminal P. C.; meantime the Police reported the case to be a false and a complaint was lodged against the petitioner under s. 182, I. P. C. On that complaint the Magistrate directed summons to issue. It is against this order that the present rule is directed. Now it is clear that the offence, if any, constituted by a false complaint against unknown persons is not one under s. 211, I. P. C., but one under s. 182 of the Code. It was therefore within the competence of the Police authorities concerned to complain of that offence and within the competence of the Magistrate, on receiving that complaint to issue summons under s. 182. Whatever be the state of affairs with regard to the *naraji* petition it has nothing whatever to do with the proceedings instituted by the Police and it is entirely beside the question to argue that the facts underlying both the proceedings were the same facts. In the result the present rule is discharged and the case under s. 182, I. P. C., against the petitioner will proceed.

D.

Rule discharged.

LAHORE HIGH COURT

Criminal Revision No. 1975 of 1940

February 3, 1941

SKEMP, J.

ABDUL KHALIQ KHAN—CONVICT—

PETITIONER

versus

EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), s. 379—Accused seizing cattle of complainant for certain dues although the complainant had already paid them—Accused subsequently attempting to return animal—Accused held guilty under s. 379.

A contractor for payment of *tirni* or grazing dues seized an animal of the complainant although the latter had already paid the dues. The contractor subsequently attempted to return the animal to the complainant who refused to take it back:

Held, that the complainant was caused a wrongful loss although the contractor did not intend to deprive the complainant permanently of the animal. The contractor therefore was guilty under s. 379, I. P. C.

Mr. Shabir Ahmed, for the Petitioner.

Mr. Basant Krishen, Assistant Advocate-General, for the Crown.

Order.—The petitioner Abdul Khaliq has petitioned for revision of his conviction under s. 379, I. P. C., and sentence of Rs. 200 fine. The petitioner is a contractor for payment of *tirni* or grazing dues in District Multan. The facts as found by the Magistrate after a careful trial are as follows:

"It appears to me that Abdul Khaliq has been seizing the cattle of the defaulters and compelling them to make payment. In this opinion, I am fortified by the fact that the accused got the assistance of Kadar Dad, Tahsil *chaprasi*. By going with the *chaprasi* he apparently wanted to show to the people that he had the authority to seize their cattle. Emboldened by his previous conduct, he seized the she-camel of the complainant. . . . The complainant had already paid the *tirni* due from him under the receipt P. D. Abdul Khaliq also appears to have realized his mistake and he probably made an attempt on the morning of March 20, 1940 to return the she-camel of the complainant who refused to take it back."

The Sessions Judge substantially agreed. He said:

"It can well be understood that the appellant would try to put pressure upon persons who had not paid *tirni*. In this particular instance he was suffering from a mistake, as *tirni* had actually been paid in respect of this camel. In view of this mistake it is not at all improbable that he snatched the camel, as the complainant was refusing to pay."

This finding of facts has not been seriously challenged before me. But I am in some doubt about one point; the receipt which the complainant ultimately produced is a receipt for *tirni* on two camels, but the complainant said he only possessed one. It has not been made clear why the complainant paid *tirni* on two camels if he only had one. It is possible that there was a *bona fide* dispute between the parties as to the number of animals on which *tirni* was due. But this point has not really been gone into, the Courts below being concerned with false evidence on other points produced by both parties. Mr. Shabir Ahmad on behalf of the petitioner contends that on the finding of the learned Sessions Judge the offence of theft has not been committed. However the Sessions Judge said:

"It is not contested that if the version of the complainant is believed a technical case of theft is made out against the appellant."

'Theft' as defined in s. 378, I. P. C., involves taking dishonestly; and 'dishonestly' is defined in s. 24 as doing anything with the intention of causing wrongful gain or wrongful loss. 'Wrongful gain' and 'wrongful loss' are defined in s. 23: 'wrongful gain' is gain by unlawful means of property to which the person gaining is not lawfully entitled: 'wrongful loss' is the loss by unlawful means of property to which the person losing it is legally entitled. Mr. Shabir Ahmad's argument is that the petitioner

had no intention of causing wrongful loss to the complainant; he wanted to realize his *tirni* dues. One of the prosecution witnesses said that it was the custom that the *tirni* contractor caught any animal which he detected for the first time in the *ilaga* in order to realize his dues. Such taking would not be larceny under the Law of England. Section 1, Larceny Act, 1916 runs as follows:

"For the purposes of this Act—

A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof."

It is quite clear that the petitioner had no intention permanently to deprive the complainant of the camel because on the following day he took it into Multan, first to the *Tirni* Darogha, then to the Revenue Assistant, then to the Tehsilder, all of whom have appeared as defence witnesses. The matter was reported to the Police after this happened and the Sub-Inspector recovered the camel from the petitioner in Multan. The offence therefore would not be larceny under the Law of England. Whereas the Law of England proceeds with reference to an intention permanently to deprive the owner of the property the Law of India as shown by the definition of the I. P. C. proceeds by reference to an intention to cause wrongful loss, and the question is whether the petitioner had the intention of causing wrongful loss to the owner. Mr. Shabir Ahmed quoted a number of cases in which convictions for theft had been set aside in High Courts on the ground that the taking was not dishonest because it was not intended to cause wrongful loss. That which most closely resembles the present case is *Aradhun Mundul v. Myan Khan* (1) in which a Bench of the Calcutta High Court held that no offence of theft had been committed when a body of men illegally seized cattle and instead of taking them to the nearest pound drove 12 or 14 miles to a more distant pound. There the Magistrate had held that wrongful loss was intended because the pounding of the cattle was effected with the malicious intention of subjecting the owners to additional expense, inconvenience and annoyance. The Bench held that the definition of 'wrongful loss' in s. 23 showed that wrongful loss must refer to the thing dishonestly taken, that is, the animals themselves and that there was no loss.

Here the petitioner without any right wrongfully deprived the owner of possession of the animal. He intended to do this

and therefore I think he intended to cause wrongful loss although he did not intend to deprive the owner permanently of his property. I maintain the conviction but I think a fine of Rs. 200 is much too severe for a man who after all is using a wrongful method in realizing Govt. dues. I maintain the conviction but remit the fine and direct that the petitioner execute a bond under s. 106, Criminal P. C., for Rs. 200 security to be of good behaviour for a period of six months.

D.

Order accordingly.

ALLAHABAD HIGH COURT

First Appeal No. 259 of 1937

January 17, 1941

BAJPAI AND DAR, JJ.

MOHAMMAD MOHTASHIM AND ANOTHER
—DEFENDANT—APPELLANTS

versus

JOTI PRASAD—PLAINTIFF—

RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Creditor's suit against debtor on pro-note—Debtor's suit against creditor under s. 33, U. P. Agriculturists' Relief Act (XXVII of 1934)—Suits disposed of by one judgment—Identical sum found due to creditor from debtor—Appeal by debtor from decree in suit filed by creditor but not from decree in his own suit—Appeal held barred under s. 11—U. P. Agriculturists' Relief Act (XXVII of 1934), s. (2)—Request that s. 3 (2) be applied, if can be entertained for first time in appeal.

A creditor instituted against his debtor a suit on a pro-note for recovery of a certain amount. The debtor also instituted a suit against the creditor under s. 33, U. P. Agri. Relief Act. Both these suits were disposed of by a single judgment and the same sum was found due to the creditor from the debtor. The debtor went in appeal from the decree in the suit filed by the creditor but not from the decree in the suit filed by himself:

Held, that the appeal was barred under s. 11, Civil P. C., 7 Ind. Cas. 156 (1), followed and held not overruled by 74 Ind. Cas. 411 (2).

A request that the provisions of s. 3 (2), U. P. Agri. Relief Act may be applied to the case cannot be entertained for the first time in appeal.

F. A. from the decision of the First Civil Judge, Saharanpur, dated February 10, 1937.

Messrs. A. P. Pandey and M. A. Kazmi, for the Appellants.

Mr. K. C. Mital, for the Respondent.

Bajpai, J.—This is an appeal by Sayid Mohammad Mohtashim and Sayid Mohammad Mohtarim who were defendants in suit No. 48 of 1936. The suit was brought by Lala Joti Prasad for the recovery of a certain sum of money on the basis of a promis-

sory note executed by the two defendants on December 1, 1933. There was another suit No. 488 of 1934 filed by Sayid Mohammad Mohtashim and Sayid Mohammad Mohtarim against Lala Joti Prasad under s. 33, Agri. Relief Act. The Court below disposed of the two suits by a single judgment. In the suit brought by the debtors under s. 33, the Court below came to the conclusion that a certain sum of money was due by the debtors to the creditor and a declaratory decree under the provisions of s. 33 (2) was given to the debtors. In the suit filed by Lala Joti Prasad the Court below came to the conclusion that the identical sum of money found due in the other case was payable to Lala Joti Prasad from the debtors. In the suit of the creditor the Court below passed a decree for the recovery of a certain sum of money. We might repeat that the same sum of money was found due from the debtors in the connected suit. The defendants have filed the present first appeal in the suit by the creditor against them. They have not filed any appeal in the suit which they themselves filed under s. 33 and in which it was declared that the same sum of money, as found due in the present case, was payable by them to Lala Joti Prasad, the creditor.

A preliminary objection has been taken that by reason of the failure of the present appellants to file an appeal in the suit for accounts filed by them, the present appeal is incompetent, and reliance is placed on the Full Bench decision of this Court in *Zaharia v. Debia* (1). In reply to the preliminary objection our attention is drawn to another Full Bench decision of this Court in *Ghansham Singh v. Bhola Singh* (2). We may mention at once that *Zaharia v. Debia* (1), was not overruled by the subsequent Full Bench decision; on the contrary there are observations in the judgments of all the learned Judges that *Zaharia v. Debia* (1), was correctly decided and was applicable to cases where the facts were similar. All that was held in the subsequent Full Bench was that under certain circumstances it might not be necessary for an aggrieved party to file two appeals, more particularly when one of the appeals in the lower Court was decided in favour of that particular party and when the points in dispute in the two appeals were clearly distinguishable. The mere fact that an identical paper decree was passed in two cases was not enough. From what we have said above it is clear that the

facts in this case are very similar to the facts in *Zaharia v. Debia* (1), and the authority of that case is binding on this Bench. The position, therefore, is that the defendant-appellants cannot be permitted to agitate before us that the sum which has been decreed to the plaintiff is liable to reduction. There is, however, one other point in the present appeal, and it is that the Court below while passing a decree in favour of the plaintiff and granting instalments to the defendants fell into a slight error. The operative portion of the order about which grievance is made is to the following effect:

"In case of default being made in payment of any three instalments the entire decretal amount, minus the amount paid, shall fall due at once."

This was in view of s. 3, sub-cl. (4), Agri. Relief Act. But the words used there are:

".....where the number of instalments allowed is six or more and any three instalments are in arrears the decree-holder may, notwithstanding the provisions of any law for the time being in force, immediately enforce payment of the whole amount then remaining due under the decree....."

The contention is that the words mentioned by us as occurring in the operative portion of the order of the Court below should be changed and brought in conformity with the phrasology used in s. 3, sub-cl. (4). This point is not in conflict in any manner with the preliminary objection, and we have the power to make the necessary alteration if the submission advanced on behalf of the appellants is sound. We think there is considerable force in the contention of the appellants, and we, therefore, allow this appeal to this extent that we modify the decree of the Court below by deleting the words, "In case of default being made in payment of any three instalments the entire decretal amount, minus the amount paid, shall fall due at once" and by substituting in lieu thereof the following words, "If any three instalments are in arrears, the plaintiff may, notwithstanding the provisions of any law for the time being in force, immediately enforce payment of the whole amount then remaining due under the decree." The rest of the appeal is dismissed.

There are certain cross-objections by the plaintiff-respondent. Grounds Nos. 1 and 2 of the cross-objections deal with the granting of instalments covering a period of 15 years, and it is submitted that this was not justified under the circumstances of the case. Regard being had to the amount decreed we think the Court below did not exercise its discretion arbitrarily in granting these instalments. Ground No. 3 is to the effect

(1) 33 A 51; 7 Ind. Cas. 156; 7 A L J 861 (F B).

(2) 45 A 506; 74 Ind. Cas. 441; A I R 1923 All. 490; 21 A L J 465 (F B).

that the Court below should have secured the payment of the decretal amount by charging sufficient immovable property of the appellants. In this connection our attention is drawn to s. 3, sub-cl. (2) of the Act which says that the Court at the time of passing an instalment decree against an agriculturist may either attach his immovable property or declare a charge on such property. It appears that no such request was made before the Court below, at least there is nothing in the judgment of the Court below from which we could infer that any such request was made, and in appeal we cannot possibly find what the circumstances of the defendants are and what the property of the defendants is on which any such charge could be created. We think it is too late in the day for such a request being entertained. There is no force in the cross-objections and they are also dismissed. Under the circumstances we direct the parties to bear their own costs of the appeal and of the cross-objections.

D.

*Order accordingly.***MADRAS HIGH COURT**Civil Revision Petition No. 354 of 1938
December 6, 1939LEACH, C. J. AND KRISHNASWAMI
AYYANGAR, J.A. L. S. P. P. L. SUBRAMANIAM
CHETTIAR BY AGENT NARAYANAN
CHETTIAR—PETITIONER*versus*ANNAMALAI CHETTIAR BY AGENT
RAMASWAMI AYYAR—RESPONDENT

Hindu Law—Joint family—Insolvency—Father joint with son becoming insolvent—Judgment-creditor of father attaching son's interest in family property before Official Assignee realizing same—Power of Official Assignee to sell son's share is lost—Civil Procedure Code (Act V of 1908), s. 73—Decree against grandfather must be deemed to be passed against son and grandson to the extent of their shares in family property—Decree against grandfather, son and grandson—Another decree against grandfather and son only—Grandfather and son adjudicated insolvents—Both decree-holders held entitled to rateable distribution in the interest of grandson.

Where a father who is joint with his son becomes insolvent, the right of realizing the son's share in the family estate under the pious obligation rule devolves upon the Official Assignee or the Official Receiver as the case may be. But, if before the Official Assignee or the Official Receiver takes steps to enforce that right, a judgment-creditor of the father attaches the son's interest in the estate, the power of the Official Assignee or Official Receiver to sell the son's share is lost.

[Case-law relied on.]

Where a money decree is passed against a grandfather who is joint with his son and grandson it must be taken to be a decree passed against the son and the grandson to the extent of their interests in the family property as they are liable to that extent for his lawful debts.

Consequently a creditor who has a decree against the grandfather, son and grandson and another creditor who has a decree against the grandfather and son only, are entitled to rateable distribution under s. 73, Civil P. C., when the grandfather and the son are adjudicated insolvents and the interest of the grandson is attached by one of the creditors before the same has been realized by the Official Assignee or the Official Receiver. 167 Ind. Cas. 503 (11), **Overruled**.

[Case-law relied on.]

C. R. P. to revise the order of the District Munsif, Dharapuram, dated December 1, 1937.

Mr. K. V. Ramachandra Ayyar, for the Petitioner.

Leach, C. J.—This petition raises a question with regard to the right to rateable distribution given by s. 73, Civil P. C., but when the authorities are examined it is clear that they negative the petitioner's contention. In 1931 the petitioner obtained a money decree against a grandfather, his son and his son's son. The respondent had previously obtained a money decree against the grandfather and the son, but not against the grandson. In 1931, in separate proceedings, the grandfather and the son were adjudicated insolvents. In 1937 the petitioner filed an application for execution of his decree and asked for the attachment of the grandson's interest in the family property. Attachment was ordered and the grandson's interest was sold on August 31, 1937. Before the sale took place the respondent filed an application for the execution of his decree, and he also asked for the attachment and sale of the grandson's share in the family property. On the strength of this application, the respondent claimed to be entitled to share rateably in the sum of Rs. 800, which was the amount realized in the execution proceedings instituted by the petitioner. The petitioner objected to the respondent's claim to rateable distribution, but his objection was overruled by the District Munsif of Dharapuram in whose Court the execution petitions were filed and the assets realized. The District Munsif, in rejecting the petitioner's contention, relied on the decision in *Palaniappa Chettiar v. Palani Goundan* (1). The petitioner asks this Court to set aside the District Munsif's order under its revisional powers.

(1) 71 M L J 541; 165 Ind. Cas. 604; A I R 1936 Mad. 948; 44 L W 615; (1936) M W N 1142; 9 R M 286.

It is now well settled law that where a father who is joint with his son becomes insolvent, the right of realizing the son's share in the family estate under the pious obligation rule devolves upon the Official Assignee or the Official Receiver as the case may be. But, if before the Official Assignee or the Official Receiver takes steps to enforce that right, a judgment-creditor of the father attaches the son's interest in the estate, the power of the Official Assignee or Official Receiver to sell the son's share is lost: see *Sat Narain v. Behari Lal* (2), *Bala Venkata Seetharama Chettiar v. Official Receiver, Tanjore* (3), *Sat Narain v. Sri Krishan Das* (4), *Gopalkrishnayya v. Gopalan* (5) and *Arunachalam Chettiar v. Sabaratnam Chettiar* (6). Therefore, as the result of the petitioner's attachment of the grandson's share the Insolvency Court lost all its interest in that share, which then became available to the petitioner as the executing creditor and to all persons who became entitled to rateable distribution under s. 73, Civil P. C. Before the proceeds of the grandson's property were brought into Court, the respondent filed his application for execution and thereupon became entitled to rateable distribution.

On behalf of the petitioner, the argument has been advanced that the respondent's decree was not obtained against the same judgment-debtor and therefore s. 73 does not apply, but this argument cannot be accepted. There is ample authority for holding that where a money decree is passed against a grandfather who is joint with his son and grandson it must be taken to be a decree passed against the son and the grandson to the extent of their interests in the family property as they are liable to that extent for his lawful debts. In *Ramanathan Chettiar v. Subramania Sastrial* (7), where the

decree of one of two judgment-creditors was against the father while the decree of the other judgment-creditor was against the father and his son, but the properties from which the assets had been realized by sale were the ancestral properties of the family of which the father and son were undivided members, White, C. J. held that the decrees were "against the same judgment-debtor" for the purpose of s. 295 of the Code of 1882, to which s. 73 of the present Code corresponds. In *Ramakrishnan Chettiar v. Viswanathan Chettiar* (8), a Full Bench of this Court (Beasley, C. J., Cornish and Pandrang Row, J.J.) held that the legal representative of a deceased person against whom a decree was passed in his lifetime but which was sought to be executed against his property in the hands of his legal representative was the same judgment-debtor within the meaning of s. 73. Pandrang Row, J. in whose judgment Beasley, C. J. concurred, observed that it was obvious that a strict literal construction of the expression, "the same judgment-debtor" could not be adopted in the sense that the decrees must be against the same persons *eo nomine*, and the weight of authority appeared to favour a liberal construction of the expression "the same judgment-debtor." The decision of White, C. J. in *Ramanathan Chettiar v. Subramania Sastrial* (7) was referred to with obvious approval.

In *Swaminatha Aiyar v. Saivu Rowthan* (9), Venkataramana Rao, J. held that when a decree has been passed against a manager of a joint Hindu family, the other members of the family must be deemed to be judgment-debtors as well, and where another decree-holder has obtained a decree against the manager and the other members of the family, they are entitled to rateable distribution. The learned Judge considered that the Full Bench decision in *Ramakrishnan Chettiar v. Viswanathan Chettiar* (8) applied. There was no insolvency in this case, but in a later decision, *Palaniappa Chettiar v. Palani Goundan* (1), Venkataramana Rao, J. had to consider the same question in connection with insolvency proceedings. In that case the respondent filed a suit against the father and attached before judgment the family property. He eventually obtained a decree, and five months later the judgment-debtor was adjudicated an insolvent. Subsequent to the adjudication, the petitioner, (8) 59 M 93; 159 Ind. Cas. 501; A I R 1936 Mad. 40; 69 M L J 771; (1935) M W N 960; 42 L W 835; 8 R M 506 (F B). (9) 43 L W 624; 160 Ind. Cas. 559; A I R 1936 Mad. 123; 8 R M 665; (1936) M W N 343.

(2) 6 L 1; 84 Ind. Cas. 883; A I R 1925 P C 18; 52 I A 22; 47 M L J 857; 10 O & A L R 1332; (1925) M W N 1; 23 A L J 85; L R 6 A (P C) 1; 26 P L R 81; 27 Bom. L R 135; 21 L W 375; 1 L C 500; 1 O W N 916; 29 C W N 797 (P C).

(3) 49 M 849; 97 Ind. Cas. 825; A I R 1926 Mad. 994; 51 M L J 269; 24 L W 345; (1926) M W N 743 (F B).

(4) 17 L 644; 164 Ind. Cas. 6; A I R 1936 P C 277; 63 I A 384; (1936) O L R 474; 9 R P C 62; (1936) O W N 681; 2 B R 757; 44 L W 417; 40 C W N 1382; 17 P L T 717; 64 C L J 80; 38 Bom. L R 1129; 1936 A L R 795; (1936) M W N 1204; 38 P L R 976; 71 M L J 812; (1937) A L J 414 (P O).

(5) 51 M 342; 111 Ind. Cas. 505; A I R 1928 Mad. 479; 54 M L J 674; 27 L W 430.

(6) I L R (1939) Mad. 585; 185 Ind. Cas. 159; (1939) M W N 367; 49 L W 515; (1939) 1 M L J 889; A I R 1939 Mad. 572; 12 R M 520.

(7) 26 M 179.

with the leave of the Insolvency Court, filed a suit against the father and his sons. The petitioner also applied for attachment before judgment of the son's shares in the joint family property. A decree was in due course passed in his favour and the sons' shares were realized in execution proceedings. Before the sale took place the respondent applied for the execution of his decree by the sale of the family estate and claimed rateable distribution. The Judge held that he was entitled to rateable distribution as the decrees obtained against the father and the father and the sons were decrees passed against the same judgment-debtor. A similar decision was given by the learned Judge in *Kundula Ramayya v. Bangaru Rangaraju* (10).

The only case which lends support to the petitioner's argument is *Arunachalam Chettiar v. Kalayappa Chettiar* (11) which was decided by Horwill, J. There the respondents attached before judgment the estate of a joint family consisting of the father and a son. A decree was obtained and the property was subsequently brought to sale, the purchase money being deposited into Court. The father then became an insolvent, and the father's share of the proceeds was handed over to the Official Receiver. The petitioner had obtained a decree against the father on a promissory note and applied for a rateable distribution. His application was filed before the proceeds had been deposited into Court. Horwill, J. considered that the petitioner was not entitled to rateable distribution. It would appear from his judgment that he considered that the Full Bench decision in *Ramakrishnan Chettiar v. Viswanathan Chettiar* (8) had no application and he laid stress on the fact that the petitioner did not make the son a party to the execution proceedings on the ground that he was liable for his father's debts and that the Court did not know that the decree was obtained against the father for a debt binding on the son. In these circumstances he rejected the petitioner's claim to rateable distribution. This decision is in direct conflict with the judgments of Venkataramana Rao, J., in *Palaniappa Chettiar v. Palani Goundan* (1) and *Kundula Ramayya v. Bangaru Rangaraju* (10), and it also runs contrary to the decision of the Full Bench in *Ramakrishnan Chettiar v. Viswanathan*

(10) (1938) 1 M L J 325; 170 Ind. Cas. 883; (1937) M. W. N. 239; 45 L W. 501; A I R 1937 Mad. 504; 10 R M 253

(11) (1937) 1 M L J 180; 167 Ind. Cas. 503; A I R 1937 Mad. 253; (1936) M W N 1212; 45 L W 203; 9 R M 464.

Chettiar (8). The judgment of Horwill, J. was considered by Venkataramana Rao, J., in *Kundula Ramayya v. Bangaru Rangaraju* (10), and I am in entire agreement with the observations of Venkataramana Rao, J., which are these :

"The learned Judge seems to be of the opinion that where there is a decree against the father alone it cannot be said that the decree was obtained against the father for a debt binding on the son. It may be so. But once there is a decree against the father the creditor is entitled to enforce the said decree against all the joint family property including the shares of the sons until the sons choose to take exception to it either in execution or by way of a suit that the said debt is one which they are not liable to pay under the Hindu Law. So long as the decree stands and the property sold is joint family property, no question as to the binding nature of the debt arises in the consideration of the question whether the judgment-debtors are the same."

It follows that I consider that the judgment of Horwill, J., to be erroneous and should be overruled. It also follows that I consider that the decision of the District Munsif in the present case was right. The petition will be dismissed but as the respondent has not appeared there will be no order as to costs. I wish to express the appreciation of the Court for the great assistance which it has received from Mr. K. V. Ramachandra Aiyar who has appeared on behalf of the petitioner. He has placed all the relevant authorities before the Court.

Krishnaswami Ayyangar, J.—I agree.

N. D.

Petition dismissed.

CALCUTTA HIGH COURT

Civil Rule No. 1255 of 1940

Decembar 2, 1940

BISWAS AND ROXBURGH, JJ.

Smt. MUKIMANNESSA

CHOWDHURANI AND OTHERS—JUDGMENT-

DEBTORS—PETITIONERS

versus

RAMESWAR SHUKUL AND OTHERS—

AUCTION-PURCHASERS—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), ss. 47, 115—Sale of judgment-debtor's holding in execution of rent decree—Application for setting aside sale under s. 174, Bengal Tenancy Act (VIII of 1885)—Subsequent application before Debt Settlement Board for settlement of debts—Notice under s. 34, Bengal Agricultural Debtors' Act (VII of 1936)—Executing Court refusing to stay further proceedings and proceeding with application for setting aside sale—Order held came under s. 47—No revision under s. 115 held competent.

The decree-holder obtained a rent decree against the petitioner and in execution of that decree, brought the holding to sale. The auction-purchaser thereafter deposited in Court the whole of the purchase money. The judgment-debtor then applied for setting aside the

sale under s. 174, Ben. Ten. Act. Subsequently the judgment-debtor made an application before a Debt Settlement Board for the settlement of his debts in which he included the debt due under the rent decree referred to above. Upon that, a notice was issued under s. 34, Ben. Agri. Debtors' Act, to the Court in which the execution case was proceeding. The execution Court refused to stay further proceedings and proceeded with the application for setting aside sale :

Held, that the order complained of was an order relating to execution, and that although the auction-purchaser was a party to the proceeding, it was still an order which came within s. 47 of the Code, the question at issue being one in which the judgment-debtor on the one hand and the decree-holder on the other were really interested. This being so, the order was open to appeal and the application under s. 115 of the Code was not, accordingly competent. 188 Ind. Cas. 483 (1), relied on.

C. Rule for setting aside the order of the Sub-Judge, 3rd Court, Tippera, (Comilla), dated July 31, 1940.

Mr. Urukramdas Chakravarty for Mr. Md. Nural Huq Chowdhury, for the Petitioners.

Messrs. Nripendra Chandra Das and Nalini Ranjan Bhattacharjee, for Opposite Party Nos. 5 and 1 to 4, respectively.

Order.—A preliminary objection has been taken to the competency of this rule that the order against which it is directed is an appealable order and that consequently no revision lies. We are of opinion that this objection should prevail. The facts are shortly these : The decree-holder opposite party obtained a rent decree against the petitioner and in execution of that decree, brought the holding to sale. The auction-purchaser thereafter deposited in Court the whole of the purchase money. The judgment-debtor then applied for setting aside the sale under s. 174, Ben. Ten. Act. This was in November 1939. On February 12, 1940, the judgment-debtor made an application before a Debt Settlement Board for the settlement of his debts in which he included the debt due under the rent decree referred to above. Upon that, a notice was issued by the Board under s. 34, Ben. Agri. Debtors' Act, to the Court in which the execution case was proceeding. The execution Court held, on the law as it then stood, that as the sale had already taken place, there was no debt and that therefore there was no proceeding to stay. On July 11, 1940, however, an amendment of s. 34, Ben. Agri. Debtors' Act, came into force, and an explanation was added to this section to the effect that an execution proceeding for the sale of any property shall be deemed to be pending and the debt in respect of which the sale takes place shall be deemed to exist until such sale becomes

absolute. Four days later another notice under s. 34 as amended was issued by the Debt Settlement Board, which was received by the executing Court on July 18. The learned Subordinate Judge, however, declined to accept this notice as made within jurisdiction, and in the result, made an order in these terms. "I hold that the execution case cannot be stayed. It will proceed." In other words, by this order he decided to proceed with the application under s. 174, Ben. Ten. Act which had been made to him. It is against this order refusing to stay further proceedings in the execution case that the present rule has been obtained.

In our opinion, there can be no question that on the authority of the decision of a Division Bench of this Court in *Nafar Chandra Sardar v. Kali Pado Das* (1) it must be held that the order complained of is an order relating to execution, and that although the auction purchaser is a party to the proceeding, it is still an order which comes within s. 47 of the Code, the question at issue being one in which the judgment-debtor on the one hand and the decree-holder on the other are really interested. This being so, we must hold that the order was open to appeal and the application under s. 115 of the Code was not, accordingly, competent. The result is that the rule must be discharged. There will be no order as to costs. This will not prevent the petitioner from filing an appeal before the District Judge from the order if he is so advised, and it will be for him to consider whether, having regard to the pendency of the proceedings in this Court, a proper case may be said to have been made out under s. 5, Lim. Act. Let the record be sent down without delay.

D.

Rule discharged.

(1) 44 C W N 364; 188 Ind. Cas. 483; A I R 1940 Cal. 275; I L R (1940) 1 Cal. 393; 13 R C I.

NAGPUR HIGH COURT

Second Appeal No. 253 of 1936

October 8, 1940

STONE, C. J. AND CLARKE, J.

SHIVJIRAM AND ANOTHER—DEFENDANTS—

APPELLANTS

versus

GULABCHAND—PLAINTIFF—RESPONDENT
Second appeal—New plea—Point of minority for calling in aid s. 6, Limitation Act, cannot be raised for first time in second appeal—Limitation Act (IX of 1908), ss. 4, 19—Acknowledgment expiring on date when the Courts are closed for vacation—Fresh

acknowledgment, if can be executed on date when the Court re-opens, in order to save limitation—Contract Act (IX of 1872), s. 25 (3)—Implied promise to pay contained in acknowledgment—S. 25 (3), if attracted—Novation—Suit based on acknowledgment—Party seeking to base suit on novation—Facts to constitute novation must be alleged and proved.

It is too late to raise the point of the minority of the plaintiff in the second Appellate Court for the purpose of calling in aid the provisions of s. 6 of the Lim. Act, where the point was not raised in either of the Courts below. 18 Ind. Cas. 391 (1), followed.

Section 4 of the Lim. Act has nothing to do with computing the period prescribed under s. 19, Lim. Act. Where on the date when the previous acknowledgment was due to expire the Courts were closed for the summer vacation, the limitation would not be saved even if the fresh acknowledgment was executed on the day when the Courts reopened. The argument that because a suit could have been instituted on the old acknowledgment when the Courts re-opened the party could accept the fresh acknowledgment while still he had right to sue, is not good. 110 Ind. Cas. 76 (2), *Held* no longer good law, 155 Ind. Cas. 205 (3), 174 Ind. Cas. 277 (4), 169 Ind. Cas. 653 (5), 181 Ind. Cas. 899 (6) and 178 Ind. Cas. 668 (7), relied on.

Unless a promise to pay is in writing it cannot fall within the purview of s. 25 (3), of the Contract Act. The implied promise to pay which is contained in all acknowledgments does not attract the provisions of s. 25 (3), of the Act, because the promise to pay is not in writing. Where the words used in an acknowledgment are: "*Juna Hisab Raju Karna Baki Dena Raha Rs. 3,200*" which may be translated: "after taking old accounts into consideration there remains to be paid a balance of Rs. 3,200," the acknowledgment does not attract the provisions of s. 25 (3), for there is no consideration for the implied promise contained therein. This is not an "account stated" of the kind which includes items on both sides which the parties have agreed to set off so that only the balance should be paid 174 Ind. Cas. 374 (8), followed.

[Case law relied on].

In a case when the plaintiff has based his case on an acknowledgment, in order to make out a case of novation he should plead the necessary facts to found novation and state what was the original contract and in what way it had been replaced by a new contract.

S. A. from the appellate decree of the Court of the Additional District Judge, Bhandara, dated February 29, 1936.

Mr. Y. V. Jakatdar with Mr. R. R. Dandige, for the Appellants.

Mr. R. N. Padhye with Messrs. K. B. Dwiwedi and J. M. Thaker, for the Respondent.

Judgment.—This is a defendants' appeal against the decree granting the full claim of the plaintiff-respondent. The claim is stated in the plaint to be based on a *sarkat* or an acknowledgment, which was admittedly executed by the appellants on June 15, 1932 in renewal of an earlier acknowledgment dated June 3, 1929. The appellants took various pleas, those with which we are concerned in this appeal being that the suit was based on a mere acknowledgment executed after the period of limitation had expired in

respect of the previous *sarkat*, and that as it did not fall within the requirements of s. 25 (3) of the Contract Act the suit was barred by limitation. Other contentions were that part of the consideration for the *sarkat* amounting to Rs. 500 was illegal being of a wagering nature, and they also claimed to have the transactions re-opened under the Usurious Loans Act. All these points were decided against the appellants in the lower Courts.

Before us the learned Counsel for the respondent has endeavoured to side track the point of limitation, which the appellants have taken, by arguing that even if the point be conceded as to the *sarkat* being beyond limitation when regarded according to the provisions of s. 19 read with s. 4 of the Lim. Act, limitation is saved by s. 6 since the respondent-plaintiff is a minor. Whether this plea would have succeeded if it had been taken in the trial Court is extremely doubtful, but we need not consider it here because in that Court not a word was said about the minority of the plaintiff, nor even in the lower Appellate Court was any such plea taken as far as we can ascertain, since nothing has been said about it in the judgment of that Court. It is before us for the first time that the point appears to have been made. It was held in *Panchu Mondal v. Sheikh Isaf* (1), by a Bench of the Calcutta High Court before whom the point of minority was similarly taken for the first time that:

"The law expressly imposes upon a Court the duty of throwing out a suit or application filed after the period of limitation fixed therefor, and it may well be that, if a Court were to decree a suit or allow an application which was, in fact, time barred without considering whether it was so or not, it could be said to have failed to exercise a jurisdiction vested in it by law so as to bring the matter within the scope of s. 115 of the Civil P. C. 1908. But we think that the same thing cannot be said of a Court merely because it has omitted to consider *ex proprio motu* the question whether a litigant was entitled to proceed out of time by reason of some special provision of law, such a question not having been raised by or on his behalf. If a litigant claims the benefit of an exceptional rule of the kind indicated it is clearly his duty both to do so expressly and to establish his claim. This is in accordance with general principles, and is recognised by O. VII, r. 1 of the Code, which provides for the contents of a plaint and lays down a rule applicable, by virtue of s. 141, to applications *mutatis mutandis*. It is true that the petitioner was described in the headings to certain applications made in this case as a minor represented by a guardian, but that alone was clearly not sufficient to entitle him to the benefit of s. 7 of the Lim. Act; nor was it, in our opinion, sufficient to throw upon the Court the duty of protecting his interests by raising a point of this kind on his behalf."

(1) 17 C.W.N. 667; 18 Ind. Cas. 391.

Although this decision is more than a quarter of a century old, it has so far we are aware, never been dissented from. It is, therefore, too late in this Court to raise the point of the minority of the plaintiff for the purpose of calling in aid the provisions of s. 6 of the Lim. Act.

As regards the questions of limitation which were agitated in the lower Courts, the acknowledgment in suit was executed more than three years after the previous acknowledgment, but the Courts below have held, relying on *Jhanaklal v. Gulabchand* (2), that limitation is saved by reading the provisions of s. 4 along with s. 19, since on the date when the previous acknowledgment was due to expire the Courts were closed for the summer vacation. Therefore, it is said that the plaintiff could have instituted his suit on the old acknowledgment when the Courts re-opened. Instead of doing so, however, he accepted a fresh acknowledgment while he still had a right to sue and, therefore, it is said that the new acknowledgment was executed within limitation. It is certainly correct that that was the view expressed in *Jhanaklal v. Gulabchand* (2) and if that were the last word on the subject, then the Courts below would have been perfectly correct to act upon that ruling. In 1935 however the Judicial Committee of the Privy Council in *Maqbul Ahmad v. Pratap Narain Singh* (3), while considering the applicability of s. 14 of the Lim. Act to the facts of the case before them, pronounced that s. 4 of the Lim. Act had nothing to do with computing the period prescribed under s. 14. The reasoning of their Lordships applies equally to a case where s. 19 is in issue as to a case where s. 14 applies. That case was followed by a Full Bench of the Lahore High Court in *Shanti Parkash v. Harnam Das* (4), which was a case under s. 19 of the Lim. Act. The same view was also expressed in *Chidambaram Chettiar v. Venkatasubba Naik* (5). There are also rulings of the other High Courts which have applied the observations of their Lordships in *Maqbul Ahmad v. Pratap Narain Singh* (3) to cases

under s. 20 of the Lim. Act: *vide Shyam Peare v. Ram Autar Singh* (6) and *Puran Chand v. Abdullah* (7). We entirely concur with those observations and hold therefore that the view expressed in *Jhanaklal v. Gulabchand* (2) is not good law.

If then the appellants are correct in saying that the suit is founded on a mere acknowledgment, then it is barred by limitation. This therefore brings us to the question whether the suit is so founded and whether there was any consideration for the acknowledgment. Under s. 25 (3) of the Contract Act an agreement made without consideration is void unless it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits. The nature of an acknowledgment, such as that we are now considering, came before Bose, J., in *Ramprasad v. Anandi* (8) and his reasoning in that case appears to us to be unanswerable:

"Unless a promise to pay is in writing it cannot fall within the purview of s. 25 (3) of the Contract Act. The implied promise to pay which is contained in all acknowledgements does not attract the provisions of s. 25 (3) of the Act, because the promise to pay is not in writing."

Here the words used in Ex. P-1 are :

"Juna Hisab Raju Karna Baki Dena Raha Rs. 3,200" which may be translated: "after taking old accounts into consideration there remains to be paid a balance of Rs. 3,200". This is not quite the same as the wording of the document which Bose, J. was considering in the above-mentioned case but it is near enough for his reasoning to apply with equal force. Somewhat similar words to those used in Ex. P-1 but in the Gujarati language were used in a document which came under consideration in *Balkrishna Mansukhram v. Jayshankar Narayan* (9) and the Bombay High Court took the same view as Bose, J. See also *Ramchandra Bachharaj v. Muka Gujan Mahar* (10),

(2) 24 N L R 83; 110 Ind. Cas. 76; A I R 1928 Nag. 192.

(3) 57 A 242; 155 Ind. Cas. 205; 1935 O W N 527; (1935) M W N 438; 7 R P C 191; 41 L W 629; (1935) A L J 578; A I R 1935 P C 85; 39 O W N 640; 68 M L J 665; 61 C L J 267; 37 P L R 395; 37 Bom. L R 533 (P. C.)

(4) I L R (1938) Lah. 193; 174 Ind. Cas. 277; A I R 1938 Lah. 234; 10 R L 540; 40 P L R 533.

(5) A I R 1937 Mad. 367; 169 Ind. Cas. 653; 42 L W 72; (1937) M W N 108; (1937) 1 M L J 262; 10 R M 83.

(6) A I R 1939 All. 252; 181 Ind. Cas. 899; 11 R A 621.

(7) I L R (1938) All. 861; 178 Ind. Cas. 668; A I R 1938 All. 606; 1938 A L R 870; 11 R A 310; (1938) A L J 1183.

(8) I L R (1940) Nag. 441; 174 Ind. Cas. 374; A I R 1938 Nag. 180; 10 R N 377.

(9) 40 Bom. L R 1010; 178 Ind. Cas. 174; A I R 1938 Bom. 460; 11 R B 147.

(10) 31 N L R 105; 153 Ind. Cas. 255; A I R 1934 Nag. 273; 7 R N 127.

Maganlal Harjibhai v. Amichand Gulabji (11), *Joti Parshad v. Raham Ali* (12), *Deoraj Tewari v. Indrasan Tewari* (13), *Govinda Nair v. Achutan Nair* (14) and *Ganga Prasad v. Ram Dayal* (15). It follows therefore that, if there is no consideration for the implied promise to pay, s. 25 (3) of the Contract Act will not come to the aid of the respondent. This is not an "account stated" of the kind which includes items on both sides which the parties have agreed to set off so that only the balance should be paid.

It has been strenuously argued before us by Mr. Padhye on behalf of the respondent that here was a novation of the contract which novation is evidenced by this entry and by a post card (Ex. P-4) written on June 20, 1931 by the appellants. As far as the post card is concerned, it is by no means clear that it is addressed to the respondent; it purports to emanate from Heeralal Sheojiram whereas the appellants are Shivjiram and Chotelal, sons of Dhannalal, and it is addressed to Nirbhe Ramji Kanayalalji which is not the name of the plaintiff or of his father. Even if it is a communication from one of the parties to the other, it does not, in our view, evidence any novation. The idea of a novation first appears to have occurred in the lower Appellate Court since it held that as the parties had agreed to pay the amount in ten instalments there was a novation of contract and a fresh cause of action at the time of execution of the *sarkat*. It is this aspect of the case which Mr. Padhye has elaborated in his argument before us. We consider that the lower Appellate Court, in coming to the conclusion that there was a novation, has lost sight of the exact nature of the appellants' pleading. They did not admit that there was an unconditional agreement to pay the amount in 10 yearly instalments. Their plea was that the acknowledgment and the oral undertaking to pay in instalments were given on the understanding that the accounts would subsequently be shown to them to satisfy them that the amount really was due and that in point of fact no accounts ever were shown to them. The same applies to the oral statement of Mr.

(11) 52 B 521; 112 Ind. Cas. 24; A I R 1928 Bom. 319; 38 Bom. L R 733.

(12) A I R 1939 Lah. 466; 186 Ind. Cas. 718; 41 P L R 878; 12 R L 415.

(13) 8 Pat. 706; 120 Ind. Cas. 470; A I R 1929 Pat. 258; 10 P L T 169; Ind. Rul. (1930) Pat. 38.

(14) A I R 1940 Mad. 678; 193 Ind. Cas. 399; 51 L W 520; (1940) 1 M L J 682; (1940) M W N 443; 13 R M 661.

(15) 23 A 502; A W N 1901; 150.

Bapat on behalf of the defendants on February 18, 1935 at p. 12 of the Paper Book. It is clear to us that the plaintiff founded his case on this acknowledgment. He has stated so over and over again. If he wanted to make out a case of novation he should have pleaded the necessary facts to found novation and stated what was the original contract and in what way it had been replaced by a new contract. Mr. Padhye has argued that a letter, which is alleged to have been given by the plaintiff to the defendants at the time when the acknowledgment was executed and which is not forthcoming, falls within the provisions of s. 63 of the Contract Act and therefore time does not begin to run until there was a failure on the part of the defendants to carry out the terms allowed to them by the letter. This argument would, in our opinion, have been a good one if it had been taken at the proper time, but we do not consider that it is a plea that can be advanced for the first time in second appeal.

It follows from the above that the appeal must succeed. It is not therefore necessary to consider the further points which were raised in the case about the wagering nature of the transaction in respect of Rs. 500 of the consideration or as to whether the transactions should have been re-opened under the Usurious Loans Act. Accordingly the lower Appellate Court's decree is set aside and the plaintiff's suit is dismissed with costs throughout.

D.

Appeal allowed.

* MADRAS HIGH COURT

Appeal No. 229 of 1937

March 6, 1940

LEACH, C. J. AND KRISHNASWAMI AYYANGAR, J.
T. S. PICHU AYYANGAR—APPELLANT

versus

SRI PERARULALA RAMANUJA JEER
SWAMIGAL, DHARAMAKARTHA AND
MANAGER OF SRI ALAGIANAMBIRAYAR
TEMPLE—RESPONDENT

Civil Procedure Code (Act V of 1908), s. 105—Suit for framing scheme—Defendant's objection that Court has no power—Objection overruled—In revision, High Court upholding objection and dismissing suit—On order being communicated lower Court passing formal decree dismissing suit—High Court's order held interlocutory—High Court's order held inappropriate—Appeal from decree held competent by virtue of s. 105—Madras Hindu Religious Endowments Act (II of 1927), ss. 62, 63, 65—Board, if can be compelled to hold inquiry—Its decision that inquiry is unnecessary, if final—Refusal of Board to frame

scheme—Power of Court in the matter—S. 63, scope and interpretation of—Court can settle scheme only where one is framed by Board—Scheme of Act—Court has no residuary power to frame scheme where Board has refused to do so.

In a suit for framing a scheme, the preliminary objection of the defendant that the Court had no power to frame a scheme was overruled. In revision, the High Court upheld the defendant's objection and dismissed the suit. On this order being communicated, the lower Court passed a formal order dismissing the suit:

Held, that the High Court's order was not final but interlocutory and was inappropriate inasmuch as the High Court dismissed the suit itself instead of directing the lower Court to dispose of it according to law. The order fell under s. 105 (1), Civil P. C., and appeal from the decree was competent by virtue of s. 105, since the order affected the decision of the lower Court when passing the decree. Ram Kirpal v. Rup Kuari (1), Mubarak Hussain v. Bihari (2) and 60 Ind. Cas. 631 (3), distinguished.

The Board cannot be compelled under s. 62, Mad. Hindu Religious Endowments Act to hold an inquiry. If it decides that an inquiry is not necessary, the applicants can carry the matter no further. [p. 811, col. 2.]

Section 63 does not give authority to the Court to frame a scheme in the event of the Board refusing to do so. The only orders which the section refers to are: (1) An order settling a scheme; (2) an order modifying a scheme; and (3) an order cancelling a scheme. The words "institute a suit in the Court to modify or set aside such order" are intended only to refer to an order settling a scheme or modifying or cancelling one. [*ibid.*]

Section 65 is merely intended to give the Court power after a scheme has been framed, to modify or cancel it at any time. Under s. 65 the Court has power to settle a scheme, but it must be a scheme which has first been framed by the Board. [p. 812, col. 2.]

The scheme of the Act was to place in the Board power of supervision of Hindu temples and *maths* in Madras province and in proper cases the control of the management. As s. 92, Civil P. C., has now been replaced by the Mad. Hindu Religious Endowments Act, 1926, so far as Hindu religious endowments of this province are concerned, that Act alone can be looked at for ascertaining what the powers of the Court are. There can be no residuary powers because the former powers are taken away by the present Act. [*ibid.*]

A. against the decree of the District Court, Tinnevely, in O. S. No. 4 of 1935.

Messrs. K. V. Sessa Ayyangar and R. Desikan, for the Appellant.

Mr. K. E. Rajagopalachariar, for the Respondent.

Leach, C. J.—In 1933 an application was made by 20 worshippers of the Sri Alagiamambirayar temple in the Tinnevely District to the Madras Hindu Religious Endowments Board for an order directing an inquiry to be held into the question whether the Board should frame a scheme for the administration of the temple and its endowments. The Board held an inquiry and as the result of the investigation decided

that it was not necessary to frame a scheme. The applicants then filed a suit in the Court of the District Judge of Tinnevely with the object of obtaining the settlement of a scheme under a decree of the Court. The suit was defended by the trustee, who is the respondent in this appeal. It is unnecessary to set out all the objections to the suit. It is sufficient to say that the main objection was that the Court had no power to frame a scheme. On this question a preliminary issue was framed and was answered by the District Judge in favour of the plaintiffs. Thereupon the respondent applied to this Court to reverse the order in exercise of its revisional powers. The application was heard by Venkataramana Rao, J., who decided that the District Judge had erred in holding that the suit lay. In addition to allowing the petition the learned Judge dismissed the suit. On the order being communicated to him the District Judge passed a formal decree dismissing the suit with costs. The appeal is from that decree. Before proceeding to discuss the merits of the appeal it is necessary to dispose of a preliminary objection raised by the respondent, who says that the order of Venkataramana Rao, J. was final and therefore, the appeal does not lie.

Section 115, Civil P. C., which confers upon the Court its powers of revision states that if the Subordinate Court appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity, the Court may make such order in the case as it thinks fit. The section only contemplates an order which is appropriate to the application, and the order of Venkataramana Rao, J., dismissing the suit was not appropriate. Having decided that the District Judge had erred on the preliminary issue he should have set aside his ruling and directed the District Judge to dispose of the suit in accordance with law and not to have dismissed the suit himself. The order of Venkataramana Rao, J. was an interlocutory order and the preliminary objection must be decided on this footing. In support of his contention that the decision of Venkataramana Rao, J. is final the learned Advocate for the respondent has quoted *Ram Kirpal v. Rup Kuari* (1), *Mubarak Hussain v. Bihari* (2) and *Hook v. Administrator*

(1) 6 A 269; 11 I A 37 (P C).

(2) 16 A 306; A W N 1894, 97.

General of Bengal (3), but as the present case is clearly governed by s. 105, Civil P.C., they are not in point and I do not propose to pause to examine them. That section says:

"(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth, as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-s. (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness."

Authority is given here to the Court to set aside an erroneous order affecting the decision of a case, unless it be an order of remand from which an appeal lies and no appeal is filed. Sub-s. (2) appeared in the Code for the first time in 1908. Now the order of Venkataramana Rao, J., certainly affected the decision of the case. As the result of the order, the District Judge was left with no other course open to him but to dismiss the suit. Therefore, the order is one which directly falls within sub-s. (1) of s. 105. If the argument of the learned Advocate for the respondent were to be accepted it would mean that this suit would be decided by an interlocutory order and there would be no appeal either to this Court or to the Privy Council. The order of Venkataramana Rao, J. was not appealable. The Letters Patent of this Court expressly provide that an order passed in revision shall not be subject to an appeal and s. 3, Civil P. C., says that no appeal shall lie to His Majesty in Council from the decree or order of one Judge of a High Court. Therefore, the order of Venkataramana Rao, J. does not fall within the purview of s. 109 of the Code which provides for appeal to His Majesty in Council from a final order or a decree of a High Court. The present appeal is from the decree, and as the order affected the decision of the Court when passing the decree it is clearly open to this Court by virtue of s. 105 to consider its correctness.

I will now turn to the merits of the appeal. Section 62, Mad. Hindu Religious Endowments Act, 1926, says that when the Board has reason to believe that the trustee of a *math* or excepted temple has been mismanaging the endowments or has been

spending or alienating them for improper purposes, or when not less than 20 persons, having interest, make an application to the Board stating that in the interests of the proper administration of the endowments a scheme of administration should be settled, the Board may hold an enquiry. The Board cannot be compelled to hold an inquiry. If it decides that an inquiry is not necessary, the applicants can carry the matter no further. So much is conceded by the learned Advocate for the appellant. The decision of the appeal depends upon the interpretation to be placed on sub-s. (4) of s. 63, but the sub-section must be read in conjunction with the first part of sub-s. (1) and sub-s. (3). The first part of sub-s. (1) of s. 63 reads as follows:

"If after making the inquiry referred to in s. 62, the Board is satisfied that the trustee concerned has mismanaged the endowments of such *math* or temple or has spent or alienated them for improper purposes, or that, in the interests of the proper administration of such endowments, a scheme of administration should be settled, the Board may, after consulting in the prescribed manner the trustee and the persons having interest by order settle a scheme of administration for the endowments connected with such *math* or temple."

Sub-ss. (3) and (4) are in these words:

"(3) The Board may at any time by order and in the manner provided in sub-s. (1) modify or cancel a scheme settled under that sub-section.

(4) Every order of the Board under this sub-section shall be published in the prescribed manner.

The trustee or any person having interest may within six months of the date of such publication institute a suit in the Court to modify or set aside such order."

For the appellant it is said that inasmuch as sub-s. (4) gives a person having interest in an endowment to institute a suit in the Court to modify or set aside an order under this section, the power must include a power to the Court to frame a scheme, if the Court sets aside an order of the Board refusing to do so. It is also said that the Court has power to frame a scheme by reason of s. 65 to which I shall refer later. It is further said that apart from the provisions of the Mad. Hindu Religious Endowments Act, 1926, there is power in the Court to frame a scheme. I agree with Venkataramana Rao, J., that s. 63 does not give any authority to the Court to frame a scheme in the event of the Board refusing to do so. The only orders which the section refers to are: (1) An order settling a scheme; (2) an order modifying a scheme; and (3) an order cancelling a scheme. I consider that the words "institute a suit in the Court to modify, or set aside such order" are intended only to refer to an order settling a scheme or modifying or cancelling one.

(3) A I R 1921 P C 11; 60 Ind. Cas. 631; 48 I A 187; 48 C 499; 19 A L J 366; 40 M L J 423; 29 M L T 336; (1921) M W M 313; 33 C L J 405; 3 U P L R (P C) 17; 23 Bom. L R 648; 25 C W N 915; 14 L W 221 (P C).

Mr. Sesha Ayyangar on behalf of the appellant has referred us to *Venkatasami v. Stridevamma* (4) and *Reasut Hossain v. Hadjee Abdullah* (5). In *Venkatasami v. Stridevamma* (4), a Full Bench of this Court held that an order rejecting an application for the appointment of a Receiver was an order passed under s. 503 of the Code of 1882, (now O. XL, r. 1) and was, therefore, appealable under s. 588, cl. (24) (now O. XLIII, r. 1, cl. 2). An appeal was given from an order appointing a Receiver, but nothing was said with regard to an appeal from an order refusing to appoint a Receiver. The Court considered that as there was an appeal from an order appointing a Receiver it followed that there must be an appeal from a negative order. This meant that on appeal the Court could appoint a Receiver, if an appointment had been improperly refused by the Court below. Mr. Sesha Ayyangar says that inasmuch as the Court has the power to set aside an order of the Board to frame a scheme under s. 63 it can set aside the order refusing to settle a scheme, and if it does so this must imply a power to frame a scheme. This does not follow. The Act may vest in the Board the power to frame a scheme and in the Court only the power to modify or cancel it, and this is my reading of the Act. The Board must in the first instance frame a scheme. The Court can modify or cancel it, but it cannot take initial action. Therefore, it is not a question of the Court having power to do something and refusing to do it, as in *Venkatasami v. Stridevamma* (4) and that makes all the difference. The decision in that case was based on *Reasut Hossain v. Hadjee Abdullah* (5) the second case quoted by Mr. Sesha Ayyangar. If sub-s. (4) were to be held to apply to the order of the Board in this case, what would be the result? The Court would have to set aside the order, but it could not pass any further order, because the power to frame a scheme is in the Board. Venkataramana Rao, J. put the position here very aptly in these words :

"So when the Board declines to frame a scheme there is no use in the Court setting at naught that discretion because there is no power in the Court to compel the Board to frame that scheme. Unless the Court has got that power it would be futile to set aside such an order."

In my opinion the Legislature never intended sub-s. (4) to have application except to orders of the Board framing schemes or modifying or cancelling them. This brings

(4) 10 M 170 (F B).

(5) 2 C 131; 3 I A 321; 26 W R 50; 3 Suther 221 (P C).

me to the second contention of the appellant. Section 65 says that "any scheme of administration which has been settled by a Court under s. 63," or which under s. 75 is deemed to be a scheme settled under the Act may, at any time, for sufficient cause be modified or cancelled by the Court in a suit instituted by the Board or the trustee or any person having interest but not otherwise. Mr. Sesha Ayyangar says that the words "any scheme of administration which has been settled by the Court under s. 63" must be read as meaning that the Court is given power to settle a scheme in any circumstances. I cannot read s. 65 in this way. The Court has power to settle a scheme, but it must be a scheme which has first been framed by the Board. Section 65 is merely intended to give the Court power, after a scheme has been framed, to modify or cancel it at any time.

I am also unable to accept the argument that there is a residuary power in the Court to frame a scheme. The first Act relating to the Madras Hindu Religious Endowments was passed in 1923. Before then a scheme for the management of a temple could only be framed in accordance with the provisions of s. 92, Civil P. C., and the suit required the sanction of the Advocate-General to its institution. It is common ground that since 1923, s. 92, has ceased to apply and that the Madras Hindu Religious Endowments Board has taken the place of the Advocate-General. The scheme of the first Act was to place in the Board power of supervision of Hindu temples and *maths* in this province and in proper cases the control of the management, and this is the scheme of the present Act. As s. 92, Civil P. C., has now been re-placed by the Mad. Hindu Religious Endowments Act, 1926, so far as Hindu religious endowments of this province are concerned, that Act alone can be looked at for ascertaining what the powers of the Court are. There can be no residuary powers because the former powers are taken away by the present Act. The only section which has application here is s. 63, and, as I have indicated, this section, in my judgment, gives no power at all to the Court to frame a scheme when the Board has refused to do so. I consider that Venkataramana Rao, J., correctly interpreted the Act in his order of revision and consequently I hold that the appeal fails and should be dismissed with costs.

Krishnaswami Ayyangar, J.—I agree with my Lord the Chief Justice on both the points dealt with in the judgment just

now delivered. On the second point, which turns on the true construction of the last sentence in s. 63 (4), Mad. Hindu Religious Endowments Act, I desire to add a few words of my own. That clause runs as follows :

"The trustee or any person having interest, may within six months of the date of such publication institute a suit in the Court, to modify or set aside such order."

The words "such publication" and "such order" in this clause have reference obviously to the kind of order mentioned just previously, in the earlier portion of the same sub-section which directs the publication of "every order of the Board under this section" in the prescribed manner. The order with which we are here concerned is no doubt an order of the Board, but is it also one *under this section* so as to give to the appellants a right to institute a suit to modify or set it aside? I was at first impressed by the argument that the point is covered by the decision of the Full Bench in *Venkatasami v. Stridevamma* (4), but on further consideration, I think that that view cannot be sustained. The above decision was rendered no doubt on similar words but occurring in a different enactment, namely, the Civil Procedure Code, 1882. By s. 588 (24) of that Code, corresponding to O. XLIII, r. 1 (s) of the present Code, an appeal was allowed against, amongst others, orders under s. 503. Section 503, contained the various provisions relating to the appointment of a Receiver, his rights and duties, etc. but said nothing about the dismissal of an application made under the section, a feature which is common to both the old and the new Codes. The argument was advanced that an appeal was permitted only in respect of an affirmative order, that is to say orders granting the application, and not against an order refusing it. The contention was negatived, the Court holding that even an order rejecting the application was an order passed *under the section* and was therefore appealable under s. 588 (24). The result was that, in the view of the Full Bench, an order *under the section*, comprehended both classes of orders positive as well as negative. Here then it is said, we have a construction of the words *orders under a section*, and the question is, are we free to adopt a different construction in respect of what is practically the same language in the Mad. Hindu Religious Endowments Act?

Two reasons in particular have operated on my mind in persuading me to assent to the opinion expressed in the judgment of

the learned Chief Justice. In the first place, it is to be observed that there is nothing in common between the Civil P. C., and the Hindu Religious Endowments Act; or to say the same thing in other words, the two statutes are not *in pari materia*. Further, the judgment of the Full Bench appears to have proceeded on considerations, which have little or no application to an Act like the one with which we are concerned. Parker, J. felt compelled to place a reasonable construction on the Act, and pointed out that the opposite construction could not have been intended by the Legislature. Brandt, J. laid stress on principles and expediency, and held that the view of the Full Bench was more consonant with the general principles of the Code and the rules of construction. But it cannot be said that there is anything in the general principles of the Hindu Religious Endowments Act, which, as pointed out by my Lord, can be said to lend support to the construction accepted in the case cited. The purpose and scope of the Mad. Hindu Religious Endowments Act are quite different and leave no room for doubt that it was the intention of the Legislature to vest the supervision and control of religious institution in the Board composed of men specially qualified by their knowledge and equipment to discharge the duty entrusted to them by the Act. It is therefore right to say that in a statute of this kind, we should require language more explicit than we have, to give a right of suit against the decisions of a body composed presumably of persons having expert knowledge in the special field of Hindu religion and charities.

Secondly, and this in my view is a more powerful argument against the appellant, the Court should be slow to adopt a construction which is not likely to afford a real and effective remedy to the complaining party. The initial duty of framing a scheme rests with the Board and with the Board only, and all that the Court can do, assuming it has the power, is to modify or set aside its order of refusal, and not to compel it to frame a scheme. There is nothing in ss. 63, 64 and 65, to warrant our holding that the Court by its decree can itself frame a scheme in the suit. To imply such a power in the Court from the opening words of s. 65, namely, "Any scheme of administration which has been settled by a Court under s. 63," is to place an unreasonable construction on these words, and cannot be permitted. Is the Court then to be placed in a position in which it is merely to set aside the order and still leave it open to the Board to refuse

to frame a scheme, in other words to stultify itself? I think not. I therefore feel that whatever might be the meaning of the words in question in some other enactment or in some other context, it is not correct to construe s. 63, as conferring a right of suit against a refusal to frame a scheme under the section.

N.-D.

Appeal dismissed.

BOMBAY HIGH COURT

Notice of Motion in Suit No. 173 of 1940

December 13, 1940

BLACKWELL, J.

KANHAIYALAL HARKARANDAS—

PLAINTIFF

versus

MOHANLAL RAMVALLABH—

DEFENDANT

Right of suit—Cause of action—Anticipation of criminal complaint—Civil suit for declaration that there is no cause of action for the anticipated criminal complaint cannot lie—Civil Procedure Code (Act V of 1908), s. 151—Injunction, if can be granted in personam against party restraining it from proceeding with criminal complaint in Court outside jurisdiction of High Court—Injunction was refused in peculiar circumstances of the case.

The mere fact that A is supposed to contemplate the bringing of an action against B or that A may have stated that he has grounds for such an action, does not entitle B to institute an action against A, to have it declared that A has not a good cause of action against B.

High Court has inherent jurisdiction to grant an injunction *in personam* against a person who has submitted to the jurisdiction to restrain him from proceeding with a criminal complaint in a Court which is not subject to the jurisdiction of that High Court. This jurisdiction, however, should be exercised with extreme caution.

[Bombay High Court refused to grant injunction *in personam* against a defendant who had submitted to its jurisdiction restraining him from proceeding with the complaint filed by him against the applicant in the Court of a Magistrate at Benares, charging him with an offence of criminal misappropriation as the plaintiff had not in the first instance applied to the Criminal Court for the stay of criminal proceedings, had instituted the civil suit with the object of forestalling and preventing the criminal proceedings, and there was a long delay in praying for the injunction.]

Mr. K. A. Somjee, for the Plaintiff.

Messrs. M. V. Desai and V. K. Chhatrapati, for the Defendant.

Order.—This is a notice of motion taken out by the plaintiff on November 13, 1940, for an order that the defendant may be restrained from proceeding with a complaint filed by him in the first Class Magistrate's Court at Benares. That complaint was filed on February 14, 1940. But a letter dated January 19, 1940, the defendant's Advocate

alleged that the plaintiff had been entrusted with ornaments by the defendant worth over Rs. 7,600 a list of which was appended to the letter on the plaintiff's assurance that they would be returned to the defendant whenever required, that the plaintiff had written several letters to the defendant assuring him that he would return the same, that in spite of repeated demands he had not done so, and had dishonestly misappropriated the ornaments. The letter demanded the return of the ornaments within a week of the receipt of the notice and stated that in default the defendant would be constrained to take steps for the prosecution of the plaintiff under s. 406, I. P. C. That letter was not in fact received by the plaintiff until January 29, 1940. Without replying to that letter the plaintiff, on January 31, 1940 filed this suit. In the plaint he alleges that on or about February 10, 1939, he lent Rs. 2,000 to the defendant who promised to pay that amount in Bombay with interest at 6 per cent., after a month or two that payment had been demanded and the defendant had refused to pay and by his Advocate's letter of January 19, 1940 to which I have referred and which is Ex. (A) to the plaint, put forward a false claim against the plaintiff. The plaint goes on to allege that the plaintiff had at no time any ornaments of the defendant's wife and submits that the plaintiff is entitled to a declaration that he is not in possession of any ornaments of the defendant's wife and that the defendant had no moneys in deposit with the plaintiff that fact having been alleged both in the letter of January 19, 1940 and in the plaint.

It is to be observed that the first cause of action alleged in the plaint is in respect of an alleged loan by the plaintiff to the defendant of Rs. 2,000. The declaration is asked for with the object of getting a decision that the plaintiff had not in his possession at any time the ornaments of the defendant and that he had no moneys on deposit with him from the defendant. I do not express any opinion as to whether that declaration is well-founded in law or not, inasmuch as it will fall to be decided on the hearing of the suit and it would not be proper for me to do so. I do, however, refer to some observations made by Joyce J., in *North Eastern Marine Engineering Co. v. Leeds Forge Co. (1)*. That case arose out of s. 32, Patents, Designs and Trade-marks Act,

(1) (1906) 1 Ch. 324; affirmed in (1906) 2 Ch. 498; 75 L.J. Ch. 720; 95 L.T. 178; 22 T.L.R. 724; 23 R.P.C. 529.

1883, but the learned Judge made some observations of a general character, with which I respectfully agree that seem to be pertinent to the declaration asked for in the present plaint. The learned Judge said (p. 329*):

"Speaking generally, in simple cases not within s. 32 of the Act the mere fact that A is supposed to contemplate the bringing of an action against B or that A may have stated that he has grounds for such an action does not, in my opinion, entitle B to institute an action against A, to have it declared that A has not a good cause of action against B. I think that is so whether the result depends merely upon questions of law, or upon facts as to which there would or might be a conflict of evidence and a protracted trial. No doubt delay may in certain cases furnish a good ground for defence; but ordinarily an intending plaintiff may postpone his action as long as he pleases, at the risk of finding himself ultimately barred by some statute of limitations and he may choose his own time for commencing proceedings."

I am by no means satisfied that that declaration was not asked for in the hope that it might induce the defendant not to launch criminal proceedings as, in my opinion, he was clearly entitled to do and in the hope that he would be persuaded to deal with the matter by way of counter-claim in the present suit. Having launched that suit, the plaintiff replied to the letter of January 19, by a letter from his attorneys dated February 1, 1940, in which he referred to the claim put forward by the defendant as a bogus demand intended to forestall the plaintiff's claim for Rs. 2,000. The letter goes on to inform the defendant that the plaintiff has filed a suit to recover the amount lent and advanced and for a declaration that the claim for the ornaments and moneys made by the defendant was not justified. The criminal complaint was filed by the defendant in the Court of the City Magistrate, Benares, on February 14, 1940. A copy thereof is set out in Ex. B to the plaintiff's affidavit of November 12, 1940. It is a complaint made not only against the plaintiff but also against accused No. 2 who is alleged to be the *munist* of the plaintiff. That complaint alleges dishonest misappropriation and conversion of ornaments entrusted by the complainant to the *munist* on the plaintiff's behalf. There appears to have been some delay in serving the criminal process upon the plaintiff. He had certainly been served before May 18, 1940, because on that date he filed a petition to quash the criminal proceedings on the ground that the matter was merely a civil dispute and that the Court had no jurisdiction. The Court dismissed that application, there was an application in revision which was dis-

missed by the District Magistrate on August 16, 1940 and the matter has now gone to the High Court of Allahabad and is still pending before that Court.

Mr. M. V. Desai who appears for the defendant concedes that this Court has got the power to make an order *in personam* against his client, to restrain him from proceeding with that criminal complaint, if in the exercise of its discretion the Court thinks proper to do so. A number of authorities were cited to me, but, in view of that concession, it is, in my opinion, unnecessary to refer to any of them. The grounds upon which the order is asked for are set out in the said affidavit of the plaintiff. In para. 3 thereof it is alleged that the complaint filed by the defendant at Benares is only for the purpose of stifling this suit and to put the plaintiff to unnecessary harassment, annoyance and costs and the same is of a blackmailing character and that it has been filed for the purpose of bringing undue pressure upon the plaintiff and similar allegations are made in para. 5 of the affidavit.

I have to consider whether the complaint was filed for that purpose. I have already drawn attention to the fact that by the letter of January 19, 1940, written on behalf of the defendant to the plaintiff the claim was made for the return of the ornaments and for payment of moneys alleged to have been deposited and that letter contains a statement that it was then the intention of the defendant, if his demand was not complied with, to file a criminal complaint for misappropriation. The intention to file that complaint was made before any demand had been put forward on behalf of the plaintiff in respect of the alleged loan of Rs. 2,000 and without even replying to the letter this suit was filed, the curious declaration to which I have drawn attention was inserted and I am now asked to say that the object of that criminal complaint was to stifle a suit which had not even been threatened and in respect of which it had not been suggested that there was any cause of action. I entirely decline to accede to such a suggestion. In my opinion, the boot is on the other leg, and the civil suit was filed and that curious declaration was inserted with the object and in the hope of forestalling and if possible preventing the threatened criminal proceedings. I have been strongly pressed by Mr. Somjee, the plaintiff's Counsel, to grant an injunction restraining the criminal proceedings upon the ground that the issues are the same and that it is a great hardship upon the plaintiff to have two Courts trying issues of a similar character. Mr. Desai for

*Page of (1906) 1 Ch.—[Ed.]

the defendant, without prejudice to his submission that the motion was unjustified and ought to be dismissed with costs, offered to have the counter-claim stayed pending the hearing and final determination of the criminal proceedings. Mr. Somjee for the plaintiff is unwilling to accede to that suggestion, and that being so, I shall not make any order staying the counter-claim. Mr. Somjee, on the other hand, has pressed me to expedite this suit with the object of getting the issues arising out of the counter-claim decided if possible before the criminal case comes up for hearing. I here point out that this motion was not taken out until November 13, 1940, although the criminal proceedings were instituted on February 12, 1940. After he had been served with the criminal process, instead of applying promptly if so advised to the Criminal Court for a stay of the criminal proceedings pending the trial of this suit in which the plaintiff had asked for the declaration to which I have referred, and which according to his contention would have justified an application to the Criminal Court for a stay even before the counter-claim was filed, he chose to wait until November 13, 1940, and in the meantime to put the defendant to considerable costs by applying to the Criminal Court to quash those criminal proceedings upon the ground that the Court had no jurisdiction. In my opinion, the factor of delay is one that I should consider. On an application of this character, and quite apart from the merits of the matter, I should not have been disposed to make an order on this motion after such a long period of delay.

On the merits I am of opinion that the plaintiff makes out no case of harassment. I have already drawn attention to the fact that it does not lie in his mouth to suggest that the complaint was filed for the purpose of stifling this suit which at the time the notice of intention to file such a complaint was given had not even been suggested; nor for the same reason can it be suggested that that complaint was of a blackmailing character, and, in my opinion, it was grossly improper for the plaintiff even to suggest such a thing in his affidavit in the events which had happened. Whatever the decision before the Criminal Court may be, the civil rights and liabilities of the parties on the counter-claim will fall to be determined on the evidence adduced in this Court. I have been strongly pressed by Mr. Somjee to grant an injunction on the ground that if a judgment is given in his favour on the counter-claim in the present suit it would be admissible in evidence in the criminal proceedings and might have great

weight with the Magistrate in coming to a conclusion upon the criminal complaint. Having regard, however, to the fact that that complaint was instituted before this suit was even suggested, that in my opinion the declaration asked for in this suit was for the purpose, if possible of forestalling the criminal complaint, and that if he can prove criminal misappropriation the defendant is entitled to proceed by way of criminal process, I am clearly of opinion that I ought not to grant an injunction.

I may refer to one further aspect of the matter. This application is based upon the inherent jurisdiction of this Court under s. 151, Civil P. C. Although a Civil Court no doubt has jurisdiction to grant an injunction *in personam* against a person who has submitted to the jurisdiction to restrain him from proceeding with a criminal complaint in a Court which is not subject to the jurisdiction of this High Court, this is a jurisdiction which in my opinion should be exercised with extreme caution. It was open to the plaintiff if he had been so minded to apply to the Criminal Court for a stay of those criminal proceedings. He has not done so. In my opinion, he ought not to have resorted to an application to this Court based upon its jurisdiction under s. 151 without first exhausting the other remedy which was open to him by an application to the Criminal Court for stay of the criminal proceedings upon the ground that the issues involved had been raised by the plaintiff by his declaration in the civil suit. In all the circumstances I am clearly of opinion that this motion was not justified. I dismiss it with costs. As regards the costs which were reserved, I think it is proper that the defendant should bear those costs himself, and I make no order in relation to them.

D.

Motion dismissed.

MADRAS HIGH COURT

Second Appeal No. 436 of 1935

April 18, 1939

WADSWORTH, J.

PARAPPIL ASSYA UMMA—APPELLANT

*versus*PALOONTEAKATH MOOSSA AND OTHERS
—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XLI rr. 27, 29 — Failure of party to examine material witness though available, if sufficient reason to examine him in appeal—Absence of recorded objection to admission of evidence in appeal—Provisions of rr. 27 and 29, if can be ignored in all cases.

When an essential piece of evidence, obviously necessary for the proof of a party's case and available to that party, has not been adduced in the trial Court, the Appellate Court will not ordinarily allow the production of the missing evidence in appeal, merely because the trial Court has commented adversely on the failure of the party to prove his case as completely as was obviously necessary. 132 Ind. Cas. 721 (1), relied on. [p. 818, col. 1.]

The failure of a party to examine a material witness when that witness is available and the consequent existence of a gap in his case is not ordinarily a sufficient reason for examining that witness in appeal, though there may possibly be circumstances in which such a procedure would be justified, as, for instance, if the whole case was in such a muddle that the Judge was unable to pronounce a satisfactory judgment without further materials. [p. 819, col. 1.]

Although when both parties agree that further evidence is necessary and admission of that evidence is made by consent, any failure on the part of the Judge to record in due form the reasons for the admission of that evidence is not a matter which would justify the reversal of the judgment or the rejection of the additional evidence. Yet it is not a rule that in all cases where there is no recorded objection to the admission of evidence in appeal under O. XLI, r. 27, Civil P. C., the provisions of r. 27 and the procedure laid down under that rule and under r. 29 can be treated as of no importance. [p. 818, col. 2.]

S. A. against the decree of the District Court, North Malabar, in A. S. No. 276 of 1932.

Mr. P. Govinda Menon, for the Appellant.
- Mr. K. Kuttikrishna Menon, for the Respondents.

Judgment.—This appeal arises out of a suit for maintenance by a Muhammadan wife who is now a widow. The defence was that she was divorced in 1919 by her husband and the evidence was mainly directly to the factum of divorce. There was a remand by the District Judge who first heard the appeal for a decision on the question, "what is the school of law governing the parties" and fresh evidence was allowed on this question. When the case was re-heard by the trial Court both parties agreed that they were governed by the Shafi-Sunni law and the trial Court reiterated the previous finding that there was no divorce. In the course of the judgment he found it necessary to make observations regarding the failure of the defence to examine the Kazi alleged to have received the divorce letter and to have maintained the register of divorces and he observed that Ex. II, a register produced by the Mukri of the mosque, did not appear to be a regular book kept by the Kazi. When the matter came up again in appeal, there was a fresh District Judge who in the course of arguments appears to have decided to permit the defendants to examine the Kazi. On November 15, 1934, the B diary contains the following entry: "Arguments closed

for the present. Adjourned to December 6, 1934, to enable the appellants to examine Kadiar." On the same day the defendants presented a petition supported by an affidavit requesting that the Kazi be summoned and examined, the only reasons given being that the Kazi was cited in the lower Court as a witness to prove the fact of divorce, that he did not appear in person and sent certain documents through the Mukri that his evidence was most material and that he could not be examined in the lower Court as he did not appear in person and the evidence on record therefore was to some extent incomplete. It does not appear that any notice of this petition was given to the plaintiff and the order consists of the one word "allowed" written in the handwriting of somebody also, presumably a clerk, and initialled by the learned District Judge. The judgment contains the following reference to the admission of this further evidence in appeal:

"In the course of the arguments it became clear that the most material evidence regarding the factum of divorce could be furnished only by the Kazi, to whom the deceased Athermankutti is said to have communicated a notice of the *talak*. In these circumstances the prayer of the learned Advocate for the appellants that the Kazi should be summoned and examined was granted."

Then later on the learned Judge observed: "His evidence fills up the serious gaps that existed in the previous evidence produced by the defendants and leaves no room for doubting that Ex. 2, as well as the new registers now marked Ex. 2 (a) and 2 (b) are genuine documents kept under the direction and supervision of the Kazi."

It is contended for the plaintiff, who is the appellant here, that the judgment of the learned District Judge is vitiated by the irregular admission of fresh evidence in appeal contrary to the provisions of O. XLI, rr. 27 to 29, Civil P. C. It is to be noted that the fresh evidence admitted by the learned District Judge consisted not only of the oral evidence of the Kazi but also of two documents, for the admission of which there is no specific prayer or order or any reason given other than the passage from the judgment just quoted. Order XLI, r. 27, provides for the admission in appeal of documents wrongly rejected by the trial Court—a provision which has no application here—and also provides that further evidence may be admitted if the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause. Rule 29, provides that where additional evidence is directed or allowed to be taken the Appellate Court shall specify the points to which the evidence is to be confined and re-

cord on its proceedings the point so specified. These provisions have been the subject of many decisions, one of the most authoritative being the case in *Parsotim Thakur v. Lal Mohar Thakur* (1), where the Judicial Committee lays down the principles which should guide an Appellate Court in admitting or refusing to admit fresh evidence in appeal. Their Lordships point that such evidence can be admitted under cl. (1) (b) of r. 27, only when the Appellate Court requires it or finds it needful. It is also pointed out that the legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent. They add that the power so conferred ought to be very sparingly exercised and that one essential requirement is that the new evidence should have a direct and important bearing on a main issue in the case; and they observe that whenever the Appellate Court adopts the procedure laid down under r. 27, it is bound to record its reasons for so doing and under r. 29, must specify the points to which the evidence is to be confined and record on its proceedings the points so specified.

It is, I think, well established that additional evidence can only be admitted in appeal when the Appellate Court itself finds a necessity for the admission of such evidence in order to pronounce a satisfactory judgment and that the power embodied in O. XLI, r. 27 is not a power to give to one party an opportunity to fill up the gaps of a badly prepared case. *Prima facie* when an essential piece of evidence, obviously necessary for the proof of a party's case and available to that party, has not been adduced in the trial Court, the Appellate Court will not ordinarily allow the production of the missing evidence in appeal, merely because the trial Court has commented adversely on the failure of the party to prove his case as completely as was obviously necessary. If the Court finds that certain missing evidence is necessary to enable it to pronounce judgment, the Court should record an order to that effect and should specify the points to which the evidence is to be confined. The question whether any omission by the Appellate Court to record its reasons and to provide materials showing that the additional evidence is admitted for proper reasons,

(1) 10 Pat. 654; 132 Ind. Cas. 721; A I R 1931 P C 143; 58 I A 254; 33 Bom. L R 1015; (1931) A L J 513; 35 C W N 786; Ind. Rul. (1931) P C 209; 34 L W 76; 54 C L J 1; 12 P L T 683; (1931) M W N 929; 61 M L J 489 (P C).

will vitiate the judgment, must depend to some extent on the circumstances of the case. It is, I think, established that when both parties agree that further evidence is necessary and admission of that evidence is made by consent, any failure on the part of the Judge to record in due form the reasons for the admission of that evidence is not a matter which would justify the reversal of the judgment or the rejection of the additional evidence. So much can be inferred from the observations of the Privy Council in *Jagarnath Pershad v. Hanuman Pershad* (2) at p. 839. Mr. Kuttikrishna Menon on the strength of one sentence in the same passage has advanced the contention that when there is no objection to the admission of fresh evidence in appeal, the correctness of the admission of that evidence and the regularity of the proceedings admitting it are not matters which can, in second appeal, form a ground for reversing the judgment based on that evidence. The passage in the judgment of the Privy Council on which reliance is placed consists of this :

"It is objected secondly that the admission of the account books on appeal was irregular, but there is nothing to show that the admission was objected to at the time."

The judgment contains no further discussion of this point and though the introductory matter of the report contains extracts from the judgment of the High Court under appeal, it is not clear what were the account books to which their Lordships refer or what were the circumstances in which those account books came to be admitted. It seems to me impossible to treat this brief observation as authority for a rule that in all cases where there is no recorded objection to the admission of evidence in appeal under O. XLI, r. 27 the provisions of r. 27 and the procedure laid down under that rule and under r. 29 can be treated as of no importance. The position on the facts in the present case is that there is no proof either that there was or was not any objection to the admission of this evidence. The probability seems to me from the record in the B diary and the way in which the order on the petition was prepared that the learned District Judge must himself have expressed the opinion in the course of the argument that fresh evidence should be admitted. In such circumstances it may well be that the Counsel for the plaintiff may have considered that no opportunity for objection remained. Now it seems to me that the absence of objection can only be

(2) 36 C 833; 3 Ind. Cas. 465; 36 I A 221; 13 C W N 830; 10 C L J 74; 6 M L T 7; 11 Bom. L R 861; 19 M L J 435 (P C).

regarded as a factor of importance when in the circumstances it appears to have been equivalent to a consent. In the present case though doubtless the plaintiff's Counsel may have been aware that the learned District Judge had expressed an intention to admit the evidence of the Kazi, we do not know whether this intention was expressed after an objection had been heard and considered or whether no opportunity for objection was allowed. It cannot, I think, be inferred that there was anything in the nature of an acquiescence in or a consent to the taking of further evidence. With reference to the admission of the two additional documents, there is no indication that this was contemplated at the time when the learned Judge permitted the examination of the Kazi. The probability seems to me to be that these two documents went into the record as incidental to the examination of the witness.

Now if the judgment had embodied a statement of the reasons for admitting this additional evidence sufficient to indicate that the learned Judge had applied his mind to the law on the subject and with reference to that law had come to the conclusion that this additional evidence ought to be admitted under the terms of O. XLI, r. 27 (1) (b), it might be contended that the failure to make any contemporaneous record of the reasons for admitting the evidence or of the points to which the evidence was to be confined, though irregular, was not a sufficient ground for rejecting that evidence or reversing the judgment based upon it. But I cannot find any such materials in the judgment of the learned District Judge. The reason which he gives for admitting the evidence of the Kazi is that the Kazi is a most material witness and that his evidence fills up the gaps in the case. The fact that the Kazi was a material witness must have struck anyone responsible for the preparation of the defendants' case and it would appear that there was no practical difficulty about getting the evidence of the Kazi who lives quite near the Court.

I am of opinion that the failure of a party to examine a material witness when that witness is available and the consequent existence of a gap in his case is not ordinarily a sufficient reason for examining that witness in appeal, though there may possibly be circumstances in which such a procedure would be justified, as, for instance, if the whole case was in such a muddle that the Judge was unable to pronounce a satisfactory judgment without further materials.

But it does not seem to me to be right to allow a party to abstain from producing evidence which is obviously necessary, in the hope that if adverse comment is made upon the absence of this evidence, the deficiency can be supplied in appeal. To my mind it is essential to insist that ordinarily a party should prove his case in the trial Court and that it is only in exceptional circumstances for which r. 27 provides that the Court may, if it finds further evidence necessary, permit that evidence to be adduced in appeal. I am therefore, of opinion that the evidence of the Kazi and the two exhibits, namely Exs. 2 (a) and 2 (b), proved through him were wrongly admitted. As the judgment of the learned District Judge has been largely influenced by that evidence, the appeal must be allowed and remanded for fresh disposal by the learned District Judge on the materials available excluding this additional evidence. Costs throughout will abide by the result. Leave to appeal is refused.

N.-S.

Appeal allowed.

SIND CHIEF COURT

Criminal Reference No. 294 of 1940

November 11, 1940

DAVIS, C. J. AND TYABJI, J.

EMPEROR—PROSECUTOR

versus

SHIVBUX AMRO—ACCUSED

Penal Code (Act XLV of 1860), s. 75—Case falling under s. 75—Trial under s. 260, Criminal Procedure Code (Act V of 1898), if bad—S. 75, whether creates separate offence—S. 75 not to be applied to case but previous convictions to be taken into account—Summary trial is not appropriate—Court can take into consideration previous convictions apart from s. 75.

While the circumstances of a case where s. 75, I. P. C., can be applied make it desirable that the offence should not be tried in a summary way and that in such cases if the trial has started in a summary way the provisions of sub-s. (2) of s. 260, Criminal P. C., should be followed, nevertheless it cannot be said that a trial in which a charge under s. 75, could be framed is necessarily bad in law because the offence is tried summarily. It may, indeed, almost always be inexpedient in the interests of justice to do so, but s. 75, is an enabling section and merely applies a principle; it does not create a separate offence or indeed, an offence at all and hence the question whether s. 260, Criminal P. C., applies to offences under s. 75, does not arise.

A trial in a summary way is not an appropriate procedure when s. 75, is to be applied. Nor, indeed, would it be an appropriate procedure when s. 75, is not to be applied, but previous convictions are to be taken into account in determining what punishment within his ordinary powers a Magistrate should impose because of the limited nature of

the sentence which may be passed under s. 262, Criminal P. C.

Previous convictions can however, be taken into account under s. 14, Evi. Act even when s. 75, I. P. C., is not to be applied. After an accused has been convicted and before sentence is passed a Court can for the purpose of deciding what sentence should be passed, take into consideration previous convictions, any question of s. 75, apart. 26 Ind. Cas. 995 (1), explained.

Cr. Ref. made by the Additional Sessions Judge, Nawabshah, dated September 27, 1940.

Mr. Partabrai D. Punwani, Advocate-General, for the Crown.

Davis, C. J.—This is a reference by the Additional Sessions Judge of Nawabshah, recommending that the conviction of one Shivbux for theft of silver head-dresses from idols in a temple and a sentence of three months' rigorous imprisonment and a fine of Rs. 50 passed by the Resident Magistrate of Tando Adam, should be set aside and a re-trial ordered, on the ground that the accused had one previous conviction had sentence of one month's rigorous imprisonment, that this was a case in which s. 75, I. P. C., should be applied, and that the Magistrate could not try this case as he did, in a summary way, for s. 260, Criminal P. C., would not apply, and the trial was therefore void under s. 530 (q), Criminal P. C.

Now, so far as the application of s. 260, Criminal P. C., is concerned, we are of the opinion that while the circumstances of a case where s. 75, I. P. C., can be applied make it desirable that the offence should not be tried in a summary way and that in such cases if the trial has started in a summary way the provisions of sub s. (2) of s. 260, Criminal P. C., should be followed, nevertheless we do not think it can be said that a trial in which a charge under s. 75, I. P. C., could be framed is necessarily bad in law because the offence is tried summarily. It may, indeed, almost always be inexpedient in the interests of justice to do so, but s. 75, I. P. C., merely applies a principle; it does not create a separate offence. It is an enabling section and provides that when accused persons are convicted of certain offences and have previous convictions they can be sentenced to enhanced punishment by the application of s. 75, I. P. C. As s. 75, I. P. C., does not create a separate offence or indeed, an offence at all, it matters not that s. 260, Criminal P. C., is limited to certain offences. There is no offence under s. 75, I. P. C. There is no question then of s. 260, Criminal

P. C., applying or not applying to offences under s. 75, I. P. C. On the other hand, there may always be other considerations which prevent the trial in a summary way of offences to which s. 75, I. P. C., is to be applied. The Criminal P. C., provides a special procedure for the trial of offences when s. 75 is to be applied. Sections 221 and 255A, Criminal P. C., regulate the procedure at a trial by a Magistrate when s. 75, I. P. C., is to be applied. Section 310, Criminal P. C., regulates the procedure in a trial by a Sessions Court when previous convictions are to be proved for the purpose of enhancing sentence whether under s. 75, I. P. C., or any other special law, such for instance, as the Criminal Tribes Act.

It is therefore clear that trial in a summary way is not an appropriate procedure when s. 75, I. P. C., is to be applied. Nor, indeed, would it appear an appropriate procedure when s. 75, I. P. C., is not to be applied, but previous convictions are to be taken into account in determining what punishment within his ordinary powers a Magistrate should impose because of the limited nature of the sentence which may be passed under s. 262, Criminal P. C. It is to be remembered that previous convictions can be taken into account even when s. 75, I. P. C., is not to be applied. After an accused has been convicted and before sentence is passed a Court can for the purpose of deciding what sentence should be passed, take into consideration previous convictions, any question of s. 75, I. P. C., apart. In the Bombay case in *Emperor v. Ismail Ali* (1), there is some discussion as to the section of the Evi. Act, if any, which applies to a case where previous convictions are to be taken into account for the purpose of deciding the punishment to be imposed, the punishment being within the ordinary powers of the Magistrate. Shah, J. points out the distinction between bad character within the meaning of s. 54, Evi. Act, and a previous conviction. Heaton, J. was of the opinion that s. 54, Evi. Act, did not apply to such a case and that previous convictions in such a case were within the sphere of penology rather than of law. Neither of the learned Judges referred to s. 14, Evi. Act, which would appear to be the appropriate section.

While therefore it would appear to us that in this case it was unnecessary to apply the provisions of s. 75, I. P. C., we consider that in view of the accused's previous conviction,

(1) 39 B 326; 26 Ind. Cas. 995; A. I. R. 1914 Bom. 216; 16 Cr. L. J. 83; 16 Bom. L. R. 934.

and the circumstances of this case the Magistrate could not adequately punish the accused in a trial held in a summary way and that he should have tried the case in a long trial and before sentence, have taken into consideration the previous conviction of the accused when deciding what sentence should be imposed. It would appear that the Magistrate within his ordinary powers of a First Class Magistrate without the assistance of s. 75, I. P. C., could have adequately punished the accused. We therefore accept the reference, set aside the conviction and sentence and order the accused to be re-tried according to law.

• s.

Reference accepted.

MADRAS HIGH COURT

Civil Suit No. 1 of 1937

January 8, 1940

GENTLE, J.

CORPORATION OF MADRAS—PLAINTIFF
versus

SECRETARY OF STATE—DEFENDANT

Madras Motor Vehicles Taxation Act (III of 1931), s. 2 (iii)—Steam roller, if "motor vehicles"—Interpretation of Statutes—Same rule apply to all statutes—Taxing statute cannot be differently construed.

Steam rollers are motor vehicles within the meaning of s. 2, Mad. Motor Vehicles Taxation Act. *Smith and Sons v. Pickering* (1), relied on.

[Case-law referred to.]

If a statute purports to impose a tax, the intention so to do must be shown by clear and unambiguous language, but the same rules of construction apply to all statutes and a taxing statute cannot be differently construed. *Att.-General v. Carlton Bank* (5), relied on. [p. 823, col. 1.]

Mr. A. Suryanarayanan, for the Plaintiff.

Sir A. Krishnaswami Ayyar (Advocate-General) and Mr. R. Ramamurthy, for the Defendant.

Judgment.—The plaintiff, the Corporation of Madras, was the owner of 21 steam rollers which were used in connexion with the discharge of the duty of making, repairing and maintaining roads within the City. Acting through the Commissioner of Police the defendant (hereinafter called "the Local Govt.") required the plaintiff to pay the sum of Rs. 16,170 as the amount of tax alleged to be leviable upon these steam rollers under the provisions of the Madras Motor Vehicles Taxation Act, 1931 (hereinafter called "the Local Act") for the period from April 1, 1931 to April 30, 1934. The plaintiff contended that these rollers were not motor vehicles within the meaning of the Local Act and that no tax was leviable upon them. Correspondence took place be-

tween the plaintiff and the Local Govt. eventuating in 1936 by a letter addressed to the Corporation informing it that if payment of the sum of Rs. 16,170 was not made the Local Govt. would adjust this sum by an equivalent deduction from the grants payable to the plaintiff during that year. Thereupon, on March 30, 1936, the plaintiff paid the above sum under protest: see Exs. P-1, P-2. On August 14, 1936 by Ex. P-4 the plaintiff claimed repayment of the above amount and gave notice of the intention to file the present suit. This demand not having met with compliance, this suit was filed on December 14, 1936. The plaintiff claims: (a) a declaration that no tax is leviable upon the steam rollers under the provisions of the Local Act; (b) a decree for the sum of Rs. 16,170 and (c) interest upon that sum at the rate of 6 per cent. per annum from March 30, 1936, the date when payment was made to the Local Govt.

The defendant in his written statement alleges that the tax is leviable on the steam rollers under the provisions of the Local Act and denies that in any event the plaintiff is entitled to recover interest. No tax upon the plaintiff's steam rollers has been demanded or paid for the period following April 30, 1934 as under s. 11 (1) (ii), Local Act, the Local Govt. may by notification make an exemption in regard to the tax payable in respect of any motor vehicle or class of motor vehicles and pursuant to this provision road rollers belonging to the Govt. or Local Govt. bodies were exempted from payment of tax after the above date. No oral evidence was given and the facts to which I refer are agreed between the parties. If a steam roller is a motor vehicle within the meaning of the Local Act, the tax was properly leviable, and the plaintiff cannot succeed. On the other hand if "motor vehicle" under the Act does not include a steam roller the plaintiff was wrongly charged with the tax and is entitled to a decree for the amount paid. There is no dispute in regard to the amount of the claim. It is conceded by the plaintiff that if the tax was payable under the Act, the sum of Rs. 16,170 is the correct amount and the learned Advocate-General on behalf of the defendant conceded that if steam rollers were not taxable, then the above sum is a debt due and recoverable by the plaintiff from the defendant. The relevant provisions of the Local Act are:

"Section 2 (iii) 'motor vehicle' has the same meaning as in the Motor Vehicles Act, 1914.

Section 4 (1). The Local Govt. may...direct that a tax shall be levied on every motor vehicle kept or used in the presidency of Madras."

Section 2, Motor Vehicles Act, 1914, (hereinafter called the "the Imperial Act") provides that a

"motor vehicle" includes a vehicle, carriage or other means of conveyance propelled or which may be propelled on a road by electrical or mechanical power either entirely or partially."

Mr. Vajayarághavan in the course of his able argument on behalf of the plaintiff, contended that a steam roller is not included in the definition of 'Motor Vehicle' in the Imperial Act and consequently is excluded from the Local Act, and further that even if included in the definition in the Imperial Act, it is excluded from the Local Act which is a taxing or revenue statute, the object of which is different to that of the Imperial Act, and its provisions must be construed differently or at least more strictly than other legislation. Except in the respect mentioned below, no question arises that a steam roller fulfils the requirements of the definition in s. 2, Imperial Act. It is necessary in the first instance to consider whether a steam roller is 'motor vehicle' within the meaning of that statute.

It was contended that the words in the Imperial Act 'vehicle,' 'carriage' and 'other means of conveyance' must be read *ejusdem generis* and consequently, a vehicle which is not used or construed for the purpose of conveying passengers or goods, is not a vehicle within the definition, a steam roller being used solely for the purpose of making, repairing and maintaining roads and is not a means of conveyance. In Shortt's Dictionary a vehicle is defined as "a means of conveyance on wheels or runners used for the carriage of persons or goods." A steam roller has three wheels, a wide one in front and two narrower wheels at the rear (which are usually wider than wheels of vehicles). These wheels are of heavy manufacture and when the roller is employed in road making are used as the rollers. When it moves from place to place and in order to progress, these wheels fulfil the ordinary functions as such, and they are no less wheels because another purpose is fulfilled by them. A steam roller is one inseparable implement with a large superstructure containing its machinery and driver's cab and it travels on a road by means of its wheels.

In *Smith and Sons v. Pickering* (1) the ques-

(1) (1915) 1 K B 326; 84 L J K B 262; 112 L T 452; 79 J P 118; 13 L G R 175; 31 T L R 75.

tion was whether a heavy threshing machine and a straw trusser or presser, each travelling on four wheels, were included in s. 17 (1), Locomotives Act, 1898, which defines a 'wagon' as including "any truck, cart, carriage or other vehicle." Scrutton, J., as he then was, in his judgment pointed out that the words "any truck, cart, carriage or other vehicle" would seem to imply that a wagon must be constructed to carry something and if not so constructed there was support in some provisions of the Locomotives Act for the contention that it was not a 'wagon,' but if it were not regarded as a wagon, other provisions in the Act for the public safety would be inapplicable, and at p. 331*, he said:

"I come to the conclusion that it is not necessary to read into the meaning of the word 'wagon' any condition that the particular structure shall be capable of carrying any load other than itself. I see no reason why a heavy superstructure upon wheels should not be described as a vehicle."

If a steam roller were not included in the definition 'of motor vehicle' in s. 2, Imperial Act, then the provisions of ss. 3, 4 and 5 in Part 2 and ss. 16 and 17 in Part 5 of the Statute would not apply to it. These sections forbid a person under 18 years of age from driving a motor vehicle, require the driver to stop when directed by a Police Officer and others specified so to do, make it an offence to drive recklessly, specify the tribunal by which offences are triable and the punishment. The Legislature could not have intended, for example, to exempt a driver of a steam roller from any penalty, although he was guilty of driving to the danger of the public or refusing to stop when required in the interests of public safety. In *Dennis v. Leonard* (2), an "Austin" motor tractor was held to be a vehicle. This is an implement upon which the driver rides and is used for the purpose of towing or pulling. Avory, J., in his judgment at p. 96† points out that it was available for the purpose of carrying a person upon it. This must of course be the driver. In *Taylor v. Goodwing* (3), a bicycle was held to be a vehicle or carriage within s. 78, Highway Act, 1835, which prohibits the furious driving of any carriage, and it would seem that in that case the words "carriage" and "vehicle" were considered to be correlative terms. That decision was followed in *Emperor v. Kikha-*

(2) (1929) 141 L T 94; 28 Cox. C C 621.

(3) (1879) 4 Q B D 228; 48 L J M C 104; 40 L T 458; 27 W R 489.

* Page of (1915) I K B.—[Ed.]

† Page of 141 L. T.—[Ed.]

bhai (4). A steam roller is propelled on a road by mechanical power, it conveys the driver, and if he has one, also his assistant. Without the former, it could not travel.

With respect, I agree with the opinion of Scrutton, L. J., in *Smith and Sons v. Pickering* (1), that a heavy superstructure upon wheels is a vehicle, and it must follow that if it propels itself by mechanical power, it is a motor vehicle. Whether a steam roller is kept or used by a private person, firm or company or by a local authority, there can be no difference as to its nature. I cannot think that it was intended by the Legislature that a private person who is the owner of a steam roller used for road making could send it upon a highway to travel in any town or other part of the country and the driver should not be liable for the consequences of infringements of the provisions in the Act enacted for the purpose of public safety. In my view, a steam roller is a motor vehicle within the meaning of the definition in s. 2, Imperial Act. It is to be noticed that under s. 13 of this Act the Governor in Council by order dated November 29, 1916 exempted road rollers from the operation of Part 3 of the Act, which deals with licensing and control of motor vehicles. If a steam roller is not a motor vehicle within the meaning of the Act, then it could not be exempted from its provisions as they would otherwise be inapplicable.

Section 2 (iii), Local Act expressly provides that a "motor vehicle" has the same meaning as in the Imperial Act. It is contended on behalf of the plaintiff that as the object of the Local Act was, as set out in the Preamble, to abolish the levy of taxes on motor vehicles by local bodies and to provide for the levy of a provincial tax, and by s. 10 (1), from the proceeds of the tax, the Local Govt. shall pay to each local body such sum as represents the average annual income in tolls or taxes theretofore levied, that the Local Act was revenue legislation and consequently the meaning of "motor vehicle" is different to that in the Imperial Act, and the legislation being of a revenue nature, the same principles of construction do not apply. I do not agree with this contention. Whilst undoubtedly if a statute purports to impose a tax, the intention so to do must be shown by clear and unambiguous language, but the same rules of construction apply to all statutes. In *Att.-General v. Carlton Bank* (5), Lord Russel, C. J., at (4) 41 B 464; 40 Ind. Cas. 289; 19 Bom. L. R. 18 Cr. L. J. 641.

(5) (1899) 2 Q B 158 (164); 68 L J Q B 788; 81 L T 115; 47 W R 650; 63 J P 629; 15 T L R 380.

p. 164 said :

"I see no reason why any special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act is to be construed relates to taxation or to any other subject, viz., to give effect to the intention of the Legislature, as that intention is to be gathered from the language employed, having regard to the context in connexion with which it is employed. The Court must no doubt ascertain the subject-matter to which the particular tax is by the statute intended to be applied, but when once that is ascertained, it is not open to the Court to narrow or whittle down the operation of the Act by considerations of hardship or business convenience, or the like."

The wording of s. 2 of the Local Act, is clear and expressive and provides that a motor vehicle within that statute shall have the same meaning as in the Imperial Act. It must follow, in my opinion, that a motor vehicle within the meaning of the Imperial Act must also be a motor vehicle within the contemplation of the Local Act. It would seem that the plaintiff Corporation is impressed with the position that prior to the passing of the Local Act, the Corporation was the authority which imposed a tax upon motor vehicles and after it came into force it was unable to accept the new position that its own vehicles were liable to taxation. I hold that the plaintiff's steam rollers are motor vehicles within the meaning of s. 2 of the Local Act and were liable to the taxation imposed upon them by the Local Govt. In the light of the conclusion to which I have arrived, it is not necessary to consider at length the arguments which have been addressed to me upon the question of interest upon the amount of the claim. The learned Advocate-General conceded that if the Corporation succeeded in recovering the sum of Rs. 16,170 it would also be entitled to interest upon that amount from August 14, 1934, the date when the demand was made for repayment. I desire merely to express shortly that in my view the plaintiff is not entitled to interest prior to the above date. The sum claimed is not a debt payable by virtue of any written instrument at a certain time and interest would, therefore, commence to accrue from the date when written notice of demand was given as provided by s. 1, Interest Act, 1839. There will be a decree, therefore, in favour of the defendant and for the costs. (Certificate for Counsel.)

N.-D.

Order accordingly.

PESHAWAR JUDICIAL COMMISSIONER'S COURT

First Appeal No. 26/10 of 1939
December 12, 1940

ALMOND, J. C. AND SOOFI, J.
B. KALA RAM S. BHAG SINGH
—PLAINTIFF—APPELLANT

versus

FAZAL BARI KHAN AND OTHERS

—DEFENDANTS—RESPONDENTS

Evidence Act (I of 1872), ss. 32 (5), 35—Entry by father in his pocket book regarding birth of his son proved to be in his handwriting—Fact that they saw his handwriting long ago, whether shakes value of their evidence—Entry in school register regarding age, admissibility of—Minor—Contract—Minor representing to be major entering into contract—Contract, validity of—Whether can be compelled to refund money received by minor.

Where entry by father in his pocket book regarding the births of his various sons which is relevant under the provisions of s. 32 (5) is proved to be in his handwriting by witnesses acquainted with his handwriting in their official capacity, the fact that it is very long time since any of them saw his handwriting would not shake the value of the evidence which they have given.

There is a presumption that when the boy is admitted into the school he was accompanied by some close relative of his who must have been aware of his age. The entry regarding the age of the boy in the school register is, therefore, admissible.

Where a minor representing to be a major has entered into a contract, the contract is void and unenforceable against the minor. The minor cannot even be compelled to refund the money received by him under the contract. 170 Ind. Cas. 934 (4), approved, 111 Ind. Cas. 175 (2), dissented from.

F. A. against the order and decree of the Senior Sub-Judge, Peshawar, dated October 26, 1938.

Messrs. L. Ram Labhaya and L. Wazirchand, for the Appellant.

Mr. Abdul Latif, for the Respondents.

Almond, J. C.—This is an appeal against the order of the Senior Subordinate Judge, Peshawar dismissing the plaintiff's suit. The plaintiff Kalaram sued the defendant Fazal Bari for recovery of Rs. 5,000, principal and Rs. 5,000, interest or rent on the basis of a mortgage deed executed by Fazal Bari on January 5, 1930. The defendant Fazal Bari has died during the pendency of this appeal and his representatives have been brought on the file. The defence of the defendant was that he was a minor at the time of the execution of the mortgage deed which therefore could not be enforced against him. He also denied the execution of the deed. The following issues were framed by the trial Court:

"1. Did the defendant execute the mortgage deed in question?

2. If so, was the defendant minor at the time of the execution of the deed and is therefore not liable?

3. Did the defendant pay Rs. 500 on account of interest, and if so, what is its effect?

4. What is the defendant's share in the property in suit?

5. To what relief is the plaintiff entitled?"

The trial Court found that the mortgage deed had been executed by the defendant, that he was a minor at the time of its execution, that he did not make any false representation as to his age and therefore the plaintiff was entitled to no relief. In the appeal before us learned Counsel has not contested the finding on the question of the execution of the document. He has however made the following points: 1. That it is not proved that the defendant was a minor at the time of the execution of the deed. 2. That he did make a false representation as to his age to the plaintiff, and 3. That if the first point is found against him and the second in his favour he is entitled to restitution of the original sum of Rs. 5,000 advanced. These are the three points for decision in this case.

As regards the question of the age of the defendant the evidence is based entirely on entries in certain documents. The first of these is made in a pocket book which is said to have belonged to the minor's father Juma Khan who was in service in Baluchistan in 1912 when the defendant is said to have been born. The father is said to have made the entries in this book regarding the births of his various sons and the birth of the defendant is shown to have taken place on April 3, 1912. To prove that this entry which is relevant under the provisions of s. 32 (5), Evi. Act, was in the handwriting of the defendant's father one witness M. Sadulla Jan, a Pleader, was examined at the trial and two others who are senior E. A. Cs in Baluchistan were examined on commission. All these three witnesses state that they served under the defendant's father in Baluchistan and thus became acquainted with his handwriting in their official capacity. They express the opinion that the entry in dispute is in the handwriting of Juma Khan. These three witnesses are entirely independent and there is no reason for doubting the opinion which they have expressed. The only criticism which learned Counsel for the appellant can make on their evidence is that it is a very long time since any of them saw the handwriting of Juma Khan, but that would not in our opinion shake the value of the evidence which they have given.

The other piece of documentary evidence relates to entries in documents at schools

which the defendant attended. He first attended the Islamia High School in Peshawar where he was admitted in 1919 and the admission register shows his date of birth as April 3, 1912. He went into the Edwards High School in 1922 where his birth was again shown as April 3, 1912. An entrance form for the school-leaving certificate was sent by the latter school to the Punjab University and was proved by an official of the University. In that application the date of birth is also given as April 3, 1912. Learned Counsel has contended in connection with these entries in the school registers which are admissible under s. 35, Evi. Act; that they can have little value in view of the fact that we are in the dark as to the persons who caused the entries to be made. There is a presumption however that when the boy was admitted into the school he was accompanied by some close relative of his who must have been aware of his age. All these entries in the various documents were made long before the present dispute arose and when there was no occasion to forge the age of the boy. There is also a further entry in the service book of the defendant kept by Govt. for he entered Govt. service after leaving school and his date of birth is also given there as April 3, 1912. On these facts we agree with the learned trial Judge that the defendant was a minor at the time of the execution of the document.

We now turn to the second point, namely, whether the defendant made a false representation as to his age at the time of the execution of the document. The document was written on January 5, 1930, by Waishnu Das a deed-writer. He says that at the time he wrote it there was no mention in it of the age of the defendant. The document was registered on January 8, and bears an interlineation giving the age of the defendant as 22 years. The defendant denies that he made this addition with his own hand, though he admits that he initialled the addition and says that he did so at the instigation of his step-brother Mohd. Sadiq, who has been traceless for the last five years. Lalchand; P. W. No. 5, the broker who arranged this contract, says that he was present at the time the deed was registered and that the addition regarding the age of the defendant was made by the defendant in his own hand at the instance of the Sub-Registrar. This witness Lalchand is an independent witness and his evidence appears to us to be in accordance with the probabilities of the case. Sub-Registrar before registering a document are required to satisfy themselves

that an executant is not a minor and it seems to have been for this reason that the addition was made. The learned trial Judge was of opinion that as this fact was established, the plaintiff should therefore have been put on his guard as regards the age of the defendant and that as he took no steps to inquire about the real age of the defendant, he could not have been misled by the statement of the defendant as to his age. We are of opinion that there was a definite misrepresentation by the defendant as to his age. He stated that he was 22 years old. The plaintiff had no means of ascertaining the correctness of this and we think that it was on the basis of this representation of the defendant that the money was then advanced.

There remains the last legal point. Learned Counsel concedes that in view of the decisions of the Judicial Committee of the Privy Council in *Mohori Bibee v. Dharmodas Ghose* (1), the contract between the plaintiff and the defendant is void and is unenforceable. It is also conceded that in view of the decisions of all the High Courts in India the defendant is not estopped from pleading his minority under the provisions of s. 115, Evi. Act. He contends however that the plaintiff is entitled to restitution of the sum of Rs. 5,000 which he advanced under this contract. There is a violent conflict of opinion on this point between the High Courts in India. The case on which the appellant relies is a judgment of a Full Bench of the Lahore High Court in *Khan Gul v. Lakha Singh* (2). The decision in that case was given by a Bench of five Judges out of whom four were of opinion that in circumstances like the present case the minor defendant could be compelled to restore the money which he received under the contract: one Judge dissented from this view and held that the minor could not be compelled to restore the money which he had received. That judgment was followed by a Single Judge of the Calcutta High Court in *Manmatha Kumar Saha v. Exchange Loan Co. Ltd.* (3). The opposite view was taken by the Allahabad High Court in *Ajudhia Prasad v. Chandan Lal* (4). That case was decided by three Judges who after considering the Lahore case all came to the conclusion that the minor defendant could not be

(1) 30 C 539; 30 I A 114; 7 C W N 441; 8 Sar. 374; 5 Bom. L R 421 (P O).

(2) A I R 1928 Lah. 609; 111 Ind. Cas. 175; 9 L 701; 30 P L R 60; 10 L L J 413 (F B).

(3) A I R 1936 Cal. 567; 165 Ind. Cas. 363; 9 R C 379; 41 C W N 115; 1 L R (1937) 1 Cal. 283.

(4) A I R 1937 All. 610; 170 Ind. Cas. 934; (1937) A L J 688; 10 R A 195; 1937 A L R 764; 1 L R (1937) All. 860 (F B).

compelled to restore money which he had received under the contract. The law on the subject has been discussed in extreme detail in all these three judgments and nothing can be added to the arguments which have been set forth in them. It only remains to be said that we consider that the view of the Allahabad High Court is the correct one. To hold otherwise would, in our opinion, be to evade the provisions of the Contract Act as interpreted by the Privy Council in *Mohori Bibee v. Dhamodas Ghose* (1). The following passage in the Allahabad case appears to us to be particularly pertinent :

"To pass a decree against a minor enforcing his pecuniary liability would while holding that the contract is void and unenforceable, at the same time be passing a decree against him on the footing that he had entered into the contract and has not carried out its terms. There is no rule of equity, justice and good conscience which entitles a Court to enforce a void contract of a minor under the cloak of equitable doctrine."

There were remarks to a similar effect by their Lordships of the Privy Council in the Calcutta case referred to. They cited with approval a dictum of Romer, L. J. given in an English case to the following effect :

"The short answer is that a Court of equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which as against that person the Legislature has declared to be void."

We are therefore of opinion that the decision of the Court below is correct though on different grounds. We accordingly dismiss this appeal with costs. Pleadar's fee Rs. 150.

D.

Appeal dismissed.

MADRAS HIGH COURT

Appeals Nos. 146 to 148 of 1938

February 3, 1939

ABDUR RAHMAN, J.

P. L. S. S. RAMANATHAN CHETTIAR

AND OTHERS—APPELLANTS

versus

K. M. V. V. KUMARAPPA CHETTIAR—

RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXXII, r. 7 (1)—Agreement or compromise by guardian on behalf of minor without leave of Court, whether voidable against all parties at minor's option—Guardian agreeing to refer matter in suit to arbitration, if can question legality of reference and award in suit and in appeal—Principle and Agent—Power-of-attorney—Authority to adjust matters—Whether includes power to refer to arbitration.

If a guardian in spite of the prohibition, contained in r. 7 (1) of O. XXXII, Civil P. C., enters into an agreement or a compromise on behalf of a minor, without obtaining leave of the Court it would be voidable against all the parties and presumably not at their option but at the option of the minor. It is therefore

the minor alone who can be held entitled to resile from the agreement or compromise, if he may choose it fit to do so, either on attaining majority or even before through his next friend or guardian. The sub-cl. (1) only contemplates two parties one of which is the minor and the other persons who have entered into a contract with the minor through his guardian. As between these two parties the contract is stated to be voidable against them and not at their option. 34 Ind. Cas. 213 (9), relied on. [p. 828, col. 1.]

[Case-law referred to.]

Obiter.—The question of legality of reference and that of an award can be raised on behalf of the minors by the same guardians who had agreed to refer the matter to arbitration both in the suit and even in the appeal. 130 Ind. Cas. 209 (7) and 149 Ind. Cas. 778 (8), not approved. [p. 827, col. 2.]

Where a power-of-attorney authorises the agent to adjust a matter, the power does not include a power to refer the matter to arbitration on the principle underlying the maxim *delagata potestas non potest delegari*.

A. against an order of the Sub-Judge, Sivaganga, dated October 16, 1937.

Babu Sitarama Rao and Mr. V. Ramaswami Ayyar, for the Appellants.

The Advocate General, Messrs. R. Ramamurthi Iyer and C. Somasundaram Chettiar, for the Respondent.

Judgment.—These appeals arise out of an order passed by the Subordinate Judge of Sivaganga on two applications, one made on behalf of the plaintiff and the other on behalf of the defendants under O. XXIII, r. 3, Civil P. C., with the allegations that the parties had referred the matter in suit, which was one for dissolution of partnership and accounts, to two arbitrations which resulted in two awards. The earlier which held the plaintiff to be entitled to recover Rs. 30,000 was pleaded on behalf of the defendants and the later under which the defendants were found to be liable to the extent of Rs. 52,000 was pleaded by the plaintiff. Since it has been settled by a Full Bench of this Court in *Subbaraju v. Venkataramaraju* (1), that where in a suit parties have referred their difference to arbitration without an order of the Court and an award is made, a decree in terms of the award can be passed by the Court under O. XXIII, r. 3, Civil P. C., the only question for decision in this case is whether the subject-matter of the suit had been so adjusted between the parties. It was asserted on behalf of the plaintiff that, although the matter was referred to a private arbitration for the first time in 1935, the award given by the arbitrators was invalid and as the plaintiff was not satisfied with it, the subject-matter of the suit along with the question of the validity of the first award were referred

(1) 51 M 800; 113 Ind. Cas. 632; A I R 1928 Mad. 1025; 55 M L J 429; 28 L W 321 (F B).

to a second arbitration by the parties on April 2, 1936 and resulted in the award Ex. A, under which the plaintiff was entitled to get a sum of Rs. 52,000, instead of Rs. 30,000 as ordered in the previous arbitration. It was also alleged that the defendants had accepted the later award, signed it in token of their acceptance, executed four *hundis* for the amount to which the plaintiff was found to be entitled by the arbitrators and delivered them to the plaintiff. He therefore applied to the Court for the adjustment and satisfaction to be recorded and the suit to be dismissed.

Various objections were raised by the defendants to this award although the *factum* of reference and the existence of a second award were not denied. No evidence was however let in on their behalf to substantiate their contentions and the learned Counsel for the appellants has therefore confined himself to certain legal objections which have to be determined in these appeals. I might state at once that in view of the plaintiff's application, it would be unnecessary to consider the award or adjustment relied upon by the defendants in their application (I. A. No. 414 of 1935) unless I come to the conclusion that in view of the legal objections stressed on behalf of the defendants the second award and satisfaction urged on behalf of the plaintiff could not be sustained. If I arrive, on the other hand, at a finding that the satisfaction pleaded on behalf of the plaintiff was unassailable, the first award or adjustment must be taken to have been superseded by the later award and satisfaction.

The first legal objection raised on behalf of the defendants is that inasmuch as there were minors who were also defendants in the suit, the matter in dispute could not have been referred to arbitration or compromise under the provisions of O. XXXII, r. 7, Civil P. C., without the leave of the Court. There is considerable force in this objection so far as it goes. No application appears to have been made to the Court in which the suit was pending for leave to refer the matter to arbitration on behalf of the minors. Even after the award was made, the guardian *ad litem* made no application to the Court for granting him leave to compromise the matter in suit. In the absence of any application for leave, the Court was not and could not have been called upon to consider whether the compromise was beneficial to the minors and the compromise could not therefore be forced on the minors even if the Court happened to consider it to

be beneficial in their interest: see *Ranga Rao v. Rajagopala Raju* (2), *Gulab Dei v. Vaish Motor Co. Etawah* (3), *Veerappa Chettiar v. Veluswami Thevar*, 146 Ind. Cas. 707 (4), *Hemangini Dasi v. Bhagwati Sundari Dasi* (5) and *In re Birchall, Wilson v. Birchall* (6). The learned Advocate-General who appeared for the respondent did not oppose this contention seriously, although it was argued by him that this objection might not be available to the same guardian who had agreed to refer the suit to arbitration. He relied on certain observations made in *Golnuri Bibi v. Abdus Samad* (7), at p. 645 and *Chennakesavulu v. Veerasami* (8), in that connection. The case in *Chennakesavulu v. Veerasami* (8), is by a single Judge of this Court and simply follows the Calcutta case. The learned Judges of the Calcutta High Court had held that if some guardians who had agreed to refer the matter to arbitration subsequently turned round after the award was made and wished to appeal against the decree passed in terms of the award, they would not be entitled to do so as the decree passed on that basis was not void but voidable at the option of the minor and that no other party could call it in question except the minor either on attaining majority or before then through another next friend.

The question before me does not relate to the competency of the appeal. Nor have I been called upon in this case to consider the validity of the reference made by the guardian on behalf of the minors without the leave of the Court, as it appears from the application presented on behalf of the plaintiff that the matter was referred to arbitration only by defendants Nos. 2 and 4 for themselves and by defendant No. 2 on behalf of defendant No. 3 as his agent, and there is no reference to the minors either in the application or in the award Ex. A which is on the record. If it were not so, I feel with great deference to the learned Judges who decided the Calcutta case that the question of legality of reference and that of an award could be raised on behalf of the minors by the same guardians both in the suit and even in the appeal: but as there is no

(2) 22 M 378.

(3) 47 A 782; 88 Ind. Cas. 429; A I R 1925 All. 570; 23 A L J 523.

(4) 146 Ind. Cas. 707; A I R 1933 Rang. 186; 6 R. Rang. 120.

(5) 27 C W N 792; 75 Ind. Cas. 682; A I R 1923 Cal. 685.

(6) (1881) 16 Ch. D 41; 44 L T 113; 29 W R 27.

(7) 58 C 628 (645); 130 Ind. Cas. 209; A I R 1931 Cal. 211; 35 C W N 238; 52 C L J 298.

(8) 65 M L J 755; 149 Ind. Cas. 778; A I R 1933 Mad. 862; 38 L W 927; 6 R M 658.

necessity to decide the point here, it is unnecessary to examine the question in any detail. In the absence of any reference to the minors in the award, the lower Court's finding that they (the minors) would be bound by the award unless they got it set aside must be held to be incorrect and is therefore set aside.

It has however been contended that in view of sub-cl. (2) of O. XXXII, r. 7, which declares an agreement of reference and even a compromise entered into without the leave of the Court not only void as against minors but also voidable against all the parties to the suit and since the defendants have expressed themselves unequivocally by pleading the defence that they were not bound by the compromise, it should be held to be wholly ineffectual. It is quite true that the words employed in sub-cl. (2) are capable of this construction but the interpretation which I have been asked to put on them is, in my opinion, unreasonable and should not be accepted. The whole object of enacting this rule was that a next friend or a guardian should not enter into any agreement in regard to the subject-matter of the suit or compromise without the leave of the Court. This Rule is undoubtedly wholesome. Sub-cl. (2) was merely providing the penalty when the next friend or guardian acted in contravention of the provisions of sub-cl. (1). If a guardian did in spite of this prohibition, enter into an agreement or a compromise on behalf of a minor, without obtaining such leave they would be voidable against all the parties and presumably not at their option but at the option of the minors. The use of the word 'against' in this sub-clause is important and must not be overlooked. It could not have been the intention of the Legislature to have given this option to the very persons who may enter into an agreement or a compromise in contravention of the rule with a next friend or a guardian of a minor. They must be presumed to have knowledge that they were dealing with a minor's guardian who has had no leave from the Court and cannot be permitted to take advantage of the situation if they find that an arbitrator has gone against them or that a compromise appeared subsequently to be more detrimental than what they thought it would be in the beginning. It is only the minor who is unable to guard his own interests and has to depend upon the *bona fides* and vigilance of other persons.

It is therefore the minor alone who can be held entitled to resile from the agreement or compromise, if he may choose it

fit to do so, either on attaining majority or even before through his next friend or guardian. The sub-cl. (1) only contemplates two parties one of which is the minor and the other persons who have entered into a contract with the minor through his guardian. As between these two parties the contract is stated to be voidable against them and not at their option. This interpretation can be supported by a decision of their Lordships of the Privy Council in *Jamna Bai v. Vasant Rao* (9), where a bond executed as a part of a compromise of a suit jointly on behalf of a minor and by another was held to be unenforceable against the minor but this fact did not absolve the other executant from her obligations under the bond. The agreement of reference or compromise would have been in this particular case voidable at the option of the minors if they were parties to the agreement but as stated above the reference and the compromise were by adult defendants alone and the minors were no parties to either. There is thus no force in the contention that the compromise should be held to be of no force against the other defendants if it was found to be not binding on the minors.

The second question which has been raised by the learned Counsel for the appellant is that defendant No. 2 was not authorized on behalf of defendant No. 3 to refer the matter to arbitration. The plaintiff on the other hand placed his reliance on the power-of-attorney executed by defendant No. 3 in favour of defendant No. 2 (Ex. 2). Mr. Sitarama Rao contends however that the power-of-attorney has to be construed strictly and must be examined with care in order to ascertain whether the act done by the agent was fairly within the scope of his authority. This is correct and bearing this rule of construction in mind I would have to examine the document. A reference to the power-of-attorney shows that defendant No. 3 had authorized defendant No. 2 to settle, liquidate or adjust all accounts existing between the defendants and any other person. There was no power authorizing defendant No. 2 to refer the matter to arbitration. Moreover, the words used in the power-of-attorney indicate that authority was being given to defendant No. 2 to adjust, and the authority could not therefore in the absence of any other words to the contrary in the power-of-attorney, be delegated on the principle un-

(9) 39 M 409; 34 Ind. Cas. 213; 43 I A 99; A I R 1916 P C 2; 14 A L J 534; 18 Bom. L R 432; 31 M L J 18; 3 L W 540; 24 C L J 74; 20 M L T 31; (1916) 1 M W N 452 (P C).

derlying the *naxim delegata potestas non potest delegari*. It is quite legitimate for a principal to expect that if he gives the power to an agent to adjust, the agent would exercise his own judgment in the matter and not agree to be bound by the judgment of some one else whom the principle did not know. The learned Advocate-General however urged that the power to adjust expressly granted should include the power to refer to arbitration as it was necessary for accomplishing the object for which the power was granted expressly. It was also argued that business could not be conducted without the existence of this power and defendant No. 2 should therefore be held to be bound by the award. I am not satisfied in the present case that the claim could not have been adjusted otherwise than by referring the dispute to arbitration. Nor was I struck by the second reason given by the learned Advocate-General. I do not agree that the business could not have been conducted without the existence of this power. I would therefore agree with the contention raised by the learned Counsel for the appellant that defendant No. 3 would not, in the circumstances, be bound by the reference to arbitration entered into by defendant No. 2 on his behalf.

The objections raised on behalf of the other defendants Nos. 2 and 4 however stand on a different footing. They had not only referred the matter to arbitration but also signed the award in token of acceptance and cannot now be permitted to pick holes in it. The plea of coercion or undue influence raised on their behalf was not even substantiated by them. It must be remembered that we are dealing with Nattukottai Chetties in this case. The plaintiff is much younger in age than defendant No. 2 and it is extremely unlikely that he might have been able to exercise the pressure on defendants Nos. 2 and 4 which has been imputed to him. The allegation that the defendants were not capable of understanding the nature of the document they were signing is almost inconceivable. Moreover, after the award was pronounced by the arbitrator, defendant No. 2 executed four *hundis* for no less than a sum of Rs. 52,000 in accordance with their decision and delivered them to the plaintiff. They cannot now be heard to say that the reference and the award were invalid and not binding on them or that the dispute between the parties had not been adjusted. The case might have presented some difficulty if the plaintiff had not agreed to be bound by the settlement in case defendant

No. 3 was not found to have authorized defendant No. 2, as held by me already to refer the matter to arbitration; but since he had accepted the *hundis* executed by defendant No. 2 in full satisfaction of his claim it may be taken that he hoped to be able to recover the amount due from defendant No. 2. The learned Advocate-General also indicated during his arguments that even if I came to an adverse finding in regard to his contention about defendant No. 3, his client would nevertheless be willing to press his application for adjustment and satisfaction to be recorded and the suit dismissed in consequence.

I have already held that the later award has not been shown to be invalid and is binding on defendants Nos. 2 and 4. Moreover, it was not only accepted by them but in pursuance of it four *hundis* were executed and delivered by defendant No. 2 to the plaintiff. It has thus passed beyond the domain of an award. The first award which formed the subject of the application presented by the defendants need not therefore be considered and must be found to have been superseded. The suit for dissolution and accounts must for the above reasons be held to have been satisfied. The result is that these appeals must be dismissed. But in view of the fact that the lower Court's finding in regard to the minors and in regard to defendant No. 3 has not been upheld, the proper order in regard to costs appears to be that the parties should bear their own in this Court.

N.-D.

Appeals dismissed.

CALCUTTA HIGH COURT

Criminal Revision Petition No. 779
of 1940

November 22, 1940

HENDERSON AND SEN, JJ.

GANGA PROSAD SINGH—ACCUSED—
PETITIONER

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 476—Magistrate trying case issuing warrants for arrest—Constable entrusted for their execution giving false information of certain offence for explaining his failure to execute them—Offence committed by constable—Complaint under s. 476, if necessary.

Magistrate who was actually trying a certain case issued warrants for arrest, which were made over to a constable for execution. As an explanation of his failure to make any arrest the constable gave false information in the *thana* that certain persons had committed an offence under s. 228-B, I. P. C. :

Held, that the constable committed an offence under s. 211, I. P. C., in a transaction which arose out of the

execution of those warrants. The offence was committed in relation of those proceedings and consequently complaint was necessary under s. 476, Criminal P. C.

Mr. Sudhansu Sekhar Mukherji, for the Petitioner.

Mr. Hamidul Huq, for the Crown.

Henderson, J.—This is a rule calling upon the District Magistrate of Birbhum to show cause why the conviction of the petitioner under s. 211, I. P. C., should not be set aside. The rule was issued on grounds Nos. 1 and 5 attached to the petition. The petitioner is a constable. He was entrusted with the execution of two warrants which had been issued against two witnesses in a certain criminal case. He failed to execute the warrants. He appeared at the *thana* and gave an information to the effect that five persons had rescued one of these men and committed an offence under s. 225-B, I. P. C. There was an investigation. No charge-sheet was submitted as the Police came to the conclusion that the case was a doubtful one. The Magistrate did not pursue the matter any further and discharged the accused persons. One of those accused persons then instituted the present case under s. 211 against the petitioner. The first ground raises the question of the jurisdiction of the Magistrate to take cognizance of the case at all. The contention made by Mr. Mukherji in support of the rule is that a complaint was necessary under s. 476, Criminal P. C. In order to determine the question we shall have to consider the meaning to be attached to the words "when such offence is alleged to have been committed in relation to any proceeding in any Court." It may be noted that the information given by the petitioner if false amounted to offences both under ss. 182 and 211, I. P. C.

It will be necessary for us to consider this point with regard to both the proceedings started by the petitioner and the proceedings in course of which the warrants were issued. I shall deal with the former first. There has been some difference of judicial opinion on this point. There can be no question that the information given by the petitioner led to proceedings of some sort before the Magistrate. In fact that result was bound to happen. For instance, the information was the foundation of a certain case which was entered as No. 314 of 1939 in the general register. In the course of those proceedings, the Magistrate passed orders for bail and finally an order of discharge. It was of course open to him to call for a charge sheet. On the other hand, at the time the

offence was committed undoubtedly there was no case pending at all. It is not necessary for us now to express our own opinion on this matter. So far as this Court is concerned that point is concluded against the petitioner. I need only refer to two cases, *Haibat Khan v. Emperor* (1) and *Tayabulla v. Emperor* (2). We are bound to follow those decisions unless we are prepared to refer the matter to a Full Bench.

In our opinion, however, the present matter can be disposed of in connexion with the other case. Warrants for arrest had been issued by the Magistrate who was actually trying that case. Those warrants were made over to the petitioner for execution. It was as an explanation of his failure to make any arrest that he gave the information in the *thana*. If that case had not been on the Magistrate's file, it would have been quite impossible for the petitioner to commit this particular offence. He actually committed it in a transaction which arose out of the execution of those warrants. In these circumstances it seems impossible for us to say that the offence was not committed in relation to those proceedings. In this view it is not necessary to consider the second ground which really raises a question whether the appeal ought to be re-heard. We accordingly make the Rule absolute. The conviction and sentence are set aside and the petitioner is discharged from his bail. It will of course be open to the Magistrate concerned to take any proceedings if he thinks it desirable to do so.

Sen, J.—I agree.

S.

Rule made absolute.

(1) 33 C 30; 3 Cr. L J 125; 10 C W N 30.

(2) 43 C 1152; 36 Ind. Cas. 845; A I R 1917 Cal. 593; 18 Cr. L J 13; 24 C L J 134; 20 C W N 1265.

MADRAS HIGH COURT

Civil Miscellaneous Petition No. 990
of 1940

April 2, 1940

LEACH, C. J. AND KRISHNASWAMI

AYYANGAR, J.

Sri KALLALAGAR DEVASTHANAM,
MADURA—PETITIONER

versus

DISTRICT COLLECTOR, MADURA—
RESPONDENT

Madras Hindu Religious Endowments Act (II of 1927), ss. 44-B (2) (a) and (2) (d) (i)—Dismissal of application for resumption of temple inam, by Collector—Appeal lies to District Collector who can confirm order or cancel it and grant appropriate relief.

The words "may...pass an order confirming, modifying or cancelling the order of the Collector" in s. 44-B (2) (d) (i) Mad. Hindu Religious Endowment Act, are not intended to be confined to an order of resumption. An unqualified right of appeal is given, and if the Collector passes an order dismissing an application for resumption of a temple *inam* under s. 44-B (2) (a) an appeal lies under s. 44-B (2) (d) (i) to the District Collector who can confirm it or cancel it and he has the power to grant appropriate relief. *Venkatasami v. Stridavama* (1), relied on 194 Ind. Cas. 809 (2), distinguished.

Messrs. V. V. Chowdhary, Sheshachalapathy, N. Koteswara Rao and A. Venkatasami, for the Petitioner.

Mr. T. Krishna Row, for Govt. Pleader, for the Respondent.

• **Leach, C. J.**—The petitioner is the trustee of the Sri Kallalagar Devasthanam, Madura. He applied to the Revenue Divisional Officer, Melur, for orders under s. 44-B, Madras Hindu Religious Endowments Act, 1926, directing the resumption of certain service *inams* granted by the temple. The Revenue Divisional Officer rejected the applications and the petitioner then filed appeals to the Collector of Madura, who held that there was no right of appeal and consequently passed an order dismissing them all. The petitioner has now asked this Court to quash the order of the Collector and to direct him to hear the appeals. Section 44-B (2) (a), Madras Hindu Religious Endowments Act, states that the Collector may resume the whole or any part of an *inam* granted for the performance of a charity or service connected with a *math* or temple on one or more of the following grounds: (i) That the holder of the *inam* has made an exchange, gift, sale or mortgage of it or any portion of it or has granted a lease for a term exceeding five years; or (ii) that the holder of the *inam* has failed to perform or make the necessary arrangements for performing in accordance with the custom or usage of the *math* or temple the charity or service for performing which the *inam* had been made; or (iii) that the *math* or temple has ceased to exist or the charity or service in question has become impossible of performance. The allegation of the petitioner was that the holders of the *inams* had failed to perform the services required of them. Clause (d) (i) of sub-s. (2) says that a party aggrieved by an order of the Collector under cl. (a) may appeal to the District Collector who may after giving notice to the parties concerned and after holding such inquiry as may be prescribed pass an order confirming, modifying or cancelling the order of the Collector. In dis-

missing the appeals the District Collector gave no reasons for holding that there was no right of appeal in these cases, but it must be assumed that in his opinion there could only be an appeal under the section from an order of resumption.

If the orders of the Revenue Divisional Officer dismissing the applications were orders under cl. 2 (a) of s. 44-B appeals do lie. In *Venkatasami v. Stridavamma* (1) a Full Bench of this Court held that an order rejecting an application for the appointment of a Receiver was an order passed under s. 503, Civil P. C., 1882, and was appealable under s. 588, cl. 24 of that Code. While the Code expressly provided for an appeal against an order appointing a Receiver nothing was said about an appeal from an order refusing to appoint one. The corresponding provision of the present Code to s. 503 is O. XL, r. 1, and s. 588 (24) is now embodied in O. XLIII, r. 1 (s). The decision of the Full Bench was that a negative order was just as much within the section as an affirmative order and unless there is something in s. 44-B, Mad. Hindu Religious Endowments Act, 1926, which prevents its application, the same principle must be applied here. I can see nothing in the section which prevents the application of the principle. In my opinion, the words "may...pass an order confirming, modifying or cancelling the order of the Collector" are not intended to be confined to an order of resumption. An unqualified right of appeal is given, and if the Collector passes an order dismissing an application the District Collector can confirm it or cancel it and as he has the power to cancel an order refusing to resume an *inam*, it must follow that he has the power to grant appropriate relief.

For the respondent, the recent decision in Application No. 229 of 1937 *Pichu Iyengar v. Ramanuja Jeer Swamigal* (2) has been relied on. In that case my learned brother and I held that a suit did not lie to set aside an order of the Hindu Religious Endowments Board refusing to settle a scheme for the administration of the endowments of a temple under s. 63 of the Act. There is nothing in common between s. 63 and s. 44-B. Sub-section (1) of s. 63 empowers the Board to settle a scheme after inquiring into the question whether a scheme is necessary. Sub-section (3) gives the Board power to modify or cancel a scheme which it has settl-

(1) 10 Mad. 179 (F B).

(2) A I R 1940 Mad. 756; 194 Ind. Cas. 809; (1940) 1 M L J 882; 51 L W 727; (1940) M W N 575; 1 L R (1940) Mad. 901; 14 R M 84.

ed and sub-s. (4) gives the right to an interested party to institute a suit in the Court to modify or set aside an order of the Board modifying or cancelling a scheme. Before the Board can modify or cancel there must, of course, be a scheme and the right of suit only arises when the Board has decided to modify or cancel a scheme which it has settled under sub-s. (1). The wording of s. 63 makes it quite clear that the power of settling a scheme in the first instance vests exclusively in the Board which may refuse to exercise the power. The right of suit is given in order to provide a safeguard against improper modification or cancellation of a scheme already settled by the Board. The decision in Application No. 229 of 1937 *Pichu Iyengar v. Ramanuja Jee Swamigal* (2) did not turn on the question whether an order of the Board refusing to settle a scheme under sub-s. (1) was an order under that sub-section. That question did not really arise. The question was with regard to the interpretation of sub-ss. 3 and 4 and it was held that they only gave a right of suit in a case where the Board has modified or cancelled an existing scheme. Holding as I do that the principle in *Venkatasami v. Stridavamma* (1) is applicable to s. 44-B it follows that I am of opinion that the Collector of Madura, ought to have heard the appeals and not have dismissed them on the ground that he had no jurisdiction to entertain them. His order should be quashed and he should be directed to hear and decide the cases according to law. I consider that the petitioner is also entitled to his costs.

Krishnaswami Ayyangar, J.—I concur. At first sight it might seem that we are here accepting a construction of the words "an order . . . under cl. (a)" occurring in s. 44-B (2) (d) (i), different to that which we adopted in Application No. 229 of 1937 *Pichu Iyengar v. Ramanuja Jee Swamigal* (2). In that case the Court distinguished the decision of the Full Bench in *Venkatasami v. Stridavamma* (1) and held in spite of the similarity of the language, that the same, or practically the same, words in s. 63 (4) should receive a different interpretation on account of the special considerations which we held were applicable in the context. As in s. 63 so in s. 44-B (2) the character of the order which the section authorizes the Collector to make is positive, that is to make an order resuming the whole or any part of an *inam* of the nature specified in cl. (1). That order he may make on his own motion or on the application of the trustee, the Committee, the Board or any other person

having an interest. Before making an order of resumption the Collector has to satisfy himself that one or more of the grounds mentioned in sub-s. 2 (a) are proved to exist. If no such proof is forthcoming, he cannot make the order, and must dismiss the application. The power to dismiss is self-evident, though not expressly mentioned. Clause (b) makes it obligatory on the Collector to give notice of the inquiry to the trustee, the Committee, or the Board, and also to the *inamdar* concerned. It is somewhat curious that among the persons to whom notice is to go, mention is not made of an applicant whose right to apply is derived from his interest in the *math* or temple only. It is difficult to imagine that having taken the trouble to move the Collector he is to drop out and take no part in the inquiry which he himself set on foot. Clause (d) provides a right of appeal to any, that is every party, aggrieved by the order of the Collector under cl. (a). It is plain, that a party may be aggrieved as much by a negative as by a positive order, and unless there is good reason to the contrary, express or implied, both kinds of orders would be comprehended by the word 'order.'

An applicant under s. 44-B comes forward with the case that an *inam* is being enjoyed by a person whose title to it has become extinguished. If an order of resumption is made, the *inamdar* may feel aggrieved by the order. On the contrary, if the inquiry results in a negative order, the applicant, or any of the persons specified in the section, or to whom notice has gone may be dissatisfied with the order, or in other words may be an aggrieved party, and to him a right of appeal is expressly given. I find no difficulty in holding that the District Collector is empowered by cl. (d) (i) to make the order of resumption in a case where the Collector refuses to make it in the first instance. Not only are the words "confirming, modifying or cancelling" in the clause under consideration, of sufficient amplitude, but it is an ordinary incident of the powers of an appellate tribunal to make the order which the tribunal of first instance failed to make. I agree that this case is not governed by the decision in Application No. 229 of 1937 *Pichu Iyengar v. Ramanuja Jee Swamigal* (2) which really proceeded on special grounds, which find no place in the present case. Memo of costs will follow.

N.-S.

Order quashed.

SIND CHIEF COURT

Criminal Reference No. 210 of 1940

October 1, 1940

DAVIS, C. J. AND TYABJI, J.

EMPEROR—PROSECUTOR

versus

AHMED HAJI SIDIK—ACCUSED

Criminal Procedure Code (Act V of 1898), s. 562—Discretion to be used in applying s. 562—Cattle-lifting by young accused acting like practised thief—Facts that he is young, is prepared to give sureties and has no previous conviction, are not sufficient for application of s. 562.

Section 562, Criminal P. C., must be applied with discretion, for otherwise, rather than preventing the manufacture of criminals, it may assist in their manufacture, for it may become known that first offences even of cattle-lifting can be committed with impunity.

Where in a case of cattle-lifting the evidence clearly shows the guilt of the accused and also shows the hand of a practised thief rather than the apprentice hand of a first offender, the fact that he was prepared to give sureties combined with his young age and the fact that he had no previous conviction are not sufficient to justify the application of s. 562, Criminal P. C.

Cr. Ref. made by the District Magistrate, Karachi, dated July 12, 1940.

Mr. Partabrai D. Punwani, Advocate-General, for the Crown.

Mr. A. I. Kazi, for the Accused.

Davis, C. J.—Notice was issued upon one Ahmed, son of Haji Sidik, to show cause why a sentence of substantive imprisonment should not be passed upon him for an offence of cattle-lifting of which he has been convicted and for which he was bound over by the Subordinate Judge and First Class Magistrate, Tatta, (Mr. Dinalshah) under s. 562, Criminal P. C., on the ground of his age and antecedents. Presumably, by "antecedents" the Magistrate referred to the fact that this accused has had no previous conviction, because we can find nothing else in his favour, and we do not think that this Magistrate has dealt with this aspect of the matter with sufficient care or has put upon the record the special circumstances which in a case of cattle-lifting, we think, should exist, before s. 562, Criminal P. C., is applied. Section 562, Criminal P. C. must be applied with discretion, for otherwise, rather than preventing the manufacture of criminals, it may assist in their manufacture, for it may become known that first offences even of cattle-lifting can be committed with impunity. The accused has only got to plead youth, produce sureties, show that he has no previous conviction for the sureties to be accepted, and the fact that in this case the accused in his statement so promptly offered

sureties seems to suggest that he was given a hint that if he pleaded guilty he would be bound over.

The evidence, however, on the record clearly shows the guilt of the accused and would seem to show the hand of a practised thief rather than the apprentice hand of a first offender. A bullock was stolen while the owner was away for his morning prayers, and the bullock was traced to a hiding place in the jungle. The accused, however, could not be traced and so the tracking party lay in wait in ambush until the accused returned to lead the bullock away which he did at about sunset. Even then he escaped though the bullock was recovered and restored to its owner. We should have thought that upon these circumstances of the case, the Magistrate would have enquired more carefully into what he describes as the "antecedents" of the accused: he would have ascertained from the accused why he committed this offence, what work he was engaged upon, what temptation was placed in his way, who was his father, what chance there was, if leniency was shown, for his leading a life free from crime. Nothing of this sort was done, and the plea of the accused and the statement that he was prepared to give sureties combined with his age and the fact that he had no previous conviction were sufficient in the opinion of the Magistrate to justify the application of s. 562, Criminal P. C.

We do not think that these circumstances were sufficient to justify the application of s. 562, Criminal P. C. We consider that the accused acted in the manner of a practised thief, and that the Magistrate should not have dealt with this serious offence of cattle lifting in this particular fashion. The learned Advocate for the accused argues that he has already been in prison for a certain period of time. It is true he was imprisoned on September 3, but that is not long enough for prison to exercise its disciplinary and deterrent effect. We have not only to think of the accused himself in this case, and the effect of the sentence upon him, but the necessity of a deterrent effect upon him and upon others as well. We do not think the fact that he was bound over would deter him or others from committing such a serious offence in future. With a certain amount of hesitation however we are prepared to limit the sentence of imprisonment which we consider necessary to pass upon him to six months. We therefore set aside the order of the Magistrate under s. 562, Criminal P. C., and sentence the accused for this offence of

which he has been rightly convicted to six months' rigorous imprisonment.

s. *Order set aside.*

MADRAS HIGH COURT

Letters Patent Appeal No. 96 of 1938

November 29, 1939

LEACH, C. J. AND KRISHNASWAMI

AYYANGAR, J.

CHERUTTY AND ANOTHER—APPELLANTS

versus

NAGAMPARAMBIL RAVU AND OTHERS—

RESPONDENTS

Hindu Law—Maintenance—Co-parcener—Minor co-parcener, if can sue for maintenance without asking for partition—Daughter, if can sue manager for maintenance.

Since a major co-parcener is entitled to sue for maintenance the right cannot be denied to a minor co-parcener and if he does happen to sue for maintenance he need not couple with the prayer for that relief a prayer for partition. 47 Ind. Cas. 354 (2) and 134 Ind. Cas. 1084 (3), followed. *Narainbhai Vaghilal v. Ranchod Premchand* (8), approved, *Himmat Singh Bechar Singh v. Ganpat Singh* (4), *Ramchandra Sakharam v. Sakharam Gopal Vagh* (5) and 64 Ind. Cas. 568 (6), not approved. 185 Ind. Cas. 26, **Reversed**. [p. 836, col. 1.]

Under the Hindu Law a daughter is entitled to maintain a suit for maintenance and consequently can sue the manager. Her right is not restricted by proceeding against her own father. The personal liability of the father furnishes an additional ground of claim over and above the liability of the family property. The former alone can be said to be enforceable against the father and his separate property. The latter gives rise to a right enforceable against the joint family as a whole. 185 Ind. Cas. 26, **Reversed**. [p. 839, col. 1.]

L. P. A. against the judgment of Wadsworth, J., reported in 185 Ind. Cas. 26.

Mr. K. P. Ramakrishna Ayyar, for the Appellants.

Mr. K. Subramaniam, for the Respondents.

Leach, C. J.—This Letters Patent Appeal arises out of a suit filed in the Court of the District Munsif of Vayitri by the appellants and their parents for a decree for maintenance. Appellant No. 1 is the son and appellant No. 2 is the daughter of one Nagamparambil Imbichutty and his wife Kalyani. Both the appellants are minors. The parents and their two children constitute one of two branches of an undivided Hindu family of which respondent No. 1 is the manager. The respondents represent the other branch and were all made defendants. The District Munsif held that the parents of the appellants were not entitled under the Hindu Law to maintain a suit for maintenance, but that the appellants were, and granted them a decree. The respondents appealed to the

Subordinate Judge of South Malabar, who gave judgment in their favour. The appellants then appealed to this Court. The appeal was heard by Wadsworth, J., who concurred in the decision of the Subordinate Judge. The appellants' parents accepted the decision of the District Munsif and therefore are not parties to this appeal. The parties are Tiyyas of South Malabar and it is common ground that the questions arising in the appeal have to be decided according to the ordinary rules of Hindu Law. Wadsworth, J. was of the opinion that a major co-parcener can never sue for maintenance. When maintenance is denied him his only remedy, he said, is to sue for partition. With regard to a minor co-parcener the learned Judge was of the opinion that a suit for maintenance might be filed, provided that he asked in the alternative for a decree for partition. It was for the Court to decide whether the appropriate relief was a decree for maintenance or a decree for partition. The learned Judge considered that the daughter of a co-parcener, like her father, can never maintain a suit for maintenance against the manager of the family. He said that her only remedy is to bring a suit against her father and claim maintenance out of his properties, joint and separate. Having obtained a decree she would be in a position to sell her father's share in the joint family estate in execution proceedings.

I find myself unable to concur in any of the conclusions of the learned Judge. It is true that there are statements in the latest edition of Mayne's "Hindu Law and Usage," 10th Edn., p. 825, and in Mullah's "Principles of Hindu Law," 8th Edn., p. 582, which support the learned Judge in his opinion that a major co-parcener cannot sue for maintenance, but they are based on certain observations of the Bombay High Court which appear to me to run contrary to decisions of the Privy Council. In passing I may mention that Varadachariar and Mockett, JJ. in *Subbayya Thevar v. Sivagnana Marudappa Pandian* (1), observed it was doubtful whether an adult son could maintain a suit for maintenance against his father when he could sue for partition, but they gave no reasons for the expression of doubt and presumably it was based on the Bombay cases. Every member of an undivided Hindu family is entitled to be maintained out of the family estate. In *Venkata Mahipati Gangadara Rama Rao v. Rajah of*

(1) I L R (1937) Mad. 42; 167 Ind. Cas. 92; A I R 1936 Mad. 828; 71 M L J 568; 44 L W 433; (1936) M V N 1034; 9 R M 419.

Pithapur (2), (known as the *Second Pithapur case*), (2), Lord Dunedin, in delivering the judgment of the Board, dealt with the question of the right of a co-parcener to be maintained out of the common property. After pointing out that it was admitted on both sides of the bar,

"that in an ordinary joint family ruled by the Mitakshara law the junior members, down to three generations from the head of the family, have a co-parcenary interest accruing by birth in the ancestral property, that this co-parcenary interest carries with it the inchoate right to raise an action of partition, and that until partition is *de facto* accomplished these same persons have a right to maintenance."

Lord Dunedin went on to say :

"It seems clear that this right is an inherent quality of the right of co-parcenary, that is of common property. The individual enjoyment of the common property being ousted by the management of the head of the family, they have a right till they exercise their right to divide to be maintained out of the property which is common to them who are excluded from the management and to the head of the family who is invested with the management."

The right to maintenance out of joint family property was dealt with again by the Privy Council in *Vellaiyappa Chetti v. Natarajan* (3). The question there was whether an illegitimate son of a Sudra was entitled as a member of the family to maintenance out of the joint family property in the hands of the collaterals with whom his father was joint. Sir Dinshaw Mullah in delivering the judgment of the Board pointed out :

"That the illegitimate son of a Sudra by a continuous concubine is a member of the family ; that the share of inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son ; and that where the father has left no separate property and no legitimate son but was joint with his collaterals, the illegitimate son is not entitled to demand a partition of the joint family property in their hands, but he is entitled as a member of the family to maintenance out of that property."

It is here emphasized that the share of inheritance, is not given in substitution of a right to maintenance. As there is a right to maintenance there must be an appropriate remedy when that right is denied. To say that the member of a joint family to whom maintenance has been denied shall cause the family to be divided and the family estate partitioned or go without anything is not providing an appropriate remedy for the injustice done to him. He may not want to have the family divided and it may be

(2) 41 M 778; 47 Ind. Cas. 354; A I R 1918 P C 81; 45 I A 148; 35 M L J 392; 24 M L T 276; 16 A L J 833; 28 C L J 428; 5 P L W 267; 20 Bom. L R 1056; (1918) M W N 922 (P C).

(3) 55 M L J 134 Ind. Cas. 1084; 8 O W N 1039; (1931) M W N 848; 35 C W N 1278; A I R 1931 P C 294; 61 M L J 522; 34 L W 589; 33 Bom. L R 1526; Ind. Rul. (1932) P C 12; (1931) A L J 1123; 58 I A 402; 55 C L J 451 (P C).

against his interest to have the family estate partitioned. In view of the fact that Wadsworth, J. relied on the statements in Mayne and Mullah based on the Bombay decisions, it is necessary that I should refer to them. The cases are, *Himmat Singh Bechar Singh v. Ganapat Singh* (4), *Ramchandra Sakharam v. Sakharam Gopal Vagh* (5) and *Bhupal v. Tavanappa* (6). In *Himmat Singh Bechar Singh v. Ganapat Singh* (4), Westropp, C. J. and Kemball, J. held that a suit for maintenance out of the ancestral estate by a Hindu son lies against his father when the estate is impartible. The Court did not decide the question of the right of a son to maintenance when he was in a position to sue for partition. The foot note to the report however shows that in an earlier case Westropp, C. J., and Melvill, J. had decided that a suit by one co-parcener against the other co-parceners for maintenance when the estate was impartible was unsustainable,

"unless indeed he were illegitimate, deformed, or idiotic, or suffering from other disability to inherit, in which case he would not be a parcener entitled to an equal share with the other members of the family, but only a person entitled to maintenance."

It is quite clear from this observation that the opinion of the Bombay High Court was that the right to maintenance was in lieu of a right to share in the estate, but I am not aware that this opinion has been accepted by any other High Court and it appears to me that it is opposed to the principle which the judgments of the Privy Council in the *Second Pithapur case* (2) and in *Vellaiyappa Chetty v. Natarajan* (3), have established. In *Ramchandra Sakharam v. Sakharam Gopal Vagh* (5), Pinhey, J. regretted that the judgment in *Himmat Singh Bechar Singh v. Ganpat Singh* (4), allowed a member of a family owning an impartible estate to sue for maintenance, but the decision in that case was eventually accepted. The case in *Bhupal v. Tavanappa* (6), had reference to a family owning a partible estate. The plaintiff was a minor member of the family, but his father was alive and, therefore, under the Hindu Law as administered in the Bombay Presidency he could not file a suit for partition without the consent of his father. It was held that in such circumstances he was entitled to sue for maintenance because he was in the same position as if the estate were impartible. As the Bombay decisions proceed on the basis that the right to maintenance is given in lieu of a right to share—

(4) 12 B H O R 94.

(5) 2 B 346.

(6) 46 B 435; 64 Ind. Cas. 568; A I R 1922 Bom. 292; 23 Bom. L R 1236.

a position which has never been accepted in the Presidency—they cannot be accepted as correctly stating the law in Madras.

If a major co-parcener is entitled to sue for maintenance and I hold that he is, the right cannot be denied to a minor co-parcener and there appears to me to be no support at all for the view that if he does happen to sue for maintenance he must couple with the prayer for that relief a prayer for partition. The statement that a daughter cannot sue the manager of the family, but must proceed against her own father, is also unsupported by authority. On the contrary there is the Full Bench decision of this Court in *Chedalavada Subbayya v. Chedalavada Ananda Ramayya* (7), which shows that she is entitled to maintain a suit for her maintenance. It was there held that the right of a daughter to her marriage expenses and maintenance was based on her right to or interest in the joint family property, and not based on the natural obligation of a father to maintain his children. The contention that the liability of the joint family during the father's lifetime was only based on the father's obligation to maintain and bear the marriage expenses of his daughters, and the obligation fell upon the joint family through him, was rejected. Ramesam, J. said:

"So far as the joint family property is concerned, the obligation is that of all the members of the family, that is, the father and the brothers, and it is not that it was originally the obligation of the father only and through him it has extended to the whole joint family."

I agree with the following observations of Chandavarkar, J. in *Narainbhai Vaghbi* v. *Ranchod Premchand* (8), at p. 145:

"Apart from authority, there is no reason, founded on sound principle, why a Hindu co-parcener, who is excluded from the enjoyment of his joint rights, should be compelled at the instance of the other co-parceners or stranger's claiming under them and against his will to break up the joint family and forced to a suit for partition."

That would be the position if the judgment now under appeal were to stand. I have said sufficient to indicate that I consider the judgment to be against principle and authority and the appeal must be allowed. The result is that the case will be remanded to the Court of the Subordinate Judge. His decision was based merely on the issue relating to the maintainability of the suit. There are other issues and these will have to be decided. On the record reaching him the Subordinate Judge will

(7) 53 M 84; 121 Ind. Cas. 113; A I R 1929 Mad. 586; 57 M L J 826; 30 L W 923; Ind. Rul. (1930) Mad. 129 (F B).

(8) 26 B 141 (145); 3 Bom. L R 598.

hear and dispose of according to law the appellant's appeal from the judgment of the District Munsif, but as their parents did not appeal from the judgment of the District Munsif the suit will stand dismissed so far as they are concerned. The appellants are entitled to their costs in this appeal and in the second appeal. They will also be entitled to the refund of the court-fees paid in the second appeal and in the Letters Patent Appeal.

Krishnaswami Ayyangar, J.—I am of the same opinion but shall add a few words on certain aspects of the question argued before us. The judgment of Wadsworth, J., when analyzed seems to be based upon two propositions: (i) that the right of a member to maintenance out of joint family assets is only to be recognized where he has no right to enforce partition, and (ii) that the right of an unmarried minor daughter in a joint family to be maintained till marriage is enforceable only against the father and not against the joint family as a whole. The soundness of these propositions is open to question, as there seems to be nothing either in the texts or in the principles of Hindu Law to lend support to either of them. The learned Judge has referred in support of his decision to the statement of law contained in Mayne and in Mullah: see Mayne's Hindu Law, Edn. 10, p. 825; Mullah's Edn. 8, p. 582. While recognizing that these statements reflect the view taken in Bombay he accepted them as equally applicable to Madras, as the proposition is found stated in general term and no Madras authority to the contrary was cited before him. He did not notice the decision of the Privy Council in the *Second Pithapur case* (2), which unambiguously recognized the right of a co-parcener to be maintained out of the joint family property, but held, however, that it is the ordinary rule that a co-parcener cannot claim maintenance if he is entitled to claim partition.

Of the three Bombay cases cited in support of the proposition, the first two *Himmat Singh Bechar Singh v. Ganpat Singh* (4) and *Ramchandra Sakham v. Sakham Gopal Vagh* (5), related to a claim for maintenance by an adult son against the father. The family possessed property which was however not liable to partition, being by nature impartible. The claim was upheld. The right of a son to be maintained out of impartible joint family estate is beyond question, and does not appear to have ever been doubted. Decisions of the highest tribunal and of this Court in *Maharaja of Venkata-*

giri v. Raja Rajeevaram Rao (9), have since authoritatively settled the point. It is plain therefore that no exception can be taken to the correctness of the actual decision of the Bombay High Court so far as it went. The ratio of the decision in the first of these cases *Himmat Singh Bechar Singh v. Ganpat Singh* (4), is to be found in the observation of Westropp, C. J. that

"no authority was cited.....to show that where a son could not enforce a partition with his father, he was prevented from suing the latter for maintenance."

To recognize a right, namely the right of co-parcenary, but at the same time to deny a remedy for its infringement, is an impossible position and this is what seems to have weighed with the Court. The learned Chief Justice expressly refrained from expressing any opinion as to the right of a son to sue for maintenance, where he might, if he chose, sue for partition. This he did in spite of the fact that an earlier decision to which he had himself been a party had laid it down that a member of an undivided family could not sue for maintenance, unless by reason of a personal disqualification he was not entitled to sue for partition. The opinion here expressed does seem to support the view which has found favour with Wadsworth, J., but, as I shall presently show, is no longer tenable. *Ramchandra Sakharam v. Sakharam Gopal Vagh* (5), was a case in which the father was found to be in possession of impartible property, but not of any property in which the son could claim a share. Melvill, J. observed that as a general rule perhaps, a Hindu is not bound to support a grown up son, but held that the liability existed when the family estate is impartible. Pinhey, J. agreed but doubted whether it is good Hindu Law to say that an adult son in an undivided Hindu family who is suffering from no disability recognized by that law, can claim a separate maintenance from his father.

In the later decision of the Bombay High Court, *Bhupal v. Tavanappa* (6), the son sued for separate maintenance, as a co-parcener in a family consisting of the father, uncle, consin and step-brother, and owning joint family property which was partible. He could not however on the view of the law as accepted in that Presidency, enforce a partition against a father when the father was joint in estate with his own ancestor or his collaterals and against his consent. Right to partition not existing, the son was held, on the principle of the earlier deci-

sions, entitled to sue for maintenance. In all these cases, the right of the son to sue for maintenance was expressly stated to arise on account of the absence of the right to partition. The larger remedy being available, the lesser relief was denied on the footing that the primary and the only true remedy for the excluded parcener was to enforce his right to partition by suit. When this remedy is cut out by reason of a personal disqualification or otherwise, the co-parcenary right ordinarily inherent in every member of the family suffers a diminution and it then finds expression in the inferior remedy of maintenance. The right to maintenance is thus to be regarded as a substitute for the lost right to a share and is in the nature of a secondary remedy to be granted in lieu of the primary one, where it is not available. This I think is the rationale which underlies the decisions of the Bombay High Court. With all respect, I regret to say that such a view of a co-parcener's right cannot be sustained either in principle or on authority. It is well to remember in this connection that a right to maintenance may arise in one of three ways. First, the existence of certain specified personal relationships, independently of the possession of joint property in the person liable, may give rise to the claim. The right in this class of cases is enforceable personally against the person on whom the law casts the burden, and is based on the well-known text of Manu, that,

"the aged parents, a virtuous wife, and an infant child must be maintained even by the doing of a hundred prohibited acts."

The right does not extend to remoter relations. The second and the more important ground of claim is that based not on pure relationship but on membership in a joint family possessed of joint family property. The Privy Council has in the *Second Pithapur case* (2), examined the jural basis of the right in this class of cases, and declared that it is an inherent quality or the co-parcenary property that it should afford the means of sustenance to all the members of the co-parcenary while the family remained joint. This is clear from the following observations of their Lordships:

"This co-parcenary interest carries with it the inchoate right to raise an action for partition, and until partition is *de facto* accomplished these same persons (junior members) have a right to maintenance."

The meaning of this statement is sufficiently explicit. The junior members are entitled to maintenance until partition out of the common property where that property

(9) I L R (1939) Mad. 622; 189 Ind. Cas. 123; 49 L W 717; (1939) M W N 522; (1939) 1 M L J 831; A I R 1939 Mad. 614; 13 R M 144.

is ordinary partible property. The right will cease the moment a partition takes place, for thereafter there is no common property. It will continue to subsist so long as partition does not take place, and in the case of impartible property it is incapable of being terminated. The effect of the texts on the subject is correctly stated in Mayne's Hindu Law, p. 821, in the following passage:

"The head of the undivided family is bound to maintain its members, their wives and their children; to perform their ceremonies and defray the expenses of their marriages."

Membership in the family, and the existence of joint property are the only conditions to which the right is subject. The third head of claim is based on the text of Yagnavalkya, which imposes a personal disqualification by reason of some defect such as blindness, impotency, etc. (Yagnavalkya, Second, 140-142). The defect operates to exclude the sufferer from a share in the inheritance, but, in lieu of it, he is recognized as being entitled to maintenance. This, in my opinion, is the only class of cases in which the right to maintenance can be said to be recognized as a substitute for the right to partition with some justification, though even here the right springs from the existence of joint property subject to the burden of supporting all the members of the family whether entitled to partition or not. But even if there is no impediment to the exercise of the right to partition, there can be no logical reason for compelling a member to sue for partition, when the head of the family neglects to maintain him. The right of an excluded member to sue for joint possession, without being obliged to sue for partition is recognized by Art. 127, Lim. Act. From this it is to my mind clear, that partition is not to be regarded as the sole remedy. Joint possession which he can seek is in most cases indistinguishable from maintenance out of the family assets, and it is therefore difficult to maintain a distinction in principle between the two. The logic of the observations of Chandavarkar, J., in *Narainbhai Vaghilai v. Ranchod Premchand* (8) referred to in the judgment of my Lord, appears to my mind to be indisputable.

That the true origin of the right in the second and third classes of cases is the existence of joint property, partible or impartible, scarcely admits of doubt at the present day. It seems to me to be absolutely impossible to get away from the principle laid down by the Privy Council which is that the right of a junior member in a joint family where the family possesses property is a right

which springs from the joint property itself. When the question came to be examined by the Board in *Vellaiyappa Chetti v. Natarajan* (3), in which the claim to maintenance was advanced by an illegitimate son of a deceased member of a joint family possessing joint family property, their Lordships used language which removes all further doubt on the point. Referring to the view taken in a decision of this Court in *Ranoji v. Kandoji* (10) that the share of inheritance given to the illegitimate son was merely in lieu of maintenance in the case of Sudras, their Lordships made the following observations:

"On the consideration of the texts and the cases on the subject their Lordships are of opinion that the illegitimate son of a Sudra by a continuous concubine has the status of the son and that he is a member of the family; that the share of inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son; that where the father has left no separate property and no legitimate son, but was joint with his collaterals, as in the present case, the illegitimate son is not entitled to demand a partition of the joint family property in their hands, but he is entitled as a member of the family to maintenance out of that property. (The italics are mine.)"

In the Full Bench decision of this Court in *Chedalavada Subbayya v. Chedalavada Ananda Ramayya* (7), the basis of the right of a daughter to maintenance out of the family property was examined, and it was again clearly laid down that the obligation was not personal to the father who was along with others a member of the family but that the obligation lay upon the family as a whole, that is to say against the family property. The texts and the decisions were gone into, and the learned Judges expressed the opinion that the right of the daughter was the surviving remnant of a larger right she once enjoyed in the joint family property. These authorities seem to take the question beyond the region of controversy. The right of a co-parcener to be maintained out of joint property is merely one of the modes in which the co-parcenary right finds expression. That being so, it is not possible to agree with the view that that right is not to be exercised if there is a right to partition. There is no warrant for holding that an excluded member must either sue for partition or be content to remain without being maintained at the expense of the joint family property. Wadsworth, J. has held that the daughter must institute a suit against the father in the first instance and pursue her remedies against his share in the joint family property. This view can be understood only on the theory that the

daughter's right to maintenance is based solely on the personal obligation of the father. As I have already indicated, this theory is opposed to the decision in the Full Bench case already referred. The personal liability of the father furnishes an additional ground of claim over and above the liability of the family property. The former alone can be said to be enforceable against the father and his separate property. The latter gives rise to a right enforceable against the joint family as a whole.

N.-D.

*Appeal allowed.***ALLAHABAD HIGH COURT**

Miscellaneous Case No. 55 of 1941

February 14, 1941

BRAUND, J.

THAKUR PRASAD CHAUDHARI—

APPLICANT

*versus***OFFICIAL LIQUIDATOR, BENARES****BANK LTD. (IN LIQUIDATION),****ALLAHABAD—OPPOSITE PARTY**

Limitation Act (IX of 1908), s. 3—Debt remains but remedy is barred—Companies Act (VII of 1913), s. 229—Liquidator's power to set-off—Distinction between set-off in his case and one under provisions of O. VIII, r. 6, Civil Procedure Code (Act V of 1908)—Liquidator can appropriate sum owing to company even if company's claim is not legally recoverable by lapse of time—Set-off.

The effect of s. 3, Lim. Act, is to bring about the automatic dismissal of suits, appeals and applications founded upon debts or causes of action which, according to their various periods of limitation, are time-barred. What the Lim. Act does not do is to extinguish the debt. The debt remains, but the remedy is destroyed.

A distinction must be drawn between the right of set-off which the Official Liquidator has under the mutual credit clause of the Insolvency Act, and the right of set-off which a defendant in a suit governed by the Civil P. C., exercises under O. VIII, r. 6 under the Civil P. C. It is required as a condition precedent to a set-off that the money should be "legally recoverable" by the defendant from the plaintiff. But the set-off which the Official Liquidator exercises is a set-off under the powers conferred on him by the Companies Act, and not under any power conferred on him by the Civil P. C., and there is no such condition precedent. The Official Liquidator can appropriate so much of the sum that the depositor owes to the company in satisfaction of what the company owes to the depositor even if the company's claim is not legally recoverable by lapse of time. 66 Ind. Cas. 209 (1), relied on.

Mr. ~~Sawalji~~ Mehrotra, for the Applicant.

Mr. I. B. Banerji, for the Opposite Party.

Judgment.—This is an application by a creditor of the Benares Bank Limited by way of appeal from a decision of the Official

Liquidator. The applicant was admittedly a person who on August 3, 1939, the date of the commencement of this winding up, was a depositor with the Bank by way of fixed deposit to the extent of Rs. 190 odd. He, accordingly, in due course submitted a proof to the Official Liquidator claiming to be a creditor of the company in this amount. The Official Liquidator admitted that he was a creditor on fixed deposit to the extent he claimed, but went on to assert that the applicant was at the same time a guarantor of the overdraft account of another client of the Bank, which account stood in debit on August 3, 1939 to the extent of over Rs. 2,000. The Official Liquidator, therefore claimed to appropriate the Rs. 190 owing by the Bank to the applicant in part satisfaction of the liability of upwards Rs. 2,000 due from the applicant to the Bank on the guarantee. Although he did not say so in so many words, what the Official Liquidator did was to put into operation the mutual credit section of the Prov. Insol. Act, and set off what was due from the company against what was due to the company. The applicant has taken two points. First he says that, inasmuch as the Official Liquidator had not exhausted all his remedies against the principal debtor on the overdraft account, there was nothing due from him and, accordingly, that there was nothing against which the company's debt to him could be set off. The applicant has, however, given up that point. The other point taken by the applicant is this. He says that the Official Liquidator is about to sue him in a separate proceeding on the guarantee and that in that separate suit he (the applicant) proposes to rely on the Lim. Act, as his defence. From that he argues that, if he is successful in that defence, it will be found that there was nothing due on August 3, 1939 from him to the company, and, again, that there was nothing against which the sum of Rs. 190 could be set off.

In my view even this argument bears little investigation. The effect of s. 3, Lim. Act, is to bring about the automatic dismissal of suits, appeals and applications founded upon debts or causes of action which, according to their various periods of limitation, are time-barred. What the Lim. Act does not do is to extinguish the debt. The debt remains, but the remedy is destroyed. Even, therefore, if it should turn out to be a fact—and I have not the least idea whether it will or not that the present applicant is able to resist the Official Liquidator's suit on the ground that the

debt is time-barred, the effect of that will not be to wipe the debt out of existence. The debt would continue to exist, although the Official Liquidator would be unable to institute a suit or to prefer an appeal or to make an application in respect of it. In exercising his rights under the mutual credit clause of the Insol. Act, the Official Liquidator has purported to do none of those things. All that has happened is that he has said to the applicant, to whom he admits the company owes money that he proposes to appropriate so much of the sum that the applicant owes to the company in satisfaction of what the company owes to the applicant.

The applicant has, I cannot help feeling, been labouring under some slight difficulty in distinguishing between the right of set-off which the Official Liquidator has exercised in this case and the right of set-off which a defendant in a suit governed by the Civil P. C. exercises under O. VIII, r. 6 to Sch. I of that Code. Under the Civil P. C., of course, the position is quite different. The Code governs the position of persons who are plaintiffs and defendants respectively in suits. If a defendant desires to avail himself of a set-off in a suit, he must bring himself within the provisions of O. VIII, r. 6, and those provisions obviously are very different from the conditions which had to be fulfilled by the Official Liquidator in this case. One has only to point to the circumstance that, under the Civil P. C. it is required as a condition precedent to a set-off that the money should be "legally recoverable" by the defendant from the plaintiff. That is a very different thing from anything we have here because the set-off which the Official Liquidator has purported to exercise is a set-off under the powers conferred on him by the Companies Act, and not under any power conferred on him by the Civil P. C. In *Narendra Lal Khan v. Tarubala Dasi* (1) at p. 823, Sir George Rankin expresses the point in another connection by saying :

"Thus, if the attorney has any form of lien upon property in respect of his bills of costs, he can exercise that lien notwithstanding that by the terms of the Lim. Act, he could not bring a suit....."

The point there was, I think, in principle the same as the point here. For these reasons this appeal must be dismissed.

D.

Appeal dismissed.

(1) 48 C 817; 66 Ind. Cas. 209; A I R 1921 Cal. 67; 25 C W N 800.

MADRAS HIGH COURT

Appeal No. 338 of 1937

August 2, 1940

PANDRANG ROW AND ABDUL RAHMAN, JJ.

• VENUGOPAL PILLAI AND OTHERS—

APPELLANTS

versus

THIRUGNANAVALLI AMMAL—

RESPONDENT

Civil Procedure Code (Act V of 1908), ss. 149, 2 (12). O. II, r. 2—Court granting time for payment of court-fee after presentation of plaint, improperly and without sufficient cause—Effect—Interest on mesne profits, if can be awarded as mesne profits—Suit for possession of property—Past mesne profits, whether must be claimed—Separate suit for such mesne profits, if lies.

Where the Court has given improperly and without sufficient cause, time for payment of court-fee after the plaint had been presented, the effect of the grant of such time is that the plaint takes effect as if it had been presented along with the full court-fee on the date of its first presentation, and no question of limitation arises where the plaint originally presented is within time. 95 Ind. Cas. 439 (9), relied on. [p. 842, col. 2.]

Interest can rightly be awarded on mesne profits by the Court as mesne profits. The fact that by the delay in the filing of the suit for mesne profits the claim on the score of interest proved to be much larger in amount than it would otherwise have been, does not disentitle the plaintiff to the interest. [p. 843, col. 1.]

A claim for past mesne profits need not be sued for in a suit for recovery of possession of the property in respect of which mesne profits are claimed by reason of O. II, r. 2, Civil P. C. A separate suit for mesne profits is competent. 27 Ind. Cas. 679 (1) held correctly decided and followed. 134 Ind. Cas. 654 (3), distinguished. [p. 841, col. 1.]

[Case-law referred to.]

A. against the decree of the Sub-Judge, Cuddalore, in O. S. No. 4 of 1933.

Mr. J. R. Gundappa Rao, for the Appellants.

Mr. T. E. Ramabhadrachari, for the Respondent.

Pandrang Row, J.—This is an appeal by defendants Nos. 1 and 3 to 6 from the decree of the Subordinate Judge of Cuddalore dated October 11, 1937, in O. S. No. 4 of 1933, a suit to recover mesne profits for Fasli 1933 in respect of certain properties together with interest thereon. There was an earlier suit between the parties which related to these very properties for cancelling a certain lease granted in respect of them by the plaintiff's great grandmother (defendant No. 2) on August 8, 1923, for three years in favour of defendant No. 1. The properties in question belonged to the plaintiff who was then a minor under the testamentary guardianship of defendant No. 2, the great grandmother who had been appointed to manage the properties by the will of the plaintiff's

father, one Thangaswami dated July 6, 1915. The testator died a few days later and in the previous suit there was no dispute as to the genuineness of the will. That suit was decreed and the appeal from the decree of the First Court was dismissed by the High Court on August 30, 1932. There was some attempt made to take the matter to the Privy Council but the idea was finally abandoned and the decree of the High Court which dismissed the appeal with costs was the final decision in that suit. The present suit was instituted on October 14, 1932, that is to say, one and a half month after the High Court had decided the suit in favour of the plaintiff who claims to have attained majority, being till then a ward of the Court under the Guardians and Wards Act, only, after attaining her 21st year which according to her, was on October 15, 1929. The present suit was thus instituted just before the lapse of the period of three years after attaining majority. The suit has been decreed by the Subordinate Judge and the present appeal is, as stated already, by defendants Nos. 1 and 3 to 6.

As in the Court below, in this appeal also, a good deal of argument has been directed to the point of the alleged bar imposed by O. II, r. 2, Civil P. C., to the present suit, the appellants' contention being that the present claim for mesne profits for Fasli 1333 should either have been included or had actually been included in the earlier suit inasmuch as it arose out of the same cause of action. This point has been discussed by the Court below some what briefly and rightly so because the point is really concluded by the Full Bench decision in *Ponnammal v. Ramamirda Aiyar* (1), which has been subsequently followed in *Khuddus v. Mohammad Hussain* (2), and it may also be added that no other High Court has taken a different view, and on the other hand there are several decisions of other High Courts which take the same view, namely that a claim for past mesne profits need not be sued for in a suit for recovery of possession of the property in respect of which mesne profits are claimed by reason of O. II, r. 2, Civil P. C. The only important reason given to us by the learned Advocate for the appellants for not accepting the view of the lower Court on this point which merely followed the Full Bench decision in *Ponnammal v.*

Ramamirda Aiyar (1), is that in view of certain observations and the decision in a later Privy Council case *Naba Kumar v. Radhashyam* (3), it must be held that the view taken by the Full Bench in *Ponnammal v. Ramamirda Aiyar* (1), is not correct. No doubt it was also argued that as a matter of fact the claim to past mesne profits had been made in the earlier suit and therefore the present claim was not maintainable. There is, however, no substance in this contention. A perusal of the plaint in the former suit makes it perfectly clear that in so many words the past mesne profits due to the plaintiff in respect of the plaint properties was not included in the suit and that the plaintiff intended to bring a separate suit in respect of the same. In view of this specific statement, and in the absence of any language in the prayer portion of the plaint to show that any claim to past mesne profits was included in the plaint, it is impossible to accept this contention.

As regards the main argument, namely that the Full Bench decision in *Ponnammal v. Ramamirda Aiyar* (1), is not good law, it is enough to say that nothing in the Privy Council judgment in *Naba Kumar v. Radhashyam* (3), is really contrary to what has been stated by the Full Bench decision in *Ponnammal v. Ramamirda Aiyar* (1). The Privy Council case does not deal with a claim to mesne profits in the first place. Secondly it is a case in which the prayer that was made in the subsequent suit, namely for taking accounts, was a prayer that could have been made on the same foundation of fact and law as the claim in the earlier case which was to declare that a certain trust existed and for reconveyance of certain properties. It is not as if this contention that the Full Bench decision in *Ponnammal v. Ramamirda Aiyar* (1), is not correct in view of the Privy Council decision in *Naba Kumar v. Radhashyam* (3), is a new argument put forward for the first time. A similar contention appears to have been pressed in *Tadapalli Ramiah v. Madalo Thathiah* (4), and repelled in that case by Venkataramana Rao, J. It is not necessary to repeat the reasons given by the learned Judge for repelling this contention. We are in general agreement with what he has said in that

(3) 61 M L J 294; 134 Ind. Cas. 654; A I R 1931 P C 229; 35 C W N 977; (1931) A L J 797; 34 L W 444; 54 C L J 274; Ind. Rul. (1931) P C 302; (1932) M W N 333. (P C).

(4) A I R 1937 Mad. 849; 174 Ind. Cas. 181; (1938) 1 M L J 320; 10 R M 669; 47 L W 547; (1938) M W N 643.

(1) 38 M 829; 27 Ind. Cas. 679; A I R 1915 Mad. 912; 28 M L J 127; 7 M L T 125; (1915) M W N 130 (F B).

(2) 51 M L J 252; 97 Ind. Cas. 389; A I R 1926 Mad. 1015; 24 L W 290; (1926) M W N 814.

case and we need only repeat some of the references which he has made in the judgment, namely, *In re Ekanthalingaswami Koil* (5), *Ramu Kallappa v. Saidappa Siderama* (6) and *Ram Karan Singh v. Nakkhed Ahir* (7). In the last of these cases, there is a comparatively full discussion of the subject. It is enough to add that the law as laid down by the decision in *Ponnammal v. Ramamirda Aiyar* (1), merely reiterated and re-affirmed the law prevailing in Madras since *Tirupati v. Narasimha* (8), which is a case of 1888 and the Full Bench decision in *Ponnammal v. Ramamirda Aiyar* (1), which is a case of 1914 has held the field without any judicial expression of any doubt regarding its correctness all these years. A further point is that no other High Court has sounded a different note, and on other hand there are several decisions which take the same view. In these circumstances and having regard to the state of the authorities which are practically unanimous for so many years, it is impossible for us to accept the contention put forward on behalf of the appellants in this case. We therefore find that there is no bar imposed by O. II, r. 2, Civil P. C., on the plaintiff's claim for mesne profits in this case.

The other points raised in this appeal on behalf of the appellants can be disposed of somewhat briefly because there is really no substance in them. One of the two points is one of limitation which was sought to be based on two grounds. These are dealt with in paras. 64 to 86 of the lower Court's judgment and para. 88 respectively, and there is little to add to what the lower Court has said on these points. The first ground is a pure question of fact, namely, the date of the birth of the plaintiff. There is an extract from the birth registrar which is not attacked on the ground of forgery or the like which shows that the plaintiff was born as alleged by her on October 15, 1908. This practically unimpeachable evidence and other evidence which points in the same direction has been sought to be attacked on the ground that the birth register extract relates not to the plaintiff but to a younger sister of hers who died a few days after birth. This story has been sought to be established by the evidence of witnesses who were not accepted

by the lower Court as witnesses of the truth. No attempt was made to file any extract of of the birth register or death register relating to this alleged younger sister of the plaintiff, and as the learned Subordinate Judge points out, if for any reason such an extract could not be got, it was open to the appellants to have examined at least the Village Munsif of the village in which the plaintiff, according to the appellants, is alleged to have been born, namely, the village Movur. On the whole, we see no reason to differ from the conclusion come to by the trial Judge on this pure question of fact and in respect of which unimpeachable documentary evidence is all on the side of the plaintiff and there is only unreliable oral evidence on the side of the appellants.

As regards the other ground, very little was said to us in support of the contention and obviously the contention is without force. The contention is that the suit is barred by limitation because the Court gave improperly and without sufficient cause time for payment of court-fee after the plaint had been presented. Whatever might have been the reasons for the Court's granting time, the effect of the grant of such time is clear, namely, that the plaint takes effect as if it had been presented along with the full court-fee on the date of its first presentation, a proposition put beyond doubt by s. 149 of the Code: *vide* also the decision in *Basavayya v. Venkatappayya* (9). The contention therefore that this claim is barred by limitation has no substance and must be repelled.

The remaining point of any substance is that the value of paddy fixed by the Court below is exclusive. The value has been fixed at Rs. 2-10-0 per kalam, a kalam being said to be 34 measures. This estimate is, in our opinion, in accordance with the weight of the evidence which has been fully discussed. There has been no omission on the part of the Court below to deal with any material part of the evidence bearing on this point and we do not see any error of judgment, in assessing the value to be given to the evidence on both sides. It is a point worthy of mention that defendant No. 1 himself when he claimed rent in respect of these very properties from his sub-tenants claimed the value of paddy at Rs. 4 and at Rs. 3-8-0. Even allowing for some exaggeration, it is impossible for it to be contended now that Rs. 2-10-0 is excessive. The estimate is mainly based on the evidence given in the previ-

(9) 51 M L J 90; 95 Ind. Cas. 439; A I R 1926 Mad. 676; (1926) M W N 341.

(5) 71 M L J 677; 165 Ind. Cas. 972; A I R 1937 Mad. 46; I L R (1937) Mad. 284; (1936) M W N 1081; 44 L W 673; 9 R M 317.

(6) 59 B 454; 157 Ind. Cas. 634; A I R 1935 Bom. 306; 37 Bom. L R 336; 8 R B 70.

(7) 53 A 951; 133 Ind. Cas. 298; A I R 1931 All. 429; (1931) A L J 673; Ind. Rul. (1931) All. 618 (F B).

(8) 11 M 210.

ous suit by a clerk of a paddy merchant whose disinterestedness is not unquestioned and his evidence was obviously based on the accounts which he had in his possession. That is really the best evidence available in the present case on this point, and the lower Court could not be said to have gone wrong in relying mainly on that evidence.

Something was said to us on the award of interest on the amount of mesne profits, calculated on this basis, namely, Rs. 2-10-0 a kalam in the lower Court's decree. The definition of 'mesne profits' in the Civil P. C. itself shows that interest is included; in other words, interest can rightly be awarded by the Court as mesne profits. It was also stated that by the delay in the filing of the present suit, the claim on the score of interest has proved to be much larger in amount than it would otherwise have been. This does not however show that the plaintiff is not entitled to the interest which she claims. On the other hand, the appellants, have, in our opinion, not the slightest claim on the indulgence of this Court. Their conduct as found in the previous suit was extremely reprehensible. There was a conspiracy to defeat the rights of the plaintiff who was then a minor to which her testamentary guardian herself was a party. A grosser case of fraud could hardly be imagined and the present suit is practically for mesne profits in respect of the very property which was attempted to be alienated by means of a lease for a very low rent in favour of one of the appellants, namely, defendant No. 1. We see therefore no reason whatever to interfere with the decree of the Court below. That decree is affirmed and this appeal is dismissed with costs of the respondent (plaintiff). We are informed that an application has been made to scale down the decree-debt in the Court below, and it is enough to say in connection with this that the decree in this appeal will not prejudice in any way the disposal of the application, if any, to scale down the debt.

N.-S.

Appeal dismissed.

RANGOON HIGH COURT
Criminal Appeal No. 980 of 1939
January 25, 1940

SHARPE, J.

THE KING—PROSECUTOR.

versus

SRIDHAR AND OTHERS—RESPONDENTS

Penal Code (Act XLV of 1860), s. 225—Police Officer in arresting person not acting on his own initiative but merely on verbal orders of his superior without written order under s. 56, Criminal Procedure Code (Act V of 1898)—Arrested person is not lawfully detained within meaning of s. 225.

Where while arresting a person a Police Officer is not acting on his own initiative or independently, but is merely doing what his superior officer verbally tells him to do, an order in writing must be delivered to him under s. 56, Criminal P. C. Where an arrest is made without such order in writing the arrested person cannot be said to be lawfully detained within the meaning of s. 225, I. P. C. 161 Ind. Cas. 459 (1), relied on. 166 Ind. Cas. 632 (2), 98 Ind. Cas. 254 (3) and 40 Ind. Cas. 709 (4), distinguished.

Cr. A. from an order of the Sessions Judge, Hathawaddy, dated August 31, 1939.

Mr. U Myint Thein, Govt. Advocate, for the Crown.

Mr. H. Basu, Hla Tun Pru, D. M. Ray, U Twa Aung, for Respondents Nos. 2, 7, 15 and 16; 5, 6 and 8; and 9 and 10, respectively.

Respondents Nos. 12, 13 and 14 in person.

Judgment.—This is an appeal against an acquittal presented by direction of the Governor. The incident in question arose out of the strike at the Burma Oil Company's works at Syriam in January of last year. At 8-10 A. M. on the morning of January 26, 1939, a first information report was made at the Police Station at Thilawa alleging that a haystack had been burnt at Thilawa the night before at about 10-30 P. M. About 4-30 P. M. on January 26, Mr. Tooke, the Sub-Divisional Police Officer at Syriam, gave orders by word of mouth to Maung Kyin Maung, a Sub-Inspector of Police, also stationed at Syriam to arrest one Forja Singh in connection with the haystack burning. Maung Kyin Maung was within the Police area under the control of Mr. Tooke but Thilawa was not in the sub-area embraced by the Sub-Inspector's activities. In accordance with this verbal order, Maung Kyin Maung proceeded to arrest Forja Singh—and he was the man that Mr. Tooke had so ordered him to arrest—in connection with the burning of the haystack on the previous night. As a matter of fact, Mr. Tooke told Maung Kyin Maung that Forja Singh was to be arrested for an offence punishable under s. 436, which is mischief by fire with intent to destroy a house whereas in point of fact if Forja Singh was to be arrested for any

offence at all in accordance with the first information report, it would be an offence punishable under s. 435, which is mischief by fire with intent to cause damage. However, that point is really immaterial because the offences under both those sections are both cognizable ones.

Maung Kyin Maung and other Police Officers went to a meeting of the strikers and he arrested Forja Singh. After he had done so, the Police party, himself included, was attacked by a mob of about 200 people who attempted to rescue Forja Singh. The present respondents were some of those who comprised that mob and they were afterwards arrested and charged with an offence punishable under s. 225 which provides the punishment for any one who attempts to rescue another person from any custody in which that person is lawfully detained for an offence. The whole question before me is whether Forja Singh, arrested as he was by Maung Kyin Maung in the circumstances just mentioned, was lawfully detained within the meaning of that section. The learned Magistrate who tried the respondents convicted them all. He bound over two of them and the rest he sentenced to six months' rigorous imprisonment each.

On appeal the learned Sessions Judge held that Forja Singh was not lawfully detained and, following the decision of my brother Mosely in *Mohamed Ismail v. Emperor* (1) he acquitted all the respondents and set aside the convictions and sentences. In my judgment, *Mohamed Ismail v. Emperor* (1) disposes of this appeal. I see no reason whatever for saying that it is not a correct decision. If I had had any reason to suppose that it was incorrect, I should have referred that question of law for the determination of a Bench, but I think that that decision is quite right and concludes this matter. The learned Govt. Advocate has brought to my notice three cases from which he argued that *Mohamed Ismail v. Emperor* (1) was not rightly decided. The latest of those cases is a Bombay case in which a Bench of the Bombay High Court discussed Mosely, J.'s decision. I refer to *Keshavlal Harilal v. Emperor* (2). That case however is distinguishable from the present case. In the Bombay case the Police constables were present when the complaint was made so that the Police Officers in question had personal knowledge of the making of the com-

(1) 13 R 754; 161 Ind. Cas. 459; A I R 1936 Rang. 119; 37 Cr. L J 462; 8 R Rang. 480.

(2) I L R (1937) Bom. 127; 166 Ind. Cas. 632; A I R 1937 Bom. 56; 38 Cr. L J 267; 38 Bom. L R 971; 9 R B 249.

plaint. In *Kishun Mandar v. Emperor* (3), it is to be observed that the Police constable who was deputed by the Sub-Inspector went along with the complainant from whom the constable, acting independently, obtained credible information which entitled him to act under s. 54, Criminal P. C.

The third case is that of *In re Ratna Mudali* (4). That case is distinguishable because, as is pointed out by Ayling, J. it was in evidence that the constable knew that the warrant in that case had in fact been issued. All those three cases are therefore distinguishable from the present case where there is not the slightest suggestion that Maung Kyin Maung acted in any way on his own initiative or that he had any information or suspicion apart from what his superior officer told him. To my mind the important part of Mosely, J.'s judgment is those few words at p. 756* where he said. "... provided that the officer is acting on his own initiative or independently in the course of his duty." If he is doing that he may then act under s. 25, Criminal P. C., but if he is not acting on his own initiative or independently, then, if he is merely doing what his superior officer tells him to do, an order in writing must be delivered to him under s. 56. In my judgment there is no reason to dispute the correctness of Mosely, J.'s decision which, in my opinion, entirely covers the present case. In those circumstances the respondents' appeals to the Sessions Judge were rightly allowed and they were properly acquitted.

The learned Govt. Advocate however has pointed out that there is a second ground to his memorandum of appeal to this Court and he asks me to convict the respondents of some other offence such, for instance, as rioting, if the materials on the record in my opinion justify it. It is enough on that point for me to say this: that the learned Sessions Judge was apparently never asked to do that. What the learned Sessions Judge did was to come to the conclusion that no offence punishable under s. 225 had been committed by the respondents. With that decision I am, as I have already said in entire agreement. I do not think it right for me now, in the circumstances of the present case and having regard both to the fact that the Sessions Judge was not asked to record a conviction under some other section and

(3) 5 Pat. 533; 98 Ind. Cas. 254; A I R 1926 Pat. 424; 27 Cr. L J 1310; 8 P L T 237.

(4) 40 M 1028; 40 Ind. Cas. 709; A I R 1918 Mad. 514; 18 Cr. L J 709.

also to the fact that it is precisely one year to-night since the haystack was set on fire, to go into these cases in detail to see what if any other offence these respondents have committed. Furthermore, the learned Govt. Advocate informed me at the outset of the hearing of this appeal that he did not now ask for anything more than a nominal sentence; all he wanted was an expression of opinion about *Mohamed Ismail v. Emperor* (1). I am much obliged to the learned Advocates on both sides for the full and clear argument which they have presented. This appeal must in my judgment be dismissed.

s. *Appeal dismissed.*

MADRAS HIGH COURT

Appeal No. 266 of 1937

February 26, 1940

LEACH, C. J. AND KRISHNASWAMI

AYYANGAR, J.

VAJJULA—APPELLANT

versus

HANUMANTHA VAJJULA GOPAL

KRISHNAMMA AND ANOTHER—

RESPONDENTS

Hindu Law — Adoption — Widow — Consent of sapindas—Burden is upon widow to prove that consent was refused with improper motive—Madras School—Nearest sapindas improperly refusing consent—Consent of next nearest sapindas is necessary—All sapindas dead—There is no residuary power in widow to adopt.

The Judge cannot assume that the *sapinda* had refused his consent to the adoption of the widow on the ground that his rights as a reversioner would come to an end if the widow adopted a son to her husband, which is an improper motive. The burden is on the widow to prove improper motive. 56 Ind. Cas. 391 (1), referred to.

Under the Mitakshara Law as interpreted in the Madras Presidency the widow cannot adopt a son to her husband unless she has received authority from him or has received the consent of her husband's *sapindas*. The consent of the *sapinda* is necessary in the absence of direct authority from the husband. If the nearest *sapindas* improperly refuse their consent to an adoption the widow is, however, entitled to seek the consent of the next nearest *sapindas*. There is no residuary power in a widow to adopt when her husband's *sapindas* are all dead.

[Case-law relied on.]

Mr. K. Kameswara Rao, for Appellant.

Messrs. P. V. Rajamannar and K. Subba Rao, for the Respondents.

Leach, C. J.—The respondents have not appeared to oppose this appeal but as the Court has decided to allow it the reasons must be stated. The suit out of which the

appeal arises was filed by the appellant in the Court of the Subordinate Judge of Rajahmundry for a declaration that the adoption of respondent No. 1 by respondent No. 2 was invalid. Respondent No. 2 is the widow of one Jagappa, *alias* Jagannatha Sastrulu, who died on December 11, 1868. The adoption took place on July 4, 1929, nearly 61 years after the death of the husband of respondent No. 2. Respondent No. 2 was a very young girl when her husband died and was still under the guardianship of her father. There were two defences set up. It was said that the appellant and other *sapindas* had given their consent to the adoption and that the widow was given power to adopt by a will executed by her deceased husband. The Subordinate Judge held that the appellant was the only living *sapinda*, that he had not given his consent, and that the alleged will was a forgery, but he dismissed the suit on the ground that the appellant had refused his consent from an improper motive. That the consent has been refused was common ground, but the appellant was not asked why he had refused his consent and there is nothing in the evidence which indicates that he refused his consent improperly. The Subordinate Judge assumed that the appellant had refused his consent, on the ground that his rights as a reversioner would come to an end if the widow adopted a son to her husband and considered that this would be an improper motive. The Subordinate Judge was not entitled to make this assumption. The burden was on the respondents to prove improper motive: see *Krishnayya v. Lakshminpathi* (1), at p. 658 and as the burden had not been discharged the appellant was entitled to succeed.

Under the Mitakshara law as interpreted in this Province the widow cannot adopt a son to her husband unless she has received authority from him or has received the consent of her husband's *sapindas*. That the consent of the *sapindas* is necessary in the absence of direct authority from the husband is to be gathered from the decisions of the Privy Council in *Collector of Madura v. Mootoo Ramalinga Sathupathy* (2), *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi* (3), *Veerabasavaraju v.*

(1) 43 M 650 (658); 56 Ind. Cas. 391; A I R 1920 P O 4; 47 I A 99; 18 A L J 601; (1920) M W N 385; 24 C W N 905; 39 M L J 70; 28 M L T 70; 12 L W 625 (P C.)

(2) 12 M I A 397; 1 Beng. L R 1; 10 W R 17; 2 Sar. 361; 2 Suther 135 (P C.)

(3) 1 M 174; 4 I A 1; 3 Sar. 669 (P C.)

Balasurya Prasud Rao (4), *Krishnayya v. Lakshmipathi* (1), *Krishnayya Rao v. Venkata Kumara Mahipathi Surya Rao Bohadur* (5) and *Balasubramanya Pandya v. Subhaya Tevar* (6): A Full Bench decision of this Court of which my learned brother and I were members had to consider the effect of these authorities in the recent case in S. A. No. 174 of 1936 *Seshamma v. Venkata Narasimharao* (7), and it was there held that they had decided that in the absence of authority from her husband the widow could adopt only with the consent of the nearest agnates, unless consent was improperly withheld, in which case she might lawfully adopt with the consent of the next nearest agnates. If there were no agnates she must look for advice to the cognates, it having been definitely laid down by the Privy Council that she was not competent to decide on an adoption for herself.

In delivering the judgment of the Judicial Committee in *Balasubramanya Pandya v. Subhaya Tevar* (6), Sir George Lowndes observed that it would be difficult for their Lordships to hold that under the Madras law there would be any residuary power in the widow to adopt in the absence of *sapindas*, but as it was not necessary to give a definite pronouncement on the question the discussion stopped there. In my opinion, the effect of the cases which have been decided by the Judicial Committee on appeals from this Court is that a widow has no power to adopt unless she has express authority from her husband or in the absence of such authority she is acting under the advice of her husband's *sapindas*. In *Patnaloo Appaleswami v. Ellamanchilli Moosalaya* (8), a Bench of the Rangoon High Court held that a widow has the same powers to adopt as her husband had in his lifetime when there are no *sapindas* living, but the learned Judges did not examine the line of

cases starting with *Collector of Madura v. Mootoo Ramalinga Sathupathy* (2). One of the learned Judges (Das, J.) based this opinion on a passage in the judgment of the Privy Council in *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma* (9), where their Lordships said that in Madras "it is established.....that unless there is some express prohibition by the husband, the wife's power, at least with the concurrence of *sapindas* in cases when that is required, is co-extensive with that of the husband."

In that case the Judicial Committee was merely concerned with the question whether a widow could make an adoption of the only son of a kinsman and was not considering the question now under discussion. The other learned Judge (Dunkley, J.) relied on the judgment of the Privy Council in *Krishnayya v. Lakshmipathi* (1), but I am unable to read it in the same way as he did. The question which the Privy Council was considering there was whether there could be a lawful adoption when the consent of some of the nearest *sapindas* had not been sought or obtained. Their Lordships held that the absence of consent on the part of the nearest *sapindas* could not be made good by the authorization of distant relatives. If the nearest *sapindas* improperly refuse their consent to an adoption the widow is, however, entitled to seek the consent of the next nearest *sapindas*. In my judgment the decisions of the Privy Council when fully examined entirely negative the proposition that there is residuary power in a widow to adopt when her husband's *sapindas* are all dead. It follows that in my opinion respondent No. 2 had no power to adopt respondent No. 1 and that the decision of the Subordinate Judge is erroneous. I would allow the appeal and decree the appellant's suit with costs both here and below.

Krishnaswami Ayyangar, J.—I agree.

N.-S.

Appeal allowed.

(9) 22 M 398; 21 A 460; 26 I A 113; 7 Sar. 330; 3 O W N 427; 9 M L J 67; 1 Bom. L R 226 (P C).

MADRAS HIGH COURT

Civil Revision Petition No. 270 of 1937

April 17, 1940

WADSWORTH, J.

BOLISSETTI SUNDARAM AND ANOTHER—
PETITIONERS

versus

KANUPARTHI VENKATAPPADASU

AND ANOTHER—RESPONDENTS

Promissory note—One of parties promising to execute pro-note but not doing so—No evidence that he authorized anyone to affix his mark—His liability,

(4) 41 M 998; 48 Ind. Cas. 706; A I R 1918 P C 97; 45 I A 265; 25 M L T 1; 17 A L J 34; 36 M L J 40; 23 C W N 251; 29 C L J 184; 9 L W 243; 21 Bom. L R 238; 1 U P L R (P C) 18 (P C).

(5) 69 M L J 388; 157 Ind. Cas. 881; A I R 1935 P C 190; 42 L W 267; 1935 O L R 537; 1935 A L R 948; 1 B R 857; 1935 O W N 1055; 37 Bom. L R 852; (1935) M W N 1216; 40 C W N 1; 8 R P C 53 (P C).

(6) I L R (1938) Mad. 551; 172 Ind. Cas. 724; A I R 1938 P C 34; 65 I A 93; 32 S L R 328; 1938 O L R 61; 1938 O W N 117; 4 B R 251; 10 R P C 162; 47 L W 110; 1938 A L R 77; (1938) A L J 215; 42 O W N 449; (1938) 1 M L J 426; 19 P L T 169; 66 C L J 581 (P C).

(7) 188 Ind. Cas. 250; A I R 1940 Mad. 356; (1940) 1 M L J 400; 51 L W 408; (1940) M W N 393; 12 R M 820; I L R (1940) Mad. 454.

(8) 12 R 22; 147 Ind. Cas. 716; A I R 1933 Rang. 334; 6 R Rang. 172.

under pro-note—Pro-note purporting to be jointly executed by A and B in renewal of old joint pro-note—A alone executing it—No evidence whether A executed only on faith that B would also execute—Note, if binding on A.

Where there is no evidence that a party to a promissory note authorized anyone to affix his mark and all that is in evidence is that he promised to execute the note and went away without doing so there was no execution either by him or by a person authorized to execute on his behalf. He is not, therefore, liable under the promissory note. 44 Ind. Cas. 813 (1), distinguished.

When A executes a bond on the faith that B will also execute it and that B fails to do so, A has an equity in his favour relieving him from a liability which he never intended to undertake. But it is also settled that if A signed the bond without any regard to the question whether B signed it or not and if he delivered it as his bond, he is liable thereon, even though B did not sign. The question whether a particular instrument was signed by one of the parties on the faith, that the other would also sign is a question of fact and or is a ground of defence which must be established by the person who has signed the instrument.

When there is a promissory note purporting to be a joint promissory note of A and B, in renewal of previous joint promissory note and A alone executes and delivers that note and B fails to execute it, the note is binding on A, when there is no evidence one way or the other whether or not A executed only on the faith that B would also execute.

C. R. P. to the revise the decree of the District Munsif, Reppalle, in S. C. S. No. 146 of 1936.

Mr. N. Vasudeva Rao, for the Petitioners.

Mr. A. Lakshmayya, for the Respondents.

Order.—The petitioners were plaintiffs in a small cause suit based on a promissory note, Ex. A, dated March 25, 1933, for a sum of Rs. 167-12-9. The promissory note reads as if it were a joint promissory note by defendants Nos. 1 and 2. But it is found that it was not executed by defendant No. 2 though it was executed by defendant No. 1. What happened was that the two defendants went to the plaintiffs and asked them to write a promissory note in renewal of two earlier promissory notes, the major note being Ex. C, a joint bond executed by both defendants Nos. 1 and 2, the lesser one being Ex. B, a promissory note by defendant No. 1 alone. While the suit note was being written defendant No. 2 went away. The scribe wrote at the foot of the note the description of defendant No. 2, as the person who affixed his mark, but no mark or thumb print was in fact taken from defendant No. 2. Defendant No. 1, executed the promissory note and he did not defend the suit nor has he appeared to oppose this revision petition. The lower Court found that as the note was intended to be a joint note and was not executed by one of the joint promisors, there was no

completed contract and the suit had to be dismissed as against both the defendants. In revision, it is contended that both the defendants are liable.

The case with reference to defendant No. 2, is simple. It is based on the decision of a Bench of this Court in *Balayya v. Subbayya* (1), which held that when a party to a promissory note authorized the scribe to affix his mark and under that authority the scribe wrote words indicating that the promisor was the person who affixed the mark, but did not actually put any mark, there was a sufficient execution by the agent of the promisor to bind him. It seems to me that there are no such facts in the present case. There is no evidence that defendant No. 2, authorized anyone to affix his mark; all that we have is evidence that he promised to execute the note and went away without doing so. There was no execution either by him or by a person authorized to execute on his behalf. Clearly therefore the decision of the lower Court, so far as defendant No. 2, is concerned, is correct. The position with reference to defendant No. 1, is not so clear and there is a good deal of rather conflicting case-law on the subject. Most of the cases decided by the Indian Courts have references to s. 87, Negotiable Instruments Act, and are cases in which when one person has signed a bond the signature of the other person is forged on that bond either with or without the connivance of the actual executant. We are not here concerned with any alteration of the instrument or any forgery of the signature of defendant No. 2.

The simple position is this: When there is a promissory note purporting to be a joint promissory note of A and B and A alone executes and delivers that note and B fails to execute it, is the note binding on A, when there is no evidence one way or the other whether or not A executed only on the faith that B would also execute? It is, I think, well-established that when A executes a bond on the faith that B will also execute it and that B fails to do so, A has an equity in his favour relieving him from a liability which he never intended to undertake. But it seems also to be settled that if A signed the bond without any regard to the question whether B signed it or not and if he delivered it as his bond, he is liable thereon, even though B did not sign. The English cases do to some extent distinguish between a deed and a simple contract. Seeing that under s. 46, Negotiable Instruments Act, the mak-

(1) A I R 1918 Mad. 24; 44 Ind. Cas. 813; 40 M. 1171.

ing of a promissory note is completed by delivery, it is difficult to see how a person who signs and delivers a negotiable instrument is in any better position than a person who signs, seals and delivers a deed. The instrument is in law the instrument of the maker, unless he can establish any equity whereby it should not be enforced against him. It seems to be settled that the question whether a particular instrument was signed by one of the parties on the faith, that the other would also sign is a question of fact: *vide Latch v. Wedlake* (2). Is this question of fact one which must be proved by the plaintiff who seeks to impose liability upon the actual executant or is it a ground of defence which must be established by the person who has signed the instrument? The latter view seems to be a correct view. It is true that Jessel M. R. has stated in *Luke v. South Kensington Hotel Co.* (3), at p. 125 that: "it is well-settled that if two persons execute a deed on the faith that a third will do so, and that is known to the other parties to the deed, the deed does not bind in equity if the third refuses to execute."

This dictum has however, been criticized by the House of Lords as going too far. In *Nass v. Westminster Bank Ltd.*, (4), where their Lordships discuss the cases on this subject and point out that they are mainly cases where it was sought to impose on a man a greater liability than he had ever intended to bear, where his intention was not in doubt, and where, if he were not able to get equitable relief, he would suffer substantial loss. Their Lordships further on quote with approval the case in *Ex parte Harding, In re Smith, Fleming and Co.* (5), where it is expressly decided that the person who asserts such an equity in his favour to relieve him from the obligations of the contract which he has signed must affirm and prove the grounds upon which that equity is based. Their Lordships state that

"two propositions as regards the equity in question may safely be asserted, namely, (i) that the intention of the person who is setting it up is not a matter of mere conjecture, and (ii) that the equity comes into play only when, in its absence, the legal effect of the unconditional execution of the deed will lead to substantial injustice."

I may observe that the case just referred to in *Ex parte Harding; In re Smith, Fleming and Co.*, (5), was not a case of a deed but of a simple letter of guarantee. And it was clearly laid down that the burden of

proof lay upon the person who, having signed that guarantee sought equitable relief against the obligation which it imposed. It is true that in that case the letter of guarantee did not in its actual recitals indicate an intention that other parties should also sign it. But the previous letter leading up to that letter of guarantee made this point clear. Turning to the facts of the present case, there was no doubt an intention to execute a joint promissory note. But defendant No. 1 was personally liable under both of the promissory notes which the suit note superseded. There was no question therefore of his being mere surety or guarantor and the plaintiffs could have recovered the whole amount of the two earlier promissory notes from him personally. It is true that the failure of defendant No. 2 to execute the suit promissory note might make it difficult for defendant No. 1 to establish a right of contribution as against him. But so far as the plaintiffs were concerned the liability with which they propose to charge defendant No. 1, under this note is not different from the liability which he proposed to undertake; and there is no evidence that he would have been unwilling to sign this promissory note, had it not been for the belief that defendant No. 2, was also going to sign it. Defendant No. 1 has not denied his liability and has not put forward any plea that his liability was incurred conditionally upon defendant No. 2 undertaking a similar liability.

On these facts and on the authorities cited, it seems to me that defendant No. 1, having signed and delivered this promissory note and having established no grounds to relieve him from the liability incurred thereunder must be held liable for the suit claim. In the result therefore I allow the petition to the extent that the plaintiffs will have a decree for the suit claim with interest at the contract rate until to-day and subsequent interest at 6 per cent. till realization and costs against defendant No. 1 only. As against defendant No. 2 the revision petition is dismissed with costs.

N.-S.

Petition partly allowed.

(2) 113 E R 678.

(3) (1879) 11 Ch D 121 (125); 48 L J Ch. 361; 40 L T 638; 27 W R 514.

(4) (1940) 1 All E R 485.

(5) (1880) 12 Ch. D 557; 41 L T 517; 48 L J Bk. 115; 28 W R 158.

OUDH CHIEF COURT

Second Civil Appeal No. 293 of 1937

January 20, 1941.

BENNETT AND GHULAM HASAN, JJ.
INDERJIT—PLAINTIFF—APPELLANT
versus

KANHAIYA LAL AND ANOTHER—

DEFENDANTS—RESPONDENTS

U. P. Land Revenue Act (III of 1901), s. 111—Partition—Objection filed after prescribed time—Order passed by Revenue Court under s. 111 (1) (b)—Civil Court, if can question—Discretion of Revenue Court to extend time prescribed for objections—Claim to separate ownership of sir land—Whether question of proprietary title.

The question whether an objection is barred as not having been made within the time prescribed by s. 111, U. P. Land Revenue Act, is essentially a question for the Revenue Court to decide, and it is not open to the Civil Court to question the decision of Revenue Courts on this point. The only circumstance in which the Civil Court would be justified in questioning the order passed by the Revenue Court under s. 111 (1) (b) is where the Civil Court finds that the question raised is not a question of proprietary title. 80 Ind. Cas. 1033 (6), relied on. [p. 851, col. 1.]

[Case-law referred to.]

The Revenue Courts have discretion to extend the time prescribed for preferring objections under s. 111, U. P. Land Revenue Act. 92 Ind. Cas. 903 (8) and *Jagdeo Singh v. Banaphal Pandey* (9), relied on. [p. 851, col. 2.]

The question of a claim to separate ownership of sir lands is a question of proprietary title. *Din Dayal v. Ram Narain* (10), followed. [*ibid.*]

S. C. A. against the order of the District Judge of Hardoi, dated April 15, 1937.

Mr. K. P. Misra, for the Appellant.

Mr. H. N. Das, for the Respondents.

Judgment.—This is a second civil appeal against the order of the learned District Judge of Hardoi dated April 15, 1937, upholding the judgment and decree passed by the learned Munsif of Hardoi dated December 17, 1936, dismissing the plaintiff's suit.

The suit was brought by Inderjit in consequence of an order passed by the Commissioner in a partition case on February 11, 1935. Inderjit had applied for partition on June 23, 1934, and proclamation had issued under s. 110 of the Land Revenue Act. Thereafter on May 13, 1935, partition proceedings had been drafted, Inderjit filed an objection on June 4, against the provision made in the partition proceedings for the partition of the sir land. The provision was that the sir of each co-sharer would go with his *patti* and that compensation would be given in cash from non-statutory and other statutory tenancy land. The objection was disallowed by the partition officer, and an appeal against his order was dismissed by the Deputy Commissioner on September 10, 1935. In second appeal the Commissioner allowed the objection, considering that it raised a

question of proprietary title, and ordered the objector under s. 111 (1) (b) of the Land Revenue Act to establish his claim in a Civil Court by instituting a suit within three months. Inderjit accordingly filed a suit for declaration that he owned half the sir land mentioned in Lists A, B, and C attached to the plaint.

The suit was contested on various grounds including the ground that the order of the Commissioner was *ultra vires*. The Munsif dismissed the suit holding that the order under s. 111 could be assailed in the Civil Court, that the Commissioner's order was *ultra vires* and, therefore, the Civil Court had no jurisdiction to try the suit. He further held that there was no cause of action for instituting a suit with respect to the sir land mentioned in List B attached to the plaint because this sir land was not included in the partition and therefore the Commissioner's order did not apply to it.

It was apparently realised by the plaintiff Inderjit that so far as the sir land in List B was concerned, it was incorrectly stated in the plaint that the cause of action accrued on February 11, 1936, the date of the Commissioner's order, because in the lower Appellate Court he filed an application for amendment of this paragraph of the plaint so as to show that the cause of action with regard to the sir land in List B arose in 1933.

The lower Appellate Court agreed with the view taken by the Munsif that the Commissioner's order was invalid, that it was open to the Civil Court to consider whether it was valid or invalid, and that as it was invalid there was no proper cause of action with regard to the property in Lists A and C. As regards the application for amendment of the plaint in regard to the property in list B, the District Judge observed that the application for amendment was very belated and that in view of the decision with regard to the property in Lists A and C that the suit was not maintainable in the Civil Court, it was not desirable to let the case proceed with respect to the property in List B. He did not, however, allow the application for amendment.

Four questions arise for decision in this appeal:

(1) Whether the Civil Court was competent to question the order of the Revenue Court under s. 111 of the Land Revenue Act.

(2) If so, whether the lower Courts correctly held that the order of the Commissioner was invalid because objections had been

taken by the plaintiff after the time contemplated by s. 111.

(3) Whether the plaintiff's objection did in fact raise a question of proprietary title.

(4) Whether, if the appeal is allowed, on the above points the appellant should be allowed to amend his plaint so as to alter the cause of action in regard to the property in List B.

On the first point the lower Appellate Court has relied on a decision of the Judicial Commissioner's Court in *Mukhtar Ahmad v. Barati Lal*, (17 O. C. 224). (1) This is undoubtedly an authority which supports the view taken by the lower Appellate Court. It was said in that case that when the jurisdiction of the Civil Courts is invoked they must satisfy themselves that all the conditions and qualifications annexed to the grant of jurisdiction have been strictly complied with. It must be made clear that the question of title which they are invited to decide has been raised by an objection filed by Revenue Court within the time provided by s. 110 of the Act, and it must be shown that the conditions laid down in s. 111, sub-s. (1) cls. (a) and (b) have been satisfied.

We have been referred to other cases bearing on this question, some of which support the appellant and some of which are against him. Reference was made to another decision of the Judicial Commissioner's Court in *Ram Lakhan Singh v. Rampal Singh*, (24 O. C. 143) (2), but the question did not directly arise in that case. It was only said that the competence of a Civil Court to decide the question of title depends upon the choice exercised by the Revenue Court. If the latter Court passes an order under cl. (a) or (b) a Civil Court has authority to try and decide the question of title, but it is a condition precedent that such an order be made,

In a case of this Court, *Ram Sidh Singh v. Mahanth Bakoodas* (4 O. W. N. 1196) (3) it was said that the jurisdiction of the Civil Courts in matters relating to partition is expressly ousted, except in so far as is provided by the provisions of s. 111 of the Land Revenue Act, and the conditions and qualifications annexed to the grant of jurisdiction must be strictly complied with.

In *Ram Sumaran v. Sarjoo Persad* (5 O. W. N. 1062) (4) it was observed by a Single

(1) 17 O C 224; 25 Ind. Cas. 316; 1 O L J 335; A I R 1914 Oudh 115.

(2) 24 O C 143; 63 Ind. Cas. 272.

(3) 4 O W N 1196; 107 Ind. Cas. 333 (2); A I R 1928 Oudh 101.

(4) 5 O W N 1062; 114 Ind. Cas. 806; 12 R D 731; A I R 1929 Oudh 67; Ind. Rul. (1929) Oudh 198.

Judge of this Court that where a statute confers jurisdiction upon a tribunal of limited authority, the conditions and qualifications under which jurisdiction has to be exercised must be directly complied and a Revenue Court is not entitled to entertain an objection raising a question of proprietary, if not filed at the proper time. Reference was made in this case to *Mukhtar Ahmad v. Barati Lal*, (1) and the principle laid down in that case was accepted as correct. The learned Judge said that a Revenue Court is not entitled to entertain an objection raising a question of proprietary title if not filed at the proper time.

The question came up before this Court again in *Dhanpati Kuer v. Kandhaiya Bakshi Singh*, (7 O. W. N. 586) (5), but here, as in some other case also, the question primarily considered was whether the Revenue Court was justified in passing an order under s. 111, of the Land Revenue Act when the provisions of that section had not been strictly complied with in regard to the time within which the objection should have been made.

It can, however, be said that it appears to have been assumed in this and in some other cases that it was open to the Civil Court to consider whether the order of the Revenue Court was legally valid.

On the other hand there is a ruling of the Allahabad High Court in *Parosiddhan Rai v. Dhaneshwar Rai*, (A. I. R. 1925 All. 818) (6), which supports the view that it is not open to the Civil Court to question the validity of the order of the Revenue Court on the ground that the provisions of s. 111 had not been complied. In this case no objection was taken after issue of the formal notice of the application for partition but when steps were taken to draft the partition proceedings under s. 114 of the Land Revenue Act, a definite and specific objection was made. The Assistant Collector held that this was an objection which ought to have been presented under s. 110 of the Land Revenue Act, and he refused to entertain it. The Collector in appeal directed the application to be entertained notwithstanding that it was not raised within the period limited by the proclamation under s. 110. It was observed by a Bench of the Allahabad High Court that the question whether the objector Parsiddhan Rai should have been permitted to make the objection when he allowed the period limited by the procla-

(5) 7 O W N 586; 172 Ind. Cas. 28; 14 R D 317; A I R 1930 Oudh 371; Ind. Rul. (1930) Oudh 444.

(6) A I R 1925 All. 818; 80 Ind. Cas. 1033.

mation under s. 110 of the Land Revenue Act to expire, was essentially one for the Revenue Courts to decide. It was also said that the Collector seemed to have dealt with the matter very sensibly. There appears to be no case of this Court in which it has been expressly held that a Civil Court is either competent or incompetent to consider the question, but the competency of the Civil Court has certainly been assumed in cases where the validity of the Revenue Court's order has been examined. We should ourselves be inclined to agree with the Allahabad High Court in *Parsiddhan Rai v. Dhaneshar Rai* (6), that the question whether an objection is barred as not having been made within the time prescribed by s. 111, is essentially a question for the Revenue Court to decide and that it is not open to the Civil Court to question the decision of the Revenue Courts on this point. The only circumstance in which in our opinion, the Civil Court would be justified in questioning the order passed by the Revenue Court under s. 111 (1) (b) is where the Civil Court finds that the question raised is not a question of proprietary title.

We have, however, considered whether it was correctly held by the lower Appellate Court in the present case that the order of the Commissioner was invalid by reason of the fact that the objection was made after the time contemplated by s. 111. We have already referred to some cases in which it was held that the Revenue Court can extend the time fixed by s. 111. This was also held by the Court of the Judicial Commissioner in *Kali Persad v. Thakur Dei* (1 O. L. J. 81) (7), where it was said that a Revenue Court acting under s. 114 of the Land Revenue Act is not precluded from dealing with an objection filed beyond the time fixed by it for filing objections, if it has not up to that time taken any action under that section.

Similarly in *Budhan Singh v. Kalka Singh*, (A I R 1926 Oudh 309) (8), it was held that in partition proceedings where an objection is raised after the appointed time but before the Court has taken any steps under s. 113 a Revenue Court is not precluded from dealing with it, and if it does decide it, the decision will be taken to be under s. 111.

Again in *Jagdeo Singh v. Banaphal Pandey*, (17 R. D. 640) (9), it was held that where in partition proceedings an objection

raising a question of proprietary title is not raised at an earlier stage, but is put forward at a very late stage, the period for filing objections can be extended for good cause.

We are very doubtful whether in view of these pronouncements we should be justified in holding that the order of the Commissioner was invalid in the present case on the ground that the objection had not been made within the proper time. It is clear that the Revenue Courts have discretion to extend the time, and as we have said we do not think that their decision on this point should be questioned in a Civil Court. We are of opinion that in the present case at least there is no sufficient reason to hold that the order is invalid. We are unable, therefore, to agree with the lower Appellate Court on this point.

On the question whether the objection does in fact raise a question of proprietary title, we have been referred to a clear ruling by the Board of Revenue in *Din Dayal v. Ram Narain* (2 U. D. 343) (10) that the question of a claim to separate ownership of certain *sir* lands in a *muafi* holding is a question of proprietary title, and in view of this ruling we see no reason to doubt that the question raised in the present case is a question of proprietary title, as was the opinion of the Commissioner.

There remains the question whether, as on these findings it will be necessary to allow the appeal and remand the suit, the application of the appellant for amendment of the plaint in regard to the *sir* land in List B should be allowed. In the circumstances we consider that it should be allowed.

We accordingly allow this appeal, set aside the orders passed by the lower Courts and remand the suit to the trial Court for decision on the merits after amendment by the appellant of the plaint with regard to the property in List B. Costs hitherto incurred in this Court and in the Courts below will abide the result.

s.

Appeal allowed.

(10) 2 U D 343.

(7) 1 O L J 81; 23 Ind. Cas. 965; A I R 1914 Oudh 313.

(8) A I R 1926 Oudh 309; 92 Ind. Cas. 903.

(9) 17 R D 640.

LAHORE HIGH COURT Full Bench

Letters Patent Appeal No. 48 of 1940
December 4, 1940

DALIP SINGH, MONROE AND SALE, JJ.
ILAM DIN AND ANOTHER—APPELLANTS

versus

MANGAL SINGH AND OTHERS—

RESPONDENTS

Punjab Tenancy Act (XVI of 1887), ss. 50-A, 50, 45 (6)—Tenant ejected under s. 45 (6) or his suit dismissed under s. 50—Whether can sue in Civil Court under any title other than title as tenant.

A suit by a person claiming possession of the land, under title of ownership or any title other than a title as tenants, (as a mortgagee with possession), is not barred under the provisions of s. 50-A, Punjab Ten. Act, even if previously the said person has been ejected by a Revenue Court under s. 45, sub-s. (6) or his suit has been dismissed under s. 50 and the Civil Court has jurisdiction to entertain such a suit. 177 Ind. Cas. 703 (6), **Overruled**, 188 Ind. Cas. 682, **Reversed**. [p. 853, col. 1.]

L. P. A. from an order of Mr. Justice Bhide, reported in 188 Ind. Cas. 682.

Order of Reference

Dalip Singh, J.—The facts of this case are as follows: 15 *kanals*, 17 *marlas* of land belong to three brothers, Mangal Singh, Gandu Singh and Bhagat Singh, sons of Bishan Das, in equal shares. Mangal Singh and Gandu Singh mortgaged with possession two-thirds share with Hussain Bakhsh. On July 5, 1920, Hussain Bakhsh mortgaged his mortgagee rights with Hassan Mohammad, father of the present plaintiffs, Ilam Din and Imam Din, and on the same day and by the same document, Bhagat Singh mortgaged his one-third share to Hassan Mohammad with possession. On April 25, 1922, Bhagat Singh mortgaged a large area of land including his share in this land to R. S. Sohna Mal with possession. On March 19, 1932 R. S. Sohna Mal transferred his mortgagee rights by sale to Mangal Singh son of R. S. Sohna Mal, and Iqbal Singh with possession. In 1929 Umar Din, a co-sharer in a *khata* appertaining to this land, applied for partition. Five or 6 *marlas* of land fell to the share of Bhagat Singh. Sohna Mal was recorded in the revenue papers as a mortgagee with possession and Ilam Din and Imam Din, the present plaintiffs, as tenants-at-will. Following the mortgage of July 5, 1920, two mutations were entered, one with respect to the shares of Mangal Singh and Gandu Singh in favour of Hassan Mohammad and one, which should have been in the name of Bhagat Singh, was, by mistake, entered in the name of Ishar Das, another co-sharer in this *khata*, who was

shown as the mortgagor. Mangal Singh and Iqbal Singh being entered in the revenue papers as mortgagees with possession applied for notice of ejectment against Ilam Din and Imam Din. On November 11, 1935, there was a report that Ilam Din had refused to accept service, execution was taken out and the plaintiffs were rejected. On June 20, 1936, the plaintiffs brought a suit to contest liability to ejectment in the Revenue Court. The suit was dismissed as barred by limitation on October 3, 1936 and an appeal from that decision to the Collector was also dismissed.

The plaintiffs now brought the present suit for possession as mortgagees entitled to possession on January 5, 1937. The suit was decreed on January 31, 1938 and the appeal to the learned District Judge was dismissed on February 25, 1939. The second appeal to this Court was accepted by the learned Single Judge on the ground of jurisdiction only. It was held that, under s. 50-A, Punjab Ten. Act, the jurisdiction of the Civil Court to entertain this suit was barred because ejectment had been ordered against the plaintiffs under s. 45 (6) and their suit under s. 50 had also been dismissed.

Upon this point there appears to be a conflict of rulings. In *Sultan Mahmud v. Ahmad Khan* (1) though the facts are not clearly stated in that judgment, it appears that I, sitting in Single Bench, decided that a suit of this nature would not be barred under the provisions of s. 50-A on the ground that this was not a suit to contest liability to ejectment or to recover compensation or to recover possession of occupancy rights but was a suit claiming under a different title which could not have been decided in the Revenue Courts at all and, as it seemed essential that some Court should have jurisdiction to decide the question of title, a suit was not barred by reason of the provisions of s. 50-A. This ruling was followed by my learned brother Tek Chand, J., in *Maru v. Abdul Rahim* (2) where he also sitting in Single Bench, came to the conclusion that the law was correctly laid down in the previous ruling of mine: *Sultan Mahmud v. Ahmad Khan* (1).

On the other hand in *Mehar Khan v. Atta Mohammad* (3) which is equivalent to 16 Lah. 1086 (3) Currie, J., sitting in Single Bench held that a similar

(1) A I R 1933 Lah. 1016; 147 Ind. Cas. 521; 6 R. L. 401.

(2) A I R 1937 Lah. 849; 175 Ind. Cas. 808; 39 P. I. R 485; 11 R. L. 49.

(3) A I R 1935 Lah. 719; 156 Ind. Cas. 592; 37 P. I. R 507; 16 L. 1086; 8 R. L. 11.

case was barred under the provisions of s. 50-A and a Letters Patent Appeal from that judgment was dismissed *in limine*, on July 9, 1935 by a Division Bench consisting of Addison and Din Muhammad, JJ. The ruling reported in *Sultan Mahmud v. Ahmad Khan* (1) does not appear to have been brought to the notice of the learned Judge who decided the case in *Mehar Khan v. Atta Mohamad* (3) but my learned brother Tek Chand, J. considered both the Single Bench rulings in *Maru v. Abdul Rahim* (2).

It would obviously be curious if, sitting together, the two Judges, who have expressed the same opinion already sitting in Single Bench, should overrule the decision of the Single Bench or differ from the ruling of the Letters Patent Appeal of 1935. I would therefore refer this case for decision to a Full Bench as the matter is of some importance and may arise again. Indeed, the cases mentioned above show that it has arisen at least three times already. The question for the Full Bench would be:

"Whether a suit by a person claiming possession of the land, under title of ownership or any title other than a title as tenant, is or is not barred under the provisions of s. 50-A, Punjab Ten. Act, where previously the said person has been ejected by a Revenue Court under s. 45, sub-s. (6) or his suit has been dismissed under s. 50?"

Tek Chand, J.—I agree.

Mr. *Mahbub Elahi*, for the Appellants.

Mr. *Nand Lal Salooja*, for the Respondents (Mangal Singh and Iqbal Singh).

OPINION

Salé, J.—The question referred to the Full Bench for decision is:

"Whether a suit by a person claiming possession of the land, under title of ownership or any title other than a title as tenants, is or is not barred under the provisions of s. 50-A, Punjab Ten. Act, where previously the said person has been ejected by a Revenue Court under s. 45 sub-s. (6) or his suit has been dismissed under s. 50?"

The material facts are stated in the order of reference, but it may be mentioned here that Mr. Salooja, on behalf of the respondents, does not accept all these facts, so stated, as correct; and since, as a result of our decision, the case must be remanded to the learned Judge in Single Bench for decision of the appeal on the merits, I would avoid repetition of anything in the nature of a controversial statement of facts. But for the purposes of this reference, the facts, as admitted, are simple. The plaintiffs in this case were recorded in the revenue records

as tenants-at-will. The defendants obtained possession of the land in suit as a result of partition proceedings; and they moved the revenue authorities to eject the plaintiffs under s. 45, Ten. Act. The plaintiffs sued in the Revenue Court to contest the notice of ejectment but the suit was dismissed as time-barred. Thereafter the plaintiffs instituted this suit in the Civil Court for possession of the land on the ground that they were not tenants-at-will but mortgagees entitled to possession. The suit was decreed by the trial Court and an appeal to the learned District Judge was dismissed. A second appeal to this Court was accepted by the learned Judge sitting in Single Bench on the ground of jurisdiction only. He held that under s. 50-A, Punjab Ten. Act, jurisdiction of a Civil Court to entertain this suit was barred because, ejectment of the plaintiffs had been ordered under s. 45, Ten. Act, and their suit under s. 50 had been dismissed. It is necessary to recite the text of s. 50-A, Punjab Ten. Act, because this section has been misquoted both in certain rulings of this Court as well as in some standard editions of the Ten. Act:

"50-A. No person whose ejectment has been ordered *Bar to civil suits.* by a Revenue Court under s. 45, sub-s. (6), or whose suit has been dismissed under s. 50, may institute a suit in a Civil Court to contest his liability to ejectment or to recover possession or occupancy rights, or to recover compensation."

The section was introduced by the Punjab Tenancy Amending Act V of 1929, and the section, as above quoted, is taken from the official edition which corresponds with the text as published in the *Gazette* of September 9, 1929. It should be noted that the bar relates to civil suits "to contest liability to ejectment, or to recover possession or occupancy rights, or to recover compensation" and not "... to recover possession of occupancy rights..." as sometimes misquoted.

The argument of Mr. Salooja, on behalf of the respondents, whose objection as to jurisdiction prevailed with the learned Judge in Single Bench, briefly stated, is that on the plain wording of this section, which is very widely expressed, all suits to contest ejectment are barred even if the contesting plaintiff is claiming on a title other than that of a tenant *e. g.*, whether as owner by prescription, or otherwise, or as a mortgagee. The argument on behalf of the plaintiffs is that the section only refers to suits by tenants or disappointed tenants litigating on the basis of their tenancy and does not apply to cases where the plaintiffs claim a title outside the purview of the Ten. Act. The learned

Judge in Single Bench in accepting Mr. Salooja's argument, followed a Single Bench authority by Currie, J., in 1935, cited as *Mehar Khan v. Atta Mohamad* (3), a Letters Patent Appeal against which was dismissed *in limine*. But a contrary decision had been given by Dalip Singh, J., in *Sultan Mahmud v. Ahmad Khan* (1), which does not appear to have been brought to the notice of Currie, J. In *Maru v. Abdul Rahim* (2), Tek Chand, J., in a considered judgment, discussed both these authorities and preferred to follow Dalip Singh, J.'s ruling, holding that *Mehar Khan v. Atta Mohamad* (3) was wrongly decided. In both *Sultan Mahmud v. Ahmad Khan* (1) and *Maru v. Abdul Rahim* (2), the plaintiffs sued on a title claimed to have been acquired by adverse possession; and Tek Chand, J. held that s. 50-A, Ten. Act

"must be read along with ss. 45 (6) and 50, which are expressly mentioned in it, and the only reasonable interpretation which can be put on it is that a second trial between the parties is barred in the Civil Courts on the grounds on which they had fought it in the Revenue Court under s. 45 (6) or s. 50. It is conceded that a Revenue Court has no jurisdiction to determine the question of the alleged acquisition of title by adverse possession."

The learned Judge went on to refer to a judgment of the Financial Commissioner reported in *Sadhu Ram v. Mehr Shah* (4), where the learned Financial Commissioner observed that "only a Civil Court can adjudicate finally on the question of adverse possession." In this connection, Tek Chand, J., further cited some observations by Benton, J. made in *Thakar Gir v. Baisakhi* (5), [a ruling on which Currie, J., relied in *Mehar Khan v. Atta Mohamad* (3)], where Benton, J. sitting with Sir Meredyth Plowden, observed

"that a person who has received notice of ejectment and who sues in the Revenue Court, either gets decrees protecting him, or he fails and is ejected. If he claims to be a proprietor it is still open to him to sue in the Civil Court and claim the land as a proprietor, if this be his contention."

In the case decided by Currie, J., *Mehar Khan v. Atta Mohamad* (3), the plaintiff had claimed a title by adverse possession, but Currie, J., observed that the case was not apparently fought out on that basis in the Revenue Court and he expressed the view that if the question of title had been raised in the suit, the case must have been referred to the Civil Court because the question was one that could only be decided by a Civil Court. He held, however, that since the question of title had not been raised, the suit

was in substance one to contest liability to ejectment, which had already been decided by a Revenue Court and was, therefore, barred under the provisions of s. 50-A, Ten. Act. Thus, Currie, J., does not appear to have supported the view that a person ejected under s. 45, Ten. Act, would be barred from agitating in a Civil Court a claim based on a title not cognizable by a Revenue Court.

In *Ujagar Singh v. Gora* (6), Bhide, J., in deciding a reference made by the Commissioner of the Lahore Division, held that s. 50-A does not restrict the grounds on which liability to ejectment may be contested and apparently took the view that where a tenant, ejected under s. 45, instituted a suit for possession on the ground that he has acquired title by adverse possession, such a suit is cognizable by a Revenue Court and not by a Civil Court. Mr. Salooja, concedes that the proposition that all questions of title can be decided by a Revenue Court, is too widely expressed and there can be no doubt that it is incorrect. His point, however, is that whatever may have been the intention of the Legislature in amending the Ten. Act by the introduction of s. 50-A, the section, as it stands, bars a person who has been litigating in the Revenue Court from pursuing the litigation in a Civil Court even though he seeks his remedy in the Civil Courts on a different title. Mr. Salooja conceded that if a person on whom a notice of ejectment is served went straight to a Civil Court on a question of title, s. 50-A would be no bar, but he contends that if he had first instituted a suit in a Revenue Court and failed, he would be barred from pursuing his remedy in a Civil Court under s. 50-A.

In our view, s. 50-A, must, as pointed out by Tek Chand, J., in *Maru v. Abdul Rahim* (2), be read with ss. 45 (6) and 50, Ten. Act, which the amending s. 50-A is intended to implement. The Ten. Act is a statute dealing primarily with relations between landlords and tenants and as has been frequently held does not govern the case of a person who litigates under a title other than that of a tenant. We are fortified in this view by the history of this amending section. In *Cheta v. Baija* (7) a Full Bench of this Court had, in 1928, held that after the failure of an action by a tenant under s. 45, Ten. Act, a disappointed claimant can still seek a remedy in a Civil Court because recourse to the Civil Court was not expressly barred by

(6) A I R 1938 Lah. 82; 177 Ind. Cas. 703; I L R (1938) Lah. 509; 11 R L 353.

(7) 9 L 38; 105 Ind. Cas. 507; A I R 1927 Lah. 452; 29 P L R 489 (F B).

(4) 11 L L T 76.

(5) 3 P R 1895.

the Act. The intention of the Ten. Act, is to make the decision of the Revenue Courts under ss. 45 and 50 of the Act final; and the object of the proposed amendment appears to have been to give statutory effect to this intention by expressly barring recourse to a Civil Court by a disappointed tenant for the purpose of attacking the decision of the Revenue Court.

Accordingly, in our view, the meaning of s. 50-A is that a disappointed tenant whose ejection has been ordered by a Revenue Court under s. 45 or whose suit has been dismissed under s. 50, cannot institute a suit in a Civil Court to contest his liability or to recover possession as a tenant or to recover occupancy rights or to recover compensation. In other words, the amending section bars a person from re-agitating in a Civil Court the question of his status as a tenant which he has lost by the action of the Revenue Court; but it does not prevent the person so ejected from instituting a suit for recovery of possession by establishing a title other than that of a tenant, *e. g.*, by adverse possession or, as in the present case, as a mortgagee with possession. The answer, therefore, to the question referred to us is that in the circumstances stated a suit is not barred by the provisions of s. 50-A, Ten. Act. The case must now be returned to the learned Judge in Single Bench for decision of the appeal on the merits.

D.

Answer accordingly.

ODUH CHIEF COURT

Civil Revision Application No. 37 of 1938

March 18, 1941

GHULAM HASAN, J.

AMJAD HUSAIN AND ANOTHER—

RESPONDENTS—APPLICANTS

versus

Mst. RAISUNNISA—APPELLANT AND

ANOTHER—RESPONDENTS—OPPOSITE PARTY

U. P. Agriculturists' Relief Act (XXVII of 1934). s. 23 (2)—Appellate order under s. 23—Case fulfilling requirements of s. 115, Civil Procedure Code (Act V of 1908)—Revision against, is maintainable—Evidence Act (I of 1872), s. 90—Original document lost—Copy admitted as secondary evidence under s. 65—Presumption under s. 90 as to genuineness of original document, if can be drawn.

The language of s. 23 of the Agri. Relief Act does not divest the Chief Court of the power of interference in revision if the case fulfils the requirements of s. 115 of the Civil P. C. *Ghulam Jilani v. Muhammad Hassan* (1), 165 Ind. Cas. 469 (2) and *Thakur Mahipal Singh v. Kamta Prasad* (3), distinguished. [p. 856, col. 2.]

Where the original document having been lost its copy is admitted under s. 65 of the Evi. Act as secondary evidence of the original, the only presumption that can be drawn under s. 90 is that it is a correct copy of the original document, but whether the original document was a genuine document is a question which is capable of proof and it is not permissible to invoke the assistance of s. 90 of the Evi. Act to prove the genuineness of the original by the production of the certified copy. 156 Ind. Cas. 864 (4), relied on, 117 Ind. Cas. 507 (5) and *Shahzadi Begam v. Secretary of State for India* (6), distinguished, 121 Ind. Cas. 273 (7), referred to. [p. 857, col. 1.]

C. R. App. of the order of the District Judge of Barabanki, dated November 23, 1937.

Mr. Mohammad Husain, for the Applicants.

Messrs. Sri Ram and Lekh Ram Varma, for the Opposite Parties.

Order.—This revision application is, directed against the appellate order passed by the District Judge of Bara Banki allowing the appeal and setting aside the order of the Assistant Collector, first class in a suit for redemption of a mortgage under s. 12 of the U. P. Agri. Relief Act.

The facts giving rise to the present litigation are as follows:—

One Ramzan Ali mortgaged the property in suit with possession to defendant No. 2, Fazal Ahmad, under a mortgage-deed dated July 7, 1902. The defendant No. 2 sold his mortgagee right to Amjad Husain, defendant No. 1. On July 21, 1904, Ramzan Ali is alleged to have sold his equity of redemption to one Abdul Hakim, defendant No. 3; who in turn made a gift of the property in favour of his wife, the plaintiff. The plaintiff thereupon filed an application for redemption of the said mortgage of July 7, 1902, under s. 12 of the U. P. Agri. Relief Act in the Court of the Assistant Collector, First Class.

Defendant No. 3 admitted the plaintiff's claim while defendants Nos. 1 and 2, who are the present applicants, filed a joint written statement contesting the application on the ground that Ramzan Ali never sold his equity of redemption and consequently the plaintiff was not a representative of the original mortgagor entitled as such to sue for redemption. In para. 12 of the written statement the sale-deed of July 21, 1904, was denied and was alleged to be a forgery. The said defendants also denied that the plaintiff was an agriculturist as defined in the U. P. Agri. Relief Act and hence the plaintiff was not entitled to sue under s. 12 of the Agri. Relief Act.

The learned Assistant Collector found that

the plaintiff had not proved that she is the legal representative of the original mortgagor Ramzan Ali. The original sale-deed of July 21, 1904, was not produced but a certified copy was produced. In this connection the learned Assistant Collector found that the evidence regarding the loss of the original document was not satisfactory and refused to admit the copy as secondary evidence. On the second question whether the plaintiff was an agriculturist or not, the learned Assistant Collector recorded a finding against the plaintiff holding that she was not an agriculturist within the meaning of the Act.

The learned District Judge in appeal set aside the finding that the loss of the original document was not satisfactorily proved and presumed from the certified copy the genuineness of the original under s. 90 of the Indian Evi. Act. In regard to the second point the learned District Judge held that as the property was admittedly in the possession of the mortgagee the plaintiff was liable to pay revenue for the property if she had possession of it. Upon this reasoning he held that the plaintiff was an agriculturist. He set aside the judgment of the trial Court and remanded the case to him for disposal according to law.

Defendants Nos. 1 and 2 have come up in revision to this Court challenging the decision of the learned District Judge on both the points decided against them.

A preliminary objection has been raised on behalf of the plaintiff-opposite-party that this revision application is incompetent. Reference has been made in this connection to the provisions of s. 23 (2) of the Agri. Relief Act which lays down that no appeal shall lie from an appellate order under this section and to *Ghulam Jilani v. Muhammad Hassan*, (L. R. 29 I. A. 51) (1) *Sardar Nihal Singh v. Ganesh Dass-Ram Gopal*, (A. I. R. 1937 Oudh 124) (2) and *Thakur Mahipal Singh v. Kamta Prasad*, (1939 O. A. 760 F. B.) (3). To my mind the preliminary objection has no substance.

The last mentioned case is a decision of a Full Bench of this Court in which it was held with special reference to the provisions of s. (5) (2) of the Agri. Relief Act that no revision is entertainable against an appellate order refusing instalments under s. 5 of the Act. The case in *Sardar Nihal Singh v.*

(1) 29 I. A. 51; 29 C 167; 4 Bom. L. R. 161; 12 M. L. J. 77; 6 O. W. N. 226; 8 Sar. 156; 25 P. R. 1902 (P. C.).

(2) A. I. R. 1937 Oudh 124; 165 Ind. Cas. 469; 1936 O. L. R. 653; 9 R. O. 218; 1936 O. W. N. 1158; 1936 R. D. 580.

(3) 1939 O. A. 760 (F. B.).

Ganesh Dass-Ram Gopal, (A. I. R. 1937 Oudh 124) (2), was followed in this Full Bench case. The decision of the Full Bench proceeded on the ground that the words "decision of the appellate Court shall be final" in s. 5 (2) of the Agri. Relief Act debarred not only a further appeal against it but prevented interference with it in revision. A reference was made to the provisions of ss. 23 and 30 (3) of the Agri. Relief Act in which the words used were that "no appeal shall lie from an appellate order passed under this section". The learned Judges constituting the Full Bench held that if the intention of the Legislature had been to bar only a second appeal they would have used in sub-s. (2) of s. 5 of the Act the same language which they used in ss. 23 and 30 (3) of the Agri. Relief Act. The decision of the Full Bench must, therefore, be confined to cases falling under s. 5 (2) of the Agri. Relief Act and must not be deemed to extend to cases under s. 23. It may be noted that ss. 12 and 23 are both included in Chap. III of the Agri. Relief Act, whereas s. 5 appears in Chap. II of the same Act.

As regards the decision in *Ghulam Jilani v. Mohammad Hassan* (L. R. 29 I. A., 51) (1) learned Counsel for the opposite party has relied on the provisions of para. 16 (2) of Sch. II of the Civil P. C. which lays down in the case of awards that no appeal lies except in so far as the decree may be in excess of, or not in accordance with, the award. In that case their Lordships of the Privy Council approved the view of Clark, J. that in the case of an award revision would be more objectionable than an appeal. Their Lordships emphasised that if an application in revision were admissible in a case like the present, the finality of any award would be open to question. That case, however has no application to a case arising out of proceedings for redemption under s. 12 of the Agri. Relief Act. The language of s. 23 of the Agri. Relief Act in my opinion does not divest this Court of the power of interference in revision if the case fulfils the requirements of s. 115 of the Civil P. C. As I shall show presently, the case before me is one in which the learned District Judge has acted illegally, or at least with material irregularity in his finding upon the principal question in the case as regards the right of the plaintiff to institute the suit for redemption.

The learned Judge has fallen into two errors, one of which is an error of fact and the other is an error of law. In his judg-

ment he states that there were only two attesting witnesses of the sale deed and both were dead. As a matter of fact there are three attesting witnesses, Mukarram Husain, Aulad Ali and Jawwad Ali, and this was so stated by Abdul Hakim, the husband of the plaintiff. Mukarram Husain and Aulad Ali are admittedly dead. According to the un rebutted testimony of Abdul Ghani, a witness produced on behalf of the defendants, Jawwad Ali, who was closely related to him, was still alive. This point is however, not of very great importance. The question that really arises for determination is whether the learned District Judge was right in presuming the genuineness of the original sale deed under s. 90 of the Indian Evi. Act by the mere production of a certified copy of the sale deed. This point is now set at rest by a decision of their Lordships of the Judicial Committee in *Basant Singh v. Brij Raj Saran Singh* (1935 O. W. N., 759) (4) where it was held that s. 90 of the Evi. Act clearly requires the production to the Court of the particular document, in regard to which the Court may make the statutory presumption. If the document produced is a copy, admitted under s. 65 of the Act as secondary evidence and it is produced from proper custody and is over 30 years old, then the signatures authenticating the copy may be presumed to be genuine but the Court is not entitled to presume the genuineness of the original. According to the aforesaid decision the certified copy of the sale deed produced in the case is admissible under s. 65 of the Indian Evi. Act as secondary evidence of the original which means only this that it is a correct copy of the original document, but whether the original document was a genuine document is a question which is capable of proof and it is not permissible to invoke the assistance of s. 90 of the Evi. Act to prove the genuineness of the original by the production of the certified copy. As regards the case in *Seethayya v. Subramany Somayajulu* (L. R. 56 I. A. 146) (5), relied upon on behalf of the opposite party their Lordships referred to that case in 1935 O. W. N., 759. (4) and explained that in that case the dispute was as to the terms of a grant, which had ad-

mittedly been made. The case in *Shahzadi Begam v. Secretary of State for India* (I. L. R. 34 Cal. 1059 P. C.) (6) cited by the opposite party has no bearing on the present case. There was no question of any presumption under s. 90 of the Indian Evi. Act which was not even referred to in the judgment. One of the two documents in that case was admitted in the trial Court without any objection while the other document was accepted as genuine upon the evidence produced in that case. The case in *Brij Kishore v. Beni Pershad* (A. I. R. 1929 Oudh 483) (2) (7) decided by a single Judge of this Court is no longer good law in view of the latest pronouncement of their Lordships of the Privy Council. In this view of the matter there is no legal basis whatever for the finding arrived at by the lower Appellate Court upon the genuineness of the original sale deed on the basis of which the plaintiff sought redemption. The decision of the learned District Judge upon this point cannot therefore be sustained and must be set aside.

In view of the decision at which I have arrived upon the principal question in the case the plaintiff is at once non-suited and has no right to maintain the suit for redemption. This finding renders it wholly unnecessary to pursue the second point raised on behalf of the defendants-applicants.

The result therefore, is that this application succeeds the judgment and decree of the lower Appellate Court is set aside and the suit is dismissed with costs throughout.

s.

Order accordingly.

(6) 34 C 1059; 34 I A 194; 6 C L J 678; 9 Bom. L R 1192 (P C).

(7) A I R 1929 Oudh 483 (2); 121 Ind. Cas. 273; 6 O W N 880; 5 Luck. 424; Ind. Rul. (1930) Oudh 49.

MADRAS HIGH COURT

Criminal Appeals Nos. 762 and 763 of 1940.
January 23, 1941

HORWILL, J.

SUBBARAYA AYYAR AND OTHERS—

APPELLANTS (IN NOS. 762 AND 763)

versus

EMPEROR—OPPOSITE PARTY

Criminal trial — Jury trial — Charge — Evidence against each accused should be summarized—Evidence Act (I of 1872), s. 27—Confession leading to discovery is admissible.

The Judge should conclude his charge with a summary of the evidence against each accused, so that the jury should be quite clear in their minds what evidence there was against each of them, though there

(4) 1935 O W N 759; 156 Ind. Cas. 864; 8 R P C 4; (1935) M. W N 768; A I R 1935 P C 132; (1935) A L J 847; 39 O W N 1057; 69 M L J 225; 42 L W 231; 37 Bom. L R 805; 37 P L R 614; 57 A 794 (P C).

(5) 56 I A 146; 117 Ind. Cas. 507; A I R 1929 P C 115; 33 C W N 578; 29 L W 801; 52 M 453; 31 Bom. L R 756; 49 C L J 566; 56 M L J 730; (1929) M. W N 553; Ind. Rul. (1929) P C 275 (P C).

is no fixed rule that a Judge should summarise separately the evidence against each accused:

Held, however, on facts that such a slight misdirection, did not prejudice the accused, specially when he himself had confessed about having committed the theft and the stolen goods were in consequence recovered from him.

Confession before Police leading to discovery of articles which are the subject of theft is clearly admissible under s. 27 of the Evi. Act.

Cr. As. against the order of the Court of the Session of the Trichinopoly Division in Case No. 35 of 1940, dated September 12, 1940.

Messrs. V. V. Radhakrishnan, and G. Gopalaswami, for the Appellants.

Mr. K. Venkataraghavachari, for the Public Prosecutor, for the Crown.

Judgment.—Fourteen men were charged by the Sessions Judge of Trichinopoly with being members of a gang associated for the purpose of habitually committing theft or robbery an offence punishable under s. 401, of the I. P. C. Of these fourteen accused, four have been acquitted. The remaining accused were sentenced each to two years rigorous imprisonment. Of these ten accused convicted five are here appealing. They are accused Nos. 3, 7, 8, 12 and 13. Most of the accused are Ambalagars a community connected with the Kallars and Maravars. Accused Nos. 1 to 3 are Pallas, accused No. 9, who has been convicted is a goldsmith. The eighth accused is a Brahmin. The main argument with regard to the eighth accused is that there is very little evidence of association with the gang apart from the evidence of P. W. No. 1, an approver. The reason for this seems to be that this accused contributed more towards the organisation of the gang than to the execution of the individual acts of theft or robbery. P. W. No. 1 says that this accused did not actually take part in any of the thefts or robberies. However, there is a not considerable body of other evidence against this accused. He made a confession proving that he was connected with this gang in a particular theft and certain articles of clothing were recovered from him in consequence of this confession. It has been argued that this confession is not admissible; but as it led to the discovery of articles which were the subject of theft it is clearly admissible under s. 27, of the Evi. Act. Two other witnesses P. Ws. Nos. 3 and 5, have spoken to his association with other members of the gang and P. Ws. Nos. 11, 12 and 28, have also spoken against him. As a Brahmin and a *mirasdar*, his habitual association with persons of evil repute is itself a matter of suspicion, and he has given no

satisfactory explanation of his association with such persons. In fact he denies it. Although the learned Judge did not marshal the evidence against this accused, it is not likely the jury overlooked the particulars of evidence against this accused. A slight misdirection was given to the jury as far as this accused is concerned with regard to a theft which had taken place and a fortnight or so before the recovery of property from him, in which the learned Judge said that this recovery indicated that this accused had taken part in the theft. The learned Judge did not indicate the alternative that the accused might have been a receiver of stolen property; but in view of the accused's own confession I do not think that this misdirection is a serious one. I agree that the learned Judge should have concluded his charge with a summary of the evidence against each accused, so that the jury should be quite clear in their minds what evidence there was against each of them. A considerable body of evidence was let in and there was a danger that the jury should decide by general impressions rather than by a memory of the actual facts proved in the evidence. However, as far as this particular accused is concerned, there is no reason to think that even if the charge had not been subject to this defect the jury would have acquitted him.

The third, seventh, twelfth and thirteenth accused made no confessions of their guilt as so many others of the accused did, nor was any property recovered from their possession. The evidence of P. W. No. 1 was corroborated, therefore, only by the evidence of certain witnesses, who speak of these persons associating at Shandies or toddy shops. In the case of the other accused, four persons have spoken best association with other members of the gang on various occasions, three persons have spoken to the association of the twelfth accused and two witnesses each to the presence of the seventh and thirteenth accused in assemblies of members of the gang. There is no fixed rule that a Judge should summarise separately the evidence against each accused and the learned Sessions Judge here has analysed the evidence of each witness fairly; but clearly he should have done so. It is difficult to know what effect such a marshalling of evidence would have had on the minds of jury; but if it had been pointed out how weak the evidence was against the seventh, twelfth and thirteenth accused, they might well have been found to be not guilty. The evidence of two witnesses who speak against the seventh and thirteenth accused is rather vague. The

evidence against the twelfth accused is the same as that against the seventh and thirteenth accused except for the addition of the evidence of P. W. No. 4, which, the learned Judge told the jury, was unworthy of acceptance. Ordinarily, if an omission of this sort takes place, one would remit the case for fresh trial, but as the evidence against these three accused is so slight, I do not think it is in the interests of justice to subject them to fresh trial.

I therefore allow the appeals of the seventh twelfth, and thirteenth accused, set aside their convictions, and cancel their bail bonds. The convictions and sentences of the other accused are confirmed and their appeals dismissed.

N.-D.

Order accordingly.

OUDH CHIEF COURT

Second Civil Appeal No. 71 of 1938

April 25, 1941

AGARWAL, J.

NAWAB HASAN BAHADUR *alias*

MUNNEY NAWAB—APPELLANT

versus

Mst. ABIDA AND ANOTHER—RESPONDENTS

Second appeal—Finding of fact—Easement of necessity—Lower Court not appreciating what easement of necessity is—Court in second appeal can find whether such easement exists.

Where the lower Court did not fully appreciate what an easement of necessity is, its finding on the question is not binding in second appeal and so the Court can find in second appeal whether such an easement exists.

S. C. A. against the order of the Sessions and Civil Judge of Lucknow, dated December 7, 1937.

Mr. H. H. Zaidi holding brief of Mr. Haider Husain, for the Appellant.

Messrs. L. S. Misra and Ali Raza, for Respondent No. 1.

Judgment.—This second appeal arises out of a suit brought by the plaintiff-appellant for the opening of a passage alleged to have been closed by the respondent *Mst. Abida Begam*.

One *Mst. Ramzani Begam* had three sons, Ghulam Husain, Ulfat Husain and Hasan Bahadur plaintiff, and a daughter Akhtari Begam. Akhtari Begam died leaving four sons, Ghulam Raza, Baqar Raza, Qazim Raza and Ali Raza. *Mst. Ramzani Begam* and her sons, Ulfat Husain and Ghulam Husain, executed a mortgage-deed of a house and a *bawarchi khana* on October 2,

1906, in favour of *Lala Girdhari Lal*. *Lala Girdhari Lal* brought a suit on his mortgage and obtained a preliminary decree for sale on October 5, 1931, which was made final on May 11, 1932. He applied for execution of the decree and purchased the house on November 30, 1932. On October 10, 1932 *Lala Girdhari Lal* applied for the amendment of his plaint and decree and wanted to include the *bawarchi khana* also. That application was withdrawn on December 17, 1932. He again applied for the same amendment on January 4, 1933, but that application was filed on March 27, 1933. He applied for a third time for the same relief on April 8, 1933, and that application was allowed on December 19, 1933. One of the judgment-debtors, Qazim Raza, came up to the Chief Court for revision, and a compromise was made between him and *Lala Girdhari Lal* in this Court. The compromise was to the effect that:

"If Qazim Raza Khan pays into Court the sum of Rs. 200 for payment to the decree-holders within six weeks from January 11, 1935, the decree-holders opposite parties shall give up their claims to the house known as *bawarchi khana* and the applicant, that is Qazim Raza shall close the door 'VX' marked in red ink by the Hon'ble Court in the map attached to the decree, so as to close the right of ingress and egress through it,"

and this amount of Rs. 200 was paid. The plaintiff was a judgment-debtor, but he had acquiesced in the order of the Court allowing the amendment and had not joined with Qazim Raza Khan in taking the matter to the Chief Court. *Lala Girdhari Lal* sold the house purchased by him to the respondent *Mst. Abida Begam*. The plaintiff as one of the co-owners of the *bawarchi khana* brought the present suit on the allegation that he had been using the door VX for ingress and egress and that was the only outlet from *bawarchi khana*. He claimed the opening of the door which had been closed under the compromise. That door is between the *bawarchi khana* and the house of *Mst. Abida Begam* which she has purchased from *Lala Girdhari Lal*. The learned Munsif framed the following issues—

(1) Has the plaintiff a right of easement to pass through the door and the court-yard of the defendant's house?

(2) Was the door closed more than two years ago as alleged? If so what is the effect thereof?

(3) Is the suit barred by s. 11 Civil P. C.?

(4) Is the plaintiff estopped from bringing the suit?

(5) Are the defendants protected by s. 41 of the T. P. Act?

The other three issues are not material. He came to the finding that the plaintiff has not acquired a right of easement by user, but that he had a right of necessity and that the suit was not barred by time. The plea of *res judicata* was not pressed before him, and he held that the plaintiff's suit was not barred by the principle of estoppel or by s. 41 of the T. P. Act. He allowed a passage to the plaintiff from the *bawarchi khana*. There was an appeal to the learned District Judge and he held that the plaintiff had failed to prove that he had an easement of necessity. He, therefore, allowed the appeal and dismissed the plaintiff's suit. The plaintiff has come up in second appeal.

It has been decided by both the Courts below that the plaintiff has not acquired any right of easement by user. It has been argued before me that the plaintiff has got an easement of necessity. It is contended on behalf of the respondents that this case of necessity was not step in the pleadings. It was stated in para. 4 of the plaint that the door and the passage in question were very old and were in existence since a long time and that was the only passage from the house known as *bawarchi khana*. Both the Courts below appeared to have thought that the plaintiff had claimed an easement of necessity. I do not think that the question of the easement of necessity was not raised by the plaintiff. The learned Munsif held that the *bawarchi khana* was surrounded on all sides by houses. The plan on the file which was before this Court in the revision case filed by Qazim Raza Khan against the amendment allowed by the lower Court shows that to the north and east of the *bawarchi khana* is the house of Mustafa Husain, to the west is the house of Mst. Abida Begam, and to the south is the house of Akhtari Begam one of the daughters of Mst. Ramzani Begam. The learned Munsif held that the report of the Commissioner appointed in the case of Lala Girdhari Lal showed that there was an opening in the wall between the *bawarchi khana* and the house of Akhtari Begam but it was blocked, and there being no other passage from the *bawarchi khana* excepting that in question, the plaintiff was entitled to use it. The learned Civil Judge held that it was not proved that the opening in the wall between the *bawarchi khana* and the house of Akhtari Begam was blocked, and it was proved by the defendants' evidence that the *bawarchi khana* was used as a kitchen both for the house of defendant No. 2 and the house of Akhtari Begam. He also held that the door in the wall between the *bawarchi*

khana and Akhtari Begam's house could be used by the plaintiff. He, therefore, dismissed the suit without deciding other points. I am bound to accept the finding of the learned Civil Judge that there was a door between the *bawarchi khana* and the house of Akhtari Begam, but under s. 13 (a) of the Indian Easements Act the plaintiff is entitled to get a way for enjoying his *bawarchi khana*. He is entitled to a way up to the public road and not to the house of Akhtari Begam. The finding of the learned Civil Judge is not that the plaintiff was entitled to go out to the public road through Akhtari Begam's house. As the *bawarchi khana* was the common kitchen of Akhtari Begam and the house now purchased by Mst. Abida Begam, it is just possible that the owner of the *bawarchi khana* may be entitled to go to Akhtari Begam's house and not further. If the *bawarchi khana* was used by Akhtari Begam it follows that she could go in it through a door in the wall between her house and the *bawarchi khana* but it does not necessarily follow from it that the owner of the *bawarchi khana* also could go to the Akhtari Begam's house through that door. I think the learned Civil Judge did not fully appreciate what an easement of necessity is, and so I can find in second appeal whether such an easement exists. When there is a house of Akhtari Begam to the south of *bawarchi khana*, it is for the defendant to establish that the plaintiff had a right to go through it to the public road. That right is not established only by the existence of a door between *bawarchi khana* and the Akhtari Begam's house. I think the plaintiff has got a right of necessity.

The learned Counsel for the respondents has argued that the plaintiff is estopped from maintaining the suit. His first argument is that there is evidence of the respondents' witness Qazim Husain that the compromise between Qazim Raza Khan and Lala Girdhari Lal was made with the plaintiff's consent. This witness is the agent of Lala Girdhari Lal, and I am not prepared to believe him. The other argument based on the evidence of Ramzan is that the plaintiff told defendant No. 2 Mst. Abida Begam, that there was no door between the *bawarchi khana* and the house that she was going to purchase. This witness was not believed by the learned Munsif and I agree with him. It is also argued that the plaintiff had not questioned the order allowing the amendment under which the *bawarchi khana* was also included in the decree for sale and Qazim Raza Khan alone appealed and got

the *bawarchi khana* released, so the plaintiff is not entitled to maintain the suit. I think this argument has got no force. The plaintiff was bound by the amendment, but its effect was not to make *Lala Girdhari Lal* an owner of the *bawarchi khana*. Under the compromise the *bawarchi khana* was not given to Qazim Raza Khan alone but *Lala Girdhari Lal* admitted that he had no claim to it, so it became the property of all the original owners including the plaintiff. I think the plaintiff's claim is not barred by the principle of estoppel. It is argued that the plaintiff released the easement under s. 38 of the Indian Easements Act. Reliance is placed on the fact that the wall between the houses of Akhtari Begam and the *bawarchi khana* has been demolished. This does not amount to the release of the easement. I have already observed that I do not believe Ramzan who says that the plaintiff told defendant No. 2 before she purchased the house that there was no passage between the *bawarchi khana* and the house she was going to purchase. I think the easement has not been extinguished. I hold that the plaintiff has got an easement of necessity.

I, therefore, allow the appeal with costs throughout, set aside the judgment and decree of the learned Civil Judge and restore that of the learned Munsif.

D.

Appeal allowed.

NAGPUR HIGH COURT

Second Appeal No. 565 of 1935

September 26, 1939

STONE, C. J. AND BOSE, J.

Seth GHASIRAM—DEFENDANT No. 4

—APPELLANT

versus

Mst. KUNDANBAI AND OTHERS—

RESPONDENTS

Transfer of Property Act (IV of 1882), ss. 39, 100—Act, if exhaustive of all charges—S. 39, scope of—Whether deals with charges or right falling short of charge—Charge created by decree, if comes under s. 100—Charge—Charge created by decree—Its effect—Decree creating charge and further directing judgment-debtor to do particular thing and decree merely declaring charge—Difference—Transferee for value without notice of charge declared by decree, whether takes free of charge—Property subject to charge sold—Burden to prove want of notice—Decree merely declaring charge and not providing for its execution, whether operates as notice of charge—Estoppel—Estoppel by record—Essentials—Charge by decree—Registration of, necessity of—Practice—New plea—Plea of res judicata for first time in second appeal—Maintenance—Rate of, fixed in decree—Its alteration or variation, how obtained.

The T. P. Act, does not purport to be exhaustive but only to deal with certain specific matters, and also primarily it was enacted to deal with transfers by act of parties. Of course it does touch here and there on certain allied matters but in view of the very cursory manner in which they are dealt with as compared to the more exhaustive treatment accorded to private transfers of property, and in view of the preamble, the Act cannot be regarded as exhaustive when it deals with these allied topics which are foreign to its main purpose. [p. 864, col. 1.]

Section 39, T. P. Act does not deal with charges but with a right which falls short of a charge. The charge does not arise until it is fixed by a decree or by agreement or by operation of law. [p. 863, col. 2.]

[Case-law referred to.]

A charge which is created by a decree is not created by act of parties, and it cannot be said to have been created by operation of law. Such a charge does not fall under s. 100, T. P. Act, nor does the principle underlying it apply to it. [ibid.]

When a decree declares a charge on certain property not only are the immediate parties to a decree bound by it but so also are all who claim through or under them and date their title from after the decree or the institution of the suit as the case may be, that is to say, not only are the parties bound but also their privies. One effect of this is that the question of notice does not ordinarily arise. 172 Ind. Cas. 949 (11), relied on. [p. 864, col. 1.]

If a Court orders a defendant to pay the plaintiff a certain sum of money on a specified date and directs that if it is not paid property which it specifies is to be sold, those orders must be carried out and the judgment-debtor cannot evade them by transferring the property so charged to another, however, innocent that other may be. The doctrine of estoppel by record applies. The doctrine of *lis pendens* may also apply in some cases, though not necessarily always. But whether *lis pendens* applies or not the doctrine of estoppel by record does. In such a case the transferee from the judgment-debtor after decree is bound to carry out its orders in the same way and to the same extent as the judgment-debtor himself. It is not necessary for the decree-holder to sue the transferee all over again. But when the decree is merely declaratory and does not direct the doing of a particular thing, that is to say, when it is not executable, then an important difference arises, and the transferee, though bound by the decision in the sense that it is *res judicata*, is not necessarily bound to the same extent and in the same way as the judgment-debtor: pleas are available to him which would not be available to his transferor. He is not estopped from putting in issue the consequences of that charge because that could not have been put in issue. [p. 864, col. 2; p. 865, col. 1.]

[Case-law discussed.]

Where a charge decree is merely declaratory and thus incapable of execution, the *bona fide* purchaser for value without notice takes free from the charge, the reason being that the legal estate prevails over a mere equity except where the legal owner takes with notice. *Whitworth v. Gains* (16), referred to.

Where a decree has declared a charge on certain property and that property is subsequently sold, the burden of proving want of notice of charge is on the purchaser. 142 Ind. Cas. 376 (28), **Overruled**.

When the decree provides for the payment of future maintenance and makes provision expressly or impliedly for its own execution, then it does not put an end to the suit and consequently whether the matter be placed on the ground of *lis pendens* or on that of estoppel by record (the two do not necessarily over-

lap) the result is the same. But when the decree is merely declaratory and inexecutable, the suit *qua* suit is at an end and then in our opinion these rules do not apply and the decree *qua* decree does not operate as notice of charge. *Venkatesh Govind v. Maruti* (29), relied on. [p. 870, col. 1.]

A provision should be made in India for the compulsory registration of charge decrees, whether declaratory or executable.

It is not any and every expression of opinion in a judgment which gives rise to the estoppel, nor can the actual decision be carried further than the circumstances warrant. In England the decision must be a final one: the matter must have been distinctly put in issue; and then only the precise point which was so put in issue and solemnly found against a party is deemed to have been finally decided for the purposes of this rule; and this is so in India as well under s. 11, Civil P. C. [p. 865, co. 2.]

The plea of *res judicata* is not a pure question of law and where the point was neither raised nor pleaded in either of the lower Courts it cannot be allowed in second appeal. [p. 871, col. 1.]

A written agreement for maintenance can be varied without the necessity of instituting a suit for that purpose. But the rule is different when the rate of maintenance is fixed in a decree. In such a case its alteration or variation can only be obtained by a separate suit properly framed for the purpose. 185 Ind. Cas. 580 (30), relied on. [*ibid.*]

S. A. from the appellate decree of the Court of the District Judge, Hoshangabad, dated August 31, 1935.

Mr. M. R. Bobde, for the Appellant.

Mr. K. B. Tare, for Respondent No. 1.

Mr. J. Sen, for Respondents Nos. 4 to 10.

Mr. Fida Hussain, for Respondent No. 3.

Judgment.—This judgment will govern S. A. No. 114/36 and S. A. No. 115/36, as well as this appeal (S. A. No. 565 of 1935). They all arise out of the same suit.

The plaintiff is the first respondent in all three appeals. On April 30, 1935, she obtained a decree for maintenance in Civil Suit No. 26 of 1894 against her husband's brother Shaligram. The decree so far as it is now relevant was in these terms:

"that defendant pay to plaintiff Rs. 250 a month or Rs. 3,000 annually for maintenance and also pay her Rs. 24,000 for arrears. The decretal amount shall be a charge on the ancestral estate in the defendant's possession....."

After this the plaintiff's maintenance again fell into arrears, so she attempted to obtain them by executing this decree. But she failed because the Court of the Judicial Commissioner held that the decree in so far as it related to future maintenance was only declaratory and so could not be executed. She was therefore, driven to filing fresh suits as arrears accrued from time to time. This suit is one of them.

The original defendants were four. Of them Shrinarayan and Mst. Savitribai were

the legal representatives of the original judgment-debtor Shaligram. They were the first and second defendants respectively. The first was a son of Shaligram and the second the widow of another son. The other two defendants Nos. 3 and 4, are mortgagees of one of the family fields. The plaintiff asked that in the event of the amount claimed not being paid; this field together with two houses in the possession of the first and second defendants be sold because, according to her, this property was part of the ancestral family property and so was subject to the charge which she had obtained in the decree of 1895.

So far the suit was simple and straightforward, but complications set in when the third and fourth defendants insisted upon the joinder of a large number of other defendants. These other defendants were purchasers from time to time of portions of the family property which had been charged by the decree of 1895 after it had been passed. The third and fourth defendants stated that the properties in the possession of these others were also subject to the charge and, therefore, their presence was necessary in order to enable the equities to be adjusted. They protested against the attempt to saddle the whole burden of the claim upon the field in their possession and upon the two houses in possession of the first and second defendants. One of the questions in appeal is whether they (the third and fourth defendants) have the right to demand this.

They, (the third and fourth defendants) succeeded in having a large number of defendants joined in the first Court (16 of them bringing the total number of defendants upto 20), and in the end, after the plaintiff had been made to amend her plaint a decree was passed in her favour against the ancestral properties in the hands of defendants Nos. 1 to 8, 15 and 19.

All these newly added defendants, with the exception of the fifth, thereupon appealed and succeeded in persuading the lower Appellate Court to dismiss the claim against them and to have the properties of Jhadtalai, Chowkdi, Dolaria and Patnari, in which they were interested, released from the decree.

The plaintiff was content with this position and did not appeal; nor did the third and fifth defendants. But the fourth defendant has appealed and has raised these questions all over again. His appeal is S. A. No. 565 of 1935.

In the first Court another question was also

raised. The third and fourth defendants claimed that they should be given the right of marshalling. In this they failed, so they appealed to the lower Appellate Court and failed there also. The fourth defendant has now appealed here against that decision and his appeal is S. A. No. 115/36. But his learned Counsel seeing that the contention was a hopeless one, abandoned it after a short discussion and told us that we need not trouble to write a formal judgment. That appeal will therefore be dismissed with costs.

The third appeal before us is by the second defendant *Mst. Savitribai*. She had asked in the lower Court to have the amount of maintenance payable by her under the previous decisions (fixed eventually at Rs. 200 a month though the original decree was for Rs. 250) reduced because of altered circumstances. She failed in both the lower Courts and has filed a second appeal here. Her appeal is S. A. No. 114/36.

Turning now to the fourth defendant's other appeal (S. A. No. 565/35, the one in which this judgment is being written), one of the questions raised was whether a defendant can compel a plaintiff to seek a decree against persons against whom she does not want to proceed. This question was raised before us as well but after a short preliminary discussion it was given up by the learned Counsel for the respondents Nos. 4-10 to this appeal, that is to say by the transferees who were subsequently joined at the instance of the 4th defendant.

That leaves us with a number of difficult questions of law, the first of which relates to the question of notice. The contention of these transferees is that they cannot be bound by any charge upon the properties which they have purchased unless it can be shown that they had notice of the charge at the date of the purchase. It will be necessary to decide the question of onus, but before we do so we will have to determine the legal category into which the charge in question here falls.

It was argued on the one side that it comes under s. 100 of the T. P. Act, and alternatively under s. 39. We do not think it falls under either.

Section 39 does not deal with charges but with a right which falls short of a charge. The charge does not arise until it is fixed by a decree or by agreement or by operation of law: See *Ram Kunwar v. Ram Dei* (1), *Bharatpur State v. Gopal* (2), *Maina v.*

Bachchi (3), *Lakshman v. Satyabhamabai* (4), *Yamnabai v. Nanabhai* (5), *Sowbagia & Manicka* (6), *Jamnabhai v. Balakrishna* (7), *Fateh Ali Chaudri v. Gobardhan Prasad* (8) and *Kuloda Prasad v. Jageshwar* (9). But apart from authority the differences between ss. 39 and 100 make this obvious.

As regards s. 100: in our opinion that cannot apply either though there is authority to the contrary. It is limited to charges created,

"by act of parties or by operation of law." A charge which is created by a decree is not created by act of parties, and we do not think that it can be said to have been created by operation of law.

B. B. Mitra thinks otherwise and relies on *Gobinda Chandra v. Dwarka Nath* (10) and *Maina v. Bachchi* (3) at p. 612 of the 9th Edition of his book on the T. P. Act. We do not think that either of these rulings goes to that length.

In both those cases the question for decision was whether a decree which creates a charge requires registration. That the learned Judges said depends upon whether a charge creates an interest in immovable property. They compared ss. 58 and 59 of the T. P. Act with s. 100 and came to the conclusion that the T. P. Act recognises a difference between a charge and a mortgage, and held that the difference lies in the fact that a charge does not create an interest in the property whereas a mortgage does. The learned Judges do not go on to hold that s. 100 is exhaustive of all charges and that one created by a decree falls within its ambit. We do not think that these decisions are authority for the proposition that charges created by decrees are ones which arise by operation of law.

We gather that Sir Dinshaw Mulla takes the same view as B. B. Mitra for he states at p. 546 of the 2nd Edition of his T. P. Act.

"Charges are created or arise in two ways and both are included in this section."

It is true he does not say that there is no other way and that he does not quote the case of a charge created by a decree as one

(3) 28 A 655; A W N 1906, 165; 3 A L J 551.

(4) 2 B 494.

(5) 12 Bom. L R 1075 (1078); 8 Ind. Cas. 1057.

(6) 33 M L J 601; 42 Ind. Cas. 975; A I R 1918 Mad. 668; 22 M L T 386; (1917) M W N 782; 6 L W 701.

(7) 53 M L J 176; 102 Ind. Cas. 101; A I R 1927 Mad. 1092; 26 L W 24; 39 M L T 64.

(8) 5 Luck. 172; 117 Ind. Cas. 405; A I R 1929 Oudh 316; 6 O W N 493; Ind. Rul. (1929) Oudh 341.

(9) 27 C 194.

(10) 38 C 837 (841); 7 C L J 492; 12 C W N 849.

(1) 22 A 236; A W N 1900, 97.

(2) 24 A 160 (163); A W N 1901, 207.

of the illustrations of charges which arise by operation of law, but we gather that he considered that s. 100 was exhaustive of all charges. In any case that is the contention of the learned Counsel for the purchasers-defendants. He argues that if a charge of this kind does not fall under s. 100, then it cannot be a charge at all so far as India is concerned because the Act is exhaustive of all matters with which it deals.

We are unable to agree because it appears from the Preamble that the Act is one to

"define and amend certain parts of the law relating to the transfer of property by act of parties."

It is clear then that the Act does not purport to be exhaustive but only to deal with certain specific matters, and also that primarily it was enacted to deal with transfers by act of parties. Of course it does touch here and thereon certain allied matters but in view of the very cursory manner in which they are dealt with as compared to the more exhaustive treatment accorded to private transfers of property, and in view of the Preamble, we are unable to regard the Act as exhaustive when it deals with these allied topics which are foreign to its main purpose.

It was argued that the omission was accidental and that in any event the principle underlying s. 100 would have to be applied to charges created by decrees even if the section itself did not apply. We are by no means certain that the omission was accidental. Decrees stand on a somewhat different footing and are governed by rules of their own, so it may well be that the intention of the Legislature was to leave decree out of the section.

The difference which the intervention of a decree makes is this: not only are the immediate parties to a decree bound by it but so also are all who claim through or under them and date their title from after the decree or the institution of the suit as the case may be, that is to say, not only are the parties bound but also their privies. One effect of this is that the question of notice does not ordinarily arise. This has recently been decided in *Ahsan Hussain v. Maina* (11).

But that does not solve the whole problem nor does that decision cover a case of this kind. The facts of that case have not been given fully in the I. L. R. report and unless the facts are studied closely the decision will appear to travel wider than was intended. The language of the judgment

(11) I L R (1938) Nag. 431; 172 Ind. Cas. 949; A I R 1938 Nag. 129; 10 R N 264.

applies fully to the facts which arose there but unless modifications not necessary for decision of that case and which of course were not under consideration there are introduced for the purposes of this case a wrong conclusion will result.

The facts are to be found in *Maina v. Ahsan Hussain* (12), where the decision of Niyogi, J., which was confirmed on appeal is reported. They were as follows. Mainabai the plaintiff had obtained a decree against her husband which directed him to pay her a sum of Rs. 8 a month for her maintenance from the date of the institution of the suit on wards. At the same time a charge was created on the property described in the decree. This decree was dated September 11, 1928.

After this, on January 4, 1929, the husband mortgaged the charged property to a third party who took without notice of the charge. A suit was instituted on the mortgage in due course and a decree was passed against the husband and the mortgagee was placed in possession. The mortgagee thereupon sued the husband and Mainabai for a declaration that Mainabai's charge decree did not bind him. He failed, the Appellate Court holding that he was a privy of the husband and so was bound by the decree. The decision was based on the ground that the previous judgment in the maintenance case created an estoppel by record.

So far there is no substantial difference between that case and this but when we turn to the judgment of Niyogi, J. we find this important sentence:

"It would be preposterous if the Civil Courts are hampered in the execution of the decree passed by them by such alienations as that in the present case."

Therefore Mainabai's decree in that case was not merely declaratory. We are not able to gather its actual terms from the judgment but it seems clear that it must have contained a direction that in the event of the money not being paid it was to be recovered from the charged property. That is to say the decree was executable.

Now of course if a Court orders a defendant to pay the plaintiff a certain sum of money on a specified date and directs that if it is not paid property which it specifies is to be sold, those orders must be carried out and the judgment-debtor cannot evade them by transferring the property so charged to another however innocent that other may be. The doctrine of estoppel by record applies. The doctrine of *lis pendens* may also apply in some cases, though not necessarily. (12) 19 N L J 254; 169 Ind. Cas. 169; 9 R N 307.

sarily always. But whether *lis pendens* applies or not the doctrine of estoppel by record does.

This latter doctrine is a wide one which is to be found in the Indian Law under different heads. In so far as the narrow facts of that case are concerned, the particular branch applicable there is, in our opinion, to be found in O. II, r. 10, of the Civil P. C. It is true there is a difference of opinion on this point: some decisions have doubted whether the rule applies to execution proceedings, others hold that it does because r. 10 has not been excluded from the scope of execution by r. 12, whereas rr. 3, 4 and 8 have. But it is not necessary to decide that here though we are inclined as at present advised to the latter view. But whether the rule applies in terms or not it has never been doubted that an estoppel does arise in such a case and that the transferee from the judgment-debtor after decree is bound to carry out its orders in the same way and to the same extent as the judgment-debtor himself. It is not necessary for the decree-holder to sue the transferee all over again.

But when the decree is merely declaratory and does not direct the doing of a particular thing, that is to say, when it is not executable, then an important difference arises, and the transferee, though bound by the decision in the sense that it is *res judicata*, is not necessarily bound to the same extent and in the same way as the judgment-debtor: pleas are available to him which would not be available to his transferor. We think there is a wide difference between a decree which orders a person to do a particular thing and one which merely declares a certain state of facts to exist.

The doctrine of estoppel by record, as it obtains in England, is set out in the 13th Volume of Halsbury's Laws of England (Hailsham Edition). At p. 402 the learned authors point out that of the several matters included by Lord Coke under this head all are now obsolete except "that which appears on the records of the Courts of Law". As to these they state that the judgment must be a final one and they divide judgments of this kind into two categories, those *in rem* and those *in personam*, or as they prefer to put it, *inter partes*.

The judgment we are considering in the present case, namely, the one which created the charge, was not a judgment *in rem* but was one *inter partes*. We have therefore to see how far this doctrine of estoppel

by record extends in the case of a judgment *inter partes*.

This is considered at pp. 438 and 409.

The most usual manner in which questions of estoppel have arisen on judgments *inter partes* has been where the defendant in an action raised a defence of *res judicata*, which he could do where former proceedings for the same cause of action by the same plaintiff had resulted in the defendant's favour, by pleading the former judgment by way of estoppel.....

But, provided a matter in issue is determined with certainty by the judgment, an estoppel may arise where a plea of *res judicata* could never be established; as where the same cause of action has never been put in suit."

The learned authors then continue to define the limitations of the under position:

"A party is precluded from contending the contrary of any precise point which, having been once distinctly put in issue, has been solemnly found against him. Though the objects of the first and second actions are different, the finding on a matter which came directly "(not collaterally or incidently)" in issue in the first action is conclusive in a second action between the same parties and their privies."

It will be seen then that the term *res judicata* is used in different senses in England and in India. What the English lawyers call *res judicata*, namely the rule which prevents a party from suing again on the same cause of action is dealt with in India by O. II, r. 2 (2), whereas what we term *res judicata* here is dealt with in England under that Branch of the law of estoppel by record which relates to judgments *inter partes*. But though the classification is different, the content and form are essentially the same, and the consequences which follow are the same. There may be a few minor differences, but if they exist they do not affect the essence of the rule. That being so, we are bound in India to look to our own rules as set forth in the Civil P. C.

But before doing so we stress that the limitations of the doctrine are as strict in England as they are here. On these points there is no difference between the two laws. It is not any and every expression of opinion in a judgment which gives rise to the estoppel, nor can the actual decision be carried further than the circumstances warrant. In England the decision must be a final one: the matter must have been distinctly put in issue; and then only the precise point which was so put in issue and solemnly found against a party is deemed to have been finally decided for the purposes of this rule; and this is so in India as well under s. 11.

Then at p. 412 of the 13th volume of Halsbury's Laws of England from which we have been quoting above, it is stated:

"The doctrine applies to all matters which existed at the time of the giving of the judgment, and which

the party had an opportunity of bringing before the Court. But if there be matter subsequent which could not be brought before the Court at the time, the party is not estopped from raising it."

"The relevance of these references in the present case is this. The position of the subsequent transferee for value without notice was not and could not have been a matter in issue in the former suit which resulted in the charge decree upon which the plaintiff here founds. It is matter subsequent which could not have been brought before the Court at the time. Therefore in all cases where the decree is merely declaratory and cannot be executed, all that the transferee (who is a privy of the defendant in the former suit), is estopped from questioning is the fact of charge and the property to which it relates. He is not estopped from putting in issue here the consequences of that charge because that was never in issue before and could not have been put in issue. It was not matter which, to quote the provisions of Expln. IV to s. 11 of the Civil P.C.

"might and ought to have been made a ground of attack or defence in the former suit."

This rule of "might and ought" obtains in England also but of course it cannot be applied there any more than here to matters which could not have been placed in issue because they were not then in existence. See 13th volume of Halsbury's Laws of England (Hailsham Edition) p. 413.

We stress again that the position is different when the decree is one which can be executed. Then different questions arise and a different set of rules, still under the general head of estoppel by record but under a different branch of it come into play—namely those which state that in execution the orders of the Court cannot be challenged but must be obeyed and the directions in those orders faithfully carried out. If, however, the plaintiff does not trouble to ask for and obtain, or having asked for is unfortunate enough not to get, an executable decree, then he cannot ask to have rules which govern execution proceedings and are special to them applied to another branch of the law to which they do not belong.

That explains the difference between *Ahsan Hussain v. Maina* (11) and this case. But it is necessary to refer to another set of cases, because the learned Judges in *Fateh Ali Chaudri v. Gobardhan Prasad* (8) stated as a general proposition that:

"...There is a consensus of opinion in all High Courts in this country that where the right is charged on a specific immovable property either by decree or

contract the subsequent transferee though for valuable consideration and without notice takes it subject to that charge."

Niyogi, J. repeated these observations in *Maina v. Ahsan Hussain* (12), the case which was under appeal in *Ahsan Hussain v. Maina* (14). With the utmost respect, not only do we think that the rule is too widely stated but we are unable to agree that there is any such general consensus of opinion.

In the first place, dealing with *Fateh Ali Chaudri v. Gobardhan Prasad* (8), itself, the decision is not based on the Indian decisions referred to in the judgment or on Indian Law but upon certain principles of English Law which the learned Judges hold are of general application and obtain in India as well. They quote passages from Ashburner on Equity and from Halsbury's Laws of England and also a passage from Kay, J.'s judgment in *Madell v. Thomas & Co.* (13) and then state:

"Under the English law, therefore the execution creditor buys subject to the liabilities created by the judgment-debtor prior to the sale. That being so, the question of notice is wholly immaterial."

"We have no doubt about that but what we feel, with respect, has been overlooked is that an execution creditor is not a purchaser and it is for that reason that the English Courts have held him bound.

The English rule arises out of a complex and technical situation into which we need not enter as the complexities have no application to India but the underlying principles upon which the English Courts proceed can be gathered from the following passages in the Lord Chancellor's judgment in *Beavan v. Lord Osford* (14). First of all he explains at p. 303* that in England certain judgments create a lien over the properties to which they relate because of 1 and 2 Vict. C. 110. At p. 305* he states:

"Now what did the legislature mean to do by that enactment? In the first place, they meant to make the judgment directly operate as a charge."

Then he continues at p. 306*:

"The effect is that they, (that is to say the persons we call decree-holders in India), have the same rights as they would have been entitled to in case the person had, by writing under his hand, agreed to charge the same."

We recognise that this is not authority for the proposition that a decree which creates a charge is on the same footing as a charge made by act of parties because the charge with which the learned Lord Chancellor was dealing was one created by statute and not

(13) (1891) 1 Q. B. D. 230 (238); 60 L. J. Q. B. 227; 64 L. T. 9; 39 W. R. 280.

(14) (1856) 25 L. J. Ch. 290; 6 De G. M. & G. 507; 2 Jur. (N. S.) 121; 4 W. R. 275.

* Pages of (1856) 25 L. J. Ch.—[Ed.]

by judgment; but at the same time it is not authority for the converse proposition. It is necessary however, to understand the English position because otherwise it becomes impossible to apply the English authorities aright.

Having made this clear we now proceed to other passages in the Lord Chancellor's judgment which deal directly with the matter which we are discussing. He was considering the position of the person who under a judgment (what we in India call a decree) passed subsequently to the one which under the law created the charge purchases the charged property. The Lord Chancellor refers to him as the judgment creditor and says :

"The question is, whether they (judgment creditors) are.....purchaser.....Is a judgment creditor a person who has purchased any part of the lands, or any rent, profit, or commodity in or out of the same? Now, independently of any authority, I confess I should have thought it was hardly arguable that a person who recovers a judgment is a purchaser. What judgment makes him a purchaser for valuable consideration? As was put by Lord Justice Knight Bruce in the course of the argument, suppose a judgment is recovered against a person in an action for assault, is he a purchaser of any land of the person who has assaulted him, for valuable consideration? Clearly not. He may be a purchaser, though he has a judgment, but he is not a purchaser by virtue of his judgment; it is something altogether foreign to the nature of a purchaser....The person who recovers a judgment may, indeed, eventually get at the land, because under the Statute of Westminster, he may take the land in execution, and therefore, he is said to have, even independently of the last statute, a lien on the land; but it is not by virtue of any purchase, but by virtue of the right which the law gives him".

Again at p. 304 * he says

"One cannot call a judgment creditor a purchaser, nor has such creditor any right to the land; he has neither *jus in re* nor *jus ad rem*."

Then he quotes Lord Eldon in *Ex parte Knott* (15).

"A mere judgment creditor, though he deals originally for a lien, does not get an estate originally in the land. He has neither *jus in re* nor *jus ad rem*,..... if he remains a mere judgment creditor, the Court says, he does not deal upon the faith of the land, in this sense, that he does not contract for an interest in the land, and therefore is entitled only as a judgment creditor to an eligit and he cannot tack."

Then he states his conclusion.

"He ((the judgment creditor)) is to be in the same predicament as if his debtor, in respect of any property over which he had absolute power of disposition, had executed a charge in his favour, and so given him an equitable right."

We will refer only to one more English case. In *Whitworth v. Gaugain* (16), Wigram V. C. said at p. 291†,

"Where the legal estate gets into the hands of a pur-

(15) (1806) 11 Ves 609; 8 R R 254.

(16) (1844) 13 L J Ch. 288.

chaser, for value, without notice of an equitable claim, that entirely supersedes the equitable claim; but it is clear, that, in the case of a trust, a judgment sued out will not have that effect. *Newland v. Paynter* was the case of furniture in a house in which a man and his wife lived. There had been a private agreement that it should be the wife's separate property. There was no trustee to protect the property. It was merely an agreement between the husband and the wife. A judgment creditor took the furniture in execution, upon which a bill was filed by the wife, and Lord Cottenham protected that property, and decided that the judgment creditor could not take it. That is a case showing as strongly as possible that, as against a judgment at law, this Court will protect equitable interests. If a mere judgment creditor, as distinguishable from a party acquiring property by conveyance without notice, could take it, there would very shortly be an end of the value of all trusts, and the creditors of a party might take the property of the *cestui que trust*."

It is we think clear from these quotations that the reason why the judgment creditor is bound by the charge, notice or no notice, is because he is not a purchaser and it is only the purchaser for value without notice who can claim exemption. With the utmost respect we feel that the English Law has been misunderstood in *Fateh Ali Chaudri v. Gobardhan Prasad* (8) and that the judgment which is founded on the assumption given at p. 178* namely that those observations apply not only to judgment creditors but also to purchasers, travels wider than the English authorities warrant.

Turning now to the Indian decisions upon which the learned Lucknow Judges and Niyogi, J. relied, the earliest decision quoted is *Kuloda Prasad v. Jageshar* (9). It appears from the recital of facts given on p. 195†, or so we gather from a passage which we shall quote, that the decree which created the charge was one which was executable and that the plaintiff was seeking to enforce the charge in execution and not by a separate suit. The passage to which we refer runs as follows :

"On appeal the Subordinate Judge also held that the decree obtained by the defendant being one for a declaration and fixing of monthly allowance, it would be executed whenever the amount might fall into arrears during her life time."

The judgment and report are both short and this is all that is said about the nature of the decree. If this was its nature, then, as we have already explained, we agree that the transferee would be bound.

The learned Judge also considered that the transferee had, or looking to the circumstances must be deemed to have had, notice of the charge, so the question before us here did not arise.

Then came *Maina v. Bachchi* (3). That

*Page of (1856) 25 L. J. Ch.—[Ed.]

†Page of (1844) 13 L. J. Ch.—[Ed.]

*Page of 5 Luck.—[Ed.]

†Page of 27 C.—[Ed.]

decision proceeded on the assumptions (to be found at p. 659*) that a charge decree falls under s. 100 of the T. P. Act : that that section (the learned Judge—there was only one—was dealing with the section as it stood before the amendment) did not exempt the *bona fide* purchaser for value without notice (he reached this conclusion by comparing s. 100 with s. 40) : and that charges by act of parties require registration and that registration amounts to notice.

We have already stated that we do not agree that charge decrees can be said to fall under s. 100. And as to the second reason we do not think that that was ever the law and we consider that s. 100 was amended in order to make it clear that the opposite view, which had also been taken, was the right view. The reasoning of the learned Judge (there was only one) was general and applied to all charges whether created by act of parties or by operation of law.

As to the third argument advanced, with the utmost respect we are unable to see what relevance it had to the question at issue.

But it is to be observed that the learned Judge also stated that

"I do not mean to say that there are no cases in which it would not be right and proper to apply the doctrine that a mere equitable claim will not be enforced against *bona fide* transferees for value without notice."

Again with respect we are unable to follow the reason upon which this qualification is grounded. If in the learned Judge's view s. 100 did not permit the transferee to raise such a plea, surely it must have applied in all cases and the Courts could not have been left with a discretion to apply or to omit the rule as they pleased.

As regards *Mahadeo Prasad v. Anandi Lal* (17) the decree creating the charge had been registered and the learned Judges held that considering that together with other facts which had been examined in the Court below the transferee must "be held to have had notice of the plaintiff's charge." That being so, again, the question did not arise but the learned Judges went on to say :

"This really concludes the case. But we may say that we are not disposed to differ from Sir Henry Richard's view in *Maina v. Bachchi* (3)."

They did not give the question any independent examination, nor did they say why they were disposed to agree with the earlier decision.

Another point of differentiation is that the charge decree there was an executable one (17) 47 A 90; 92 Ind. Cas. 348; A I R 1925 All. 60; 22 A L J 887.

*Page of 28 A.—[Ed.]

and the question arose in a claim suit under O. XXI, r. 63, because in execution of the charge decree the Court had exempted the subsequent purchaser for value without notice. Had that case been before us we would have reached the same conclusion but not along the lines of *Maina v. Bachchi* (3).

In *Bhoje Mahadev Parab v. Gangabai* (18) the question also arose in execution and the learned Judges merely followed *Kuloda Prasad v. Jageshar* (9) without assigning any reasons of their own. *Kallappa v. Balwant* (19) did the same thing.

As regards *Srinivasa Raghava Aiyangar v. Ranganatha Aiyangar* (20) the charge there was created by a document, that is to say, by act of parties, and not by decree, and even at that one Judge considered that the document was a mortgage while the other thought it only created a charge. It was also held that the transferee had notice anyway. So the case has no possible application to the present one.

That leaves *Hemlata Debi v. Bhowani Roy* (21), which Niyogi, J. has quoted. But there the learned Judges merely followed *Kuloda Prasad v. Jageshar* (9), thinking, without analysing them, that the decisions in India on this point were all uniform. The distinction which we have drawn between executable decrees and those which are merely declaratory and incapable of execution was not considered.

It will be seen then when the decisions are analysed that most of them do not apply, and that of the two decisions which decide the point the one in *Maina v. Bachchi* (3), does so on a ground which we hardly think would be accepted as good law at the present day. The other *v. Hemlata Debi v. Bhowani Roy* (21), merely follows *Kuloda Prasad v. Jageshar* (9), which in our opinion relates to a different set of facts. Apart from those two rulings the only other decision which at all touches the point at issue is the *obiter* in *Sarju Prasad v. Mangal Singh* (22), where the learned Judges without giving any reasons state that they are not disposed to differ from the earlier Allahabad ruling. On this point we agree with the criticism which that learned author Sir Dinshaw Mulla has levelled

(18) 37 B 621; 21 Ind. Cas. 54; 15 Bom. L R 809.

(19) 27 Bom. L R 434; 87 Ind. Cas. 951; A I R 1925 Bom. 343.

(20) 36 M L J 618; 51 Ind. Cas. 963; A I R 1919 Mad. 528.

(21) 39 C W N 725.

(22) 47 A 490; 87 Ind. Cas. 294; A I R 1924 All. 339; 23 A L J 254;

against these cases in his T. P. Act, 2nd Edition, p. 550.

Turning now to the decree which forms the foundation of these proceedings the plaintiff in S. A. No. 565/35, *Mst. Kundanbai*, attempted, when arrears of maintenance had again accrued, to execute her charge decree but the Court of the Judicial Commissioner held that the decree was merely declaratory and was incapable of execution. The learned Additional Judicial Commissioner, therefore, quashed the execution proceedings and held they must be looked upon as a mere nullity. *Mst. Kundanbai* has in consequence been obliged to file a succession of fresh suits as arrears arose. That decision is *res judicata* and binds the parties as such. So it must be accepted in this case that *Mst. Kundanbai's* charge decree was merely declaratory and was incapable of execution. I did not order the judgment-debtor, so far as the charge was concerned, to do any particular thing.

We now have to determine what the effect of that decree is on property in the hands of a subsequent purchaser for value without notice. Applying the principles about estoppel by record to which we have referred and bearing in mind that the estoppel is restricted to the precise point put in issue and decided, or at the outside to a point which might and ought to have been raised, we can only conclude that the decree declared that the property was charged in the hands of the judgment-debtor in that suit and nothing more.

If that was all it declared, and we hold it to be so, then the ordinary law governing charges must obtain; and under that law the *bona fide* purchaser for value without notice takes free of the charge: the reason being that the legal estate prevails over a mere equity except when the legal owner takes with notice, "Even against a judgment at law the Court will protect equitable interests." *Whitworth v. Gaugain* (16).

This was not seriously contested and so all we need do in addition to referring to s. 100, which we think illustrates the general principle, is to refer to the following books: Story's Equity 3rd Edition, pp. 36, 154 and 167 to 169; Hanbury's Modern Equity, 2nd Edition, 29, 43 and 53; Halsbury's Laws of England (Hailsham Edition) Vol. 13, p. 92. To quote the striking and picturesque language of Hanbury,

"All equitable interests have this principle in common, that they fasten on the consciences of certain persons to whom the legal estate belongs. But they meet their Waterloo when the legal estate gets into the

hands of one who has given value for the legal estate, and has no notice of their existence."

This *bona fide* purchaser is the bogey who frightens away all equitable interests alike."

The next question we have to consider is where the burden of proving notice, or the absence of it, lies. In our opinion it lies on the purchaser. To quote Hanbury again, p. 43,

"The defence of *bona fide* purchaser for value is an affirmative defence. In order to establish it a purchaser must show, in the word of Fry, J. *In re Morgan* (23), 'that he took all reasonable care and made inquiry, and that having taken care and made inquiry, he receives no notice of the trust which affected the property.'"

This is also the Indian Law and was so held by one of us in *Renukabai v. Bheosan Hapsaji* (24). We quote the following passage:

"That brings me to the question of notice. There is not much difficulty there. Whether the matter falls squarely within s. 100 or whether it comes under a more general rule of law, the burden is on the transferee to establish that he is a *bona fide* transferee for value without notice. This has been settled by their Lordships of the Privy Council in....."

Bhup Narain Singh v. Gokul Chand Mahton (25), where they quote a passage from an earlier ruling of the Board in *Varden Seth Sam v. Luckpathy Rovjee Lallah* (26).....

"As one who owns property subject to a charge can, in general, convey no title higher or more free than his own, it lies always on a succeeding owner to make out a case to defeat such prior charge."

To these rulings we may add *Debendra Nath v. Lalit Krishna* (27), and a decision of the Privy Council in *Bhup Narain Singh v. Gokul Chand Mahton* (25).

A contrary view was taken in *Pannalal Jadam v. Narayan Rao* (28). Grille, A.J.C., was of opinion that the amendment to s. 100 of the T. P. Act, settled the controversy on the question of notice which existed between the different High Courts and considered that the proviso throws the burden on the person seeking to enforce the charge. We are with respect unable to agree for the reasons we have given and overrule that decision.

That in our opinion settles the question except for this. It was contended that a

(23) (1881) 18 Ch. D 93 (102); 50 L J Ch. 834; 45 L T 183.

(24) (1939) N L J 129 (133); 185 Ind. Cas. 33; A I R 1939 Nag. 132; 12 R N 129.

(25) 13 Pat. 242; 147 Ind. Cas. 1134; A I R 1934 P C 68; 61 I A 115; 6 R P C 108; 11 O W N 330; 39 L W 363; 15 P L T 67; (1934) M W N 206; 66 M L J 255; 38 C W N 393; (1934) A L J 291; 36 Bom. L R 391; 59 C L J 139 (P C).

(26) 9 M I A 303; 1 Sar. 357; 1 Suther. 480 (P C).

(27) 42 C W N 1090.

(28) 15 N L J 141; 142 Ind. Cas. 376; Ind. Rul. (1932) Nag. 112.

decree in itself operates as notice. We do not think it does. This was decided in *Venkatesh Govind v. Maruti* (29), where the learned Judges quoting from Sugden on Vendors and Purchasers stated.

"Decrees are not notice to a purchaser, but the *lis pendens* is not terminated where the decree does not put an end to the suit."

That is also our view. When the decree provides for the payment of future maintenance and makes provision expressly or impliedly for its own execution, then it does not put an end to the suit and consequently whether the matter be placed on the ground of *lis pendens* or on that of estoppel by record (the two do not necessarily overlap) the result is the same. But when the decree is merely declaratory and inexecutable, the suit *qua* suit is at an end and then in our opinion these rules do not apply and the decree *qua* decree does not operate as notice.

That brings us to the individual cases of the various purchasers. The appeal we are considering is a second appeal and the question of notice is one of fact. Therefore, if there is positive evidence on record on which the finding of the lower Appellate Court can be based we cannot interfere. In so far as respondent No. 4 is concerned, his purchase was under Ex. 6-D1. Not only does the deed not refer to any prior charge but the recitals expressly state that there is none and the purchaser Ghasiram who has entered the box as 6 D. W. No. 1 swears that he made enquiries and sent agent to search the registration files but in spite of that he got no inkling of the charge. He has been believed by both the lower Courts. Therefore, the lower Appellate Court was right in releasing his property, 16 annas in *Mouza Jhadtallai*, from the decree.

We turn next to respondents No. 5 and 6. They are concerned with *Mouza Doloria*. They claim through a chain of transfers which commenced with a mortgage by the Court of Wards which had taken over the estate, dated January 5, 1901. The deed is Ex. 7 D-7 and Ex. 7 D-8 is the Commissioner's sanction. The mortgagee sued on the mortgage and obtained a decree for sale. Exhibit 7 D-3 is the judgment. The property was sold in execution and purchased by Pannalal and Jayaram. Exhibit 7 D-4 is the sale certificate and Ex. 7 D-5 is the receipt given by them acknowledging receipt of possession. These two then sold the property to *Raja Laxminarayan* by Ex. 7 D-6 and he in his turn sold to these two respondents.

(29) 12 B 217.

7 D. W. No. 1 is an agent of the original mortgagees, one of whom is the 7th defendant in this case. He swears that he made due enquiries about encumbrances from the then Manager of the Court of Wards and says that he was not told anything about a charge. He swears that his master purchased without knowledge or notice of any charge. The property was purchased at the auction for Rs. 19,150 as Ex. 7 D-4 shows, so it is clear that a substantial price was paid for it. This witness has also been believed, so this item, that is to say, 16 annas of *Mouza Doloria* excluding the cultivating rights in the *sir* (Ex. 7 D-7), was also rightly released.

The case of respondents Nos. 7, 8 and 9 is different. They are concerned with *Mouza Chowkdi*. In their case there is no evidence one way or other, therefore, as the burden of proof is on them, the property in their possession must be held to be subject to the charge.

That leaves outstanding the case of respondent No. 10. He is interested in *Mouza Patnari*. He has entered the box as 15 D. W. No. 1 and has been believed. He swears that he purchased without notice and that he paid the full price of the village. This village was also rightly released.

We do not know whether there were any other purchasers: at any rate none of them has appeared and so we are not called upon to consider their cases, if any. We say this because owing to some mistake Mr. Sen was shown as representing respondent No. 11 as well as respondents Nos. 4-10. He informs us that that is a mistake, so the only purchasers whose cases have been placed before us are the respondents Nos 4-10.

We now have left S. A. No. 114/36. The appellant there is the second defendant *Mst. Savitribai*, a successor by inheritance of the judgment-debtor *Shaligram* against whom the original charge decree was passed. She is one of the persons who now represents the family and states that owing to altered circumstances the maintenance payable should be reduced. The plaintiff objects and states that that cannot be done in this suit. She states that so long as her decree stands she is entitled to the sum mentioned in it. If the family want a reduction they must sue for that relief and obtain modification of the decree in a suit of their own. They also state that this matter is *res judicata* it having been so decided by the Judicial Commissioner's Court in a previous suit between

the same parties. A copy of that judgment was filed as Ex. P-32.

Savitribai's learned Counsel replies that the plea of *res judicata* is not a pure plea of law and that as it was not pleaded or raised in the lower Courts it cannot be agitated here.

We find that the plea of *res judicata* was taken in respect of certain other matters but curiously enough not on this point though the First Court's judgment in the previous case was cited in Issue No. 3. That issue is wide and would have covered this plea if it had been taken. It runs:

"Whether any decisions in the said.....civil suit No. 4 of 1921 (this is the suit in question though the decision was given in appeal).....operate as *res judicata* in this suit and against which of the defendants?"

However it is clear that the point was not argued in either of the lower Courts, so we think it right not to allow the objection to be taken now.

But though the plea of *res judicata* was not raised, the point which is said to have been decided was taken clearly enough in the plaintiff's reply, dated August 6, 1930 para. 3, and even if the judgment of the Judicial Commissioner's Court is not used as *res judicata*, it can be used as a precedent on a question of law. In any case we have ourselves recently considered the matter at length in *Trimbak v. Bhagubai* (30) and have reached the same conclusion. As both sides relied on this decision it is necessary to set out the passages in the judgment which relate to variation of decrees.

We were dealing there with a written agreement for maintenance and came to the conclusion that such agreements could be varied without the necessity of instituting a suit for that purpose. But when analysing the various rulings we pointed out that the rule was different when the rate of maintenance was fixed in a decree. This is what we said:

"The decisions deal mainly with decrees and would appear to indicate a different rule, namely that unless a decree provides on the face of it machinery for its own alteration, variation can only be obtained by a separate suit properly framed for the purpose," with that opinion we still agree and nothing was shown us to the contrary. This appeal (S. A. No. 114/36) therefore fails and is dismissed with costs.

The result then is as follows. S. A. No. 114/36 fails and is dismissed with costs. S. A. No. 115/36 also fails and is likewise dismissed with costs. A. S. No. 565/35 succeeds partially. As against the respondents Nos. 4,

(30) 1939 N L J 409; 185 Ind. Cas. 580; A I R 1939 Nag. 249; 12 R N 159.

5, 6 and 10 (Ghasiram, Thakurlal, Nanhelal and Jagannathsingh) it fails and is dismissed. These respondents will be paid their costs by the appellant Ghasiram. As against the respondents Nos. 7, 8 and 9 (Champalal, Gangabishan and Sheonarayan) the appeal succeeds. But as the plaintiff asked for no relief against them in the beginning and as the plaintiff did not appeal against their exclusion from the decree, and as the appellant though insisting on their joinder does not want the question of contribution to be decided in this suit, we think it right that the costs of this appeal and of these three respondents in the lower Courts should be borne as incurred. These respondents will consequently be added to the decree and also the village in which they are interested, and the plaintiff's claim will be decreed as against them and their village as well. The same will be done as regards respondent No. 11 (Hazarilal). The order as to costs in his case will also be the same.

We desire to add that in our view the regrettable tangle which has occurred here is due to what we feel is the mistaken view taken by the late Judicial Commissioner's Court about the decree which created the charge. But that is beyond our power to remedy. The decision binds the parties. It is necessary however for us to state that as a matter of law we do not endorse that opinion in case our decision should be interpreted as authority to the contrary.

We also desire to state that it is our opinion that provision should be made in India for the compulsory registration of such decrees as in England. When the decree is declaratory it is unfair that the decreeholder should be deprived of the protection which he receives from the law which now states that registration is to operate as notice. On the other hand, when the decree is executable it is in the last degree unjust to the *bona fide* purchaser for value without notice who is then bound by the charge as a privy. If all decrees affecting immovable property were to be made compulsorily registrable, these difficulties and injustices would disappear. A person who purchased without searching the registers would then have no one but himself to blame.

N.

Appeal allowed partially.

OUDH CHIEF COURT

Criminal Revision No. 25 of 1941.

and

Criminal Reference No. 5 of 1941

May 23, 1941.

GHULAM HASAN, J.

DIWAN—COMPLAINANT—APPLICANT

versus

RAJA RAM AND OTHERS—ACCUSED

—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 258, 367—Order of acquittal should be incorporated in judgment—Criminal trial—Accused charged under ss. 325/149, Penal Code (Act XLV of 1860)—Accused not convicted under these sections—Acquittal may be implied.

It is imperative that if in any case in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal. The provisions of s. 258 (1), Criminal P. C., are mandatory. Mere mention of the fact of acquittal in an order-sheet is not enough. The order-sheet is no substitute for the judgment.

The fact that the accused have not been convicted under ss. 325/149 of the I. P. C., although charged may well be regarded as their implied acquittal of that offence although there is no express order to that effect. 111 Ind. Cas. 332 (1), relied on.

Cr. R. made by the Sessions Judge, Rae Bareli.

The Govt. Advocate, for the Crown.

Mr. Jagdish Shankar Pathak, for the Applicant Dewan, served.

Mr. Siraj Husain, for Opposite Parties Nos. 1 to 18.

Judgment.—Both the criminal reference and the criminal revision arise out of the same facts. They are as follows :—

Seventeen persons were convicted by a Special Magistrate of the First Class under ss. 323, 147 and 426 of the I. P. C., and sentenced to a fine of Rs. 10, Rs. 5 and Rs. 5 under the aforesaid sections separately. It appears from the order-sheet of the record that one Raja Ram, who was also one of the accused, was acquitted, although there is no mention whatever in the judgment passed by the Special Magistrate. All the 17 accused appealed, and the learned Additional Sessions Judge of Rae Bareli dismissed their appeal. The learned Additional Sessions Judge noted the fact that in his judgment the Special Magistrate had sentenced 16 accused only but it appears from the order-sheet that Bhagwan Bakhsh, one of the accused, had also been convicted. This accused had also appealed and his appeal had also been dismissed. The learned Additional Sessions Judge treated this as a mere irregularity and not an illegality. He noted the fact that there was no order of acquittal about Raja Ram accused but since the order-sheet mentioned that he had been

acquitted, this also amounted to an irregularity and not an illegality. The learned Judge further expressed the opinion that the Magistrate had convicted the accused under s. 323 and not under s. 325 of the I. P. C., although the complainant Diwan had received grievous injury. As a revision by Diwan before the learned Sessions Judge for enhancement of the sentence was already pending, he declined to consider that question in appeal. He added, however, that the Special Magistrate had passed a lenient sentence.

The 17 accused filed a criminal revision in this Court on February 11, 1941, in which they referred to the fact that a reference had been made by the learned Sessions Judge to this Court on the application of Diwan for enhancement of sentences passed upon the applicants.

The learned Sessions Judge made a reference to this Court by his order dated January 22, 1941, which will now be considered along with revision application.

Briefly stated, the facts are that Diwan Pasi held a patta in respect of certain plots in village Bahadurpur from the Kapurthala estate, which was the original proprietor of this village, which was subsequently sold to Raja Ram. Diwan had a grove on these plots, it is stated, for a long time, and Raja Ram on acquiring the village attempted to dispossess him from the plots and challenged the genuineness of the patta granted to him by the Kapurthala estate. The prosecution case was that Diwan was working in his field on November 15, 1939, at about 10 or 11 A. M., when he was informed by his son, Sita Ram, that Padum Prasad and other applicants were cutting his trees. He hurried to the spot and found that the applicants were armed with lathis and some of them were cutting the trees. He remonstrated with the applicants whereupon Padum Prasad is alleged to have said that he was doing so under the orders of his master Raja Ram. Diwan was beaten by the applicants, along with certain co-sharers of his, who had arrived on the spot. Diwan received six injuries of which one was grievous and it was a fracture of the left ulna. The injuries received by the other members of his party were simple. Diwan made a report at Police Station Kotwali on November 15, 1939. On the same day Sital, one of the applicants, made a report against Diwan and certain other persons under s. 147 of the I. P. C.

The Police investigated both the complaints but channelled the applicants on the complaint of Diwan and did not proceed

with the complaint of the opposite party. Although Diwan had received a grievous hurt the Special Magistrate convicted the applicants under s. 323 and not under s. 325 of the I. P. C. He stated in the beginning of his judgment that the applicants had been sent up for action under ss. 325, 147 and 526, I. P. C. The Special Magistrate committed the further irregularity of recording no order of conviction or acquittal in respect of Bhagwan Bakhsh and Raja Ram.

The learned Sessions Judge in his order of reference points out all these irregularities and further says that Raja Ram admittedly, according to the prosecution case, was not present at the time of the *marpit* and he could not be directly charged either under s. 323 or s. 147 or s. 426 of the I. P. C., but that upon the evidence produced in the case he should have been charged with the abetment of the offences of mischief and *marpit*. He also expressed the opinion that it was adequately proved that the offence of grievous hurt had been committed in the prosecution of the common object of an unlawful assembly and recommended to this Court that either the applicants should be convicted under ss. 325 and 149 of the I. P. C. or a re-trial for these offences should be ordered. In making a final recommendation to this Court he, however, recommended a re-trial of the accused Raja Ram for an offence of abetting and instigating hurt and mischief and a re-trial of the remaining accused for the offence of being members of an unlawful assembly, in prosecution of the common object of which grievous hurt was caused to Diwan Pasi under ss. 325 and 149 of the I. P. C. He added that the re-trial should include the offence under s. 426 of the I. P. C. as well.

The Special Magistrate in his explanation states that he forgot to observe in his judgment that Raja Ram was acquitted although the order-sheet of even date made it clear. He, however, admitted the error with regret.

I have heard arguments at some length in these cases, both on behalf of the applicants and the Crown. I have also heard Counsel for Diwan complainant. In my opinion there is no doubt whatever from a perusal of the record and the judgment of the Special Magistrate that the case has been completely mishandled. Under s. 258(1) of the Criminal P. C. it is imperative that if in any case in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal. The provisions of this section are mandatory. It

appears from the judgment of the Special Magistrate that they have been honoured more in breach than in observance. There is absolutely no order in his judgment either about the conviction or the acquittal of Raja Ram. The order-sheet to which the Special Magistrate refers is no substitute for the judgment. According to s. 367 (2) of the Criminal P. C. every judgment shall specify the offence (if any) of which, and the section of the I. P. C. or other law under which the accused is convicted, and the punishment to which he is sentenced. Under cl. (4) if it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty. I regret to note that the judgment of the Special Magistrate discloses a flagrant disregard of the provisions of law contained in ss. 258 and 367 of the Criminal P. C. Similar observations apply to the case of Bhagwan Bakhsh about whom there is no order of conviction or acquittal in the judgment itself but there is a reference in the order-sheet.

The fact that the applicants have not been convicted under ss. 325/149 of the I. P. C. although charged may well be regarded as their implied acquittal of that offence although there is no express order to that effect, as held in *Kishan Singh v. King-Emperor* (L. R. 55 I. A. 390) (1) by their Lordships of the Privy Council.

Having regard to the fact that the case has been tried in a most perfunctory and unsatisfactory fashion and the record discloses a complete lack of appreciation of the essentials of the case, I consider it expedient in the interests of justice that this case should be re-tried by a stipendiary Magistrate. This will enable the applicants to put up a proper defence and to lead evidence in support thereof. Learned Counsel for the applicants has taken me through the record and has argued upon the merits of the case that the prosecution evidence must fail on its intrinsic weakness. He has also complained that his clients were not able to produce certain evidence which was essential to their case and they have been materially prejudiced by the action of the Special Magistrate. It is obviously undesirable for me to express any opinion on the merits of the case. I refrain from doing so. The Magistrate to whom this case is transferred will frame proper charges against the

(1) 55 I. A. 390; 111 Ind. Cas. 332; A. I. R. 1928 P. C. 254; 29 Cr. L. J. 828; 5 O. W. N. 911; 28 L. W. 396; (1928) M. W. N. 749; 29 P. L. R. 575; 33 O. W. N. 1; 48 C. L. J. 397; 50 A. 722; 30 Bom. L. R. 1572; 55 M. L. J. 786; 26 A. L. J. 1099 (P. C.).

accused in the light of the prosecution case and will give full opportunity to the accused to put up their defence.

I, therefore, accept the reference, allow the revision, quash the convictions and sentences of the seventeen applicants and order their retrial. Raja Ram shall be tried for the offence of abetment and mischief. The record will be forwarded to the District Magistrate for disposal of the case by a stipendiary Magistrate.

D.

Reference accepted.

CALCUTTA HIGH COURT

Appeal No. 60 of 1935

July 12, 1940

NASIM ALI AND NARSING RAU, JJ.

LOKE NATH MUKERJEE AND OTHERS—

APPELLANTS

versus

ABANI NATH MUKHERJEE AND OTHERS

—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 92—Question whether particular property appertains to public trust or whether trustee has been validly appointed or not, when can be determined in suit under s. 92—Mere assertion by trustee that trust properties are private properties whether sufficient ground for his removal—Library held trust for public purpose of charitable nature—Will—Construction—Principles—Intention of testator—Garden in compound of building is presumed to be for the benefit of all the occupants of the building in the absence of words allocating it to occupants of particular floor—Practice—Duty of Court—Appealable case—Court's opinion on all important issues must be recorded.

Mere declarations are outside the scope of s. 92 of the Civil P. C. But where reliefs contemplated by the section are claimed and such reliefs cannot be granted without the determination of the question whether a public trust exists or whether a particular property appertains to a public trust the Court in a suit under s. 92 can determine the question whether a public trust exists or a particular property appertains to such public trust. A suit for a mere declaration that a trustee has not been validly appointed may be outside the scope of s. 92. But in a suit under s. 92 the Court has to determine whether a trustee has been validly appointed or not if determination of such a question is necessary for giving reliefs claimed in the suit which properly come under that section. [p. 878, col. 1.]

Mere assertion in a suit under s. 92, by a trustee that trust properties are private properties is not by itself a sufficient ground for his removal. If he committed any breach of trust before the suit, his conduct in the course of the suit is an important element to be taken into consideration in deciding whether the breach should be condoned and he should be allowed to retain the office. [p. 879, col. 1.]

Where a testator in his will sets apart certain portion of his building for a library to be used by general public and dedicates part of his property for the upkeep of the library and appoints a committee for its management, the library is a trust for public purpose of a charitable nature within the meaning of s. 92.

The Court has no power to give effect to a hypothetical intention by supplying lacunæ in the will and thereby making a new will for the testator. The Court cannot speculate as to what the testator may suppose to have intended to write. The only intentions of the testator which the Court can carry out are intentions either expressly or impliedly expressed in the will. No indication of intention is sufficient to induce the Court to hold that a certain bequest has been made, unless, as a matter of fact, the bequest is made either expressly or by necessary implication in the will. Necessary implication does not mean natural necessity but so strong a possibility of intention, that a contrary intention cannot be supposed. *Williamson v. Adam* (2) and *Crook v. Hill* (3), relied on. [p. 880, col. 1.]

The natural presumption is that a garden in the compound of a building is intended for the benefit of all the occupants of the building, unless there are words allocating the whole of it to the occupants of some particular floor. Where there are no such words in the will the Courts are entitled to infer that the garden appertains to the whole building. [p. 882, col. 2.]

In appealable cases Courts are bound to record their opinion on all important issues. *Tara Kant Banerjee v. Puddomoney Dossee* (4) and 74 Ind. Cas. 906 (5), relied on.

A. from the original decree of the District Judge, Hooghly, dated October 6, 1934.

Mr. Atul Chandra Gupta, Dr. Kadha Binode Pal, Messrs. Apurbadhan Mukerjee, Bijan Behary Mitter and Robindra Kumar Goswami, for the Appellants.

Messrs. Hira Lal Chakravarti, Syamadas Bhattacharjee, Gopendra Nath Das and Sanat Kumar Chatterjee, for the Respondents.

Nasim Ali, J.—Babu Joy Kissen Mukherjee, a wealthy zamindar of Uttarpara, in the District of Hooghly, started at his own expense a public library for the use and benefit of the public of Uttarpara. There is a plot of land measuring about 3 *bighas* 2 *cottas* in Uttarpara. The river Ganges is on the east of this plot and the Grand Trunk Road is on its west. There are compound walls on the north, south and west with two gates on the Grand Trunk Road. There is a small strip of vacant land measuring about four *chittaks* between the northern portion of the western compound wall and the Grand Trunk Road. On the east there is a parapet on the buttress. There is a *pucca ghat* on the river bank inside the compound. Within this plot there is a big building. It consists of a basement and two storeys. There is a lawn (formerly a flower garden) to the east of this building. There are out-houses on the north and south within the compound. The library is now located in certain rooms in the first storey of the main building. The second storey is a *baitakkhana*. The servants of the library and the *baitakkhana* reside in the out-houses. Babu Joy Kissen was the owner of this

land and the building thereon. On July 11, 1879 he made his last will. The provisions of his will relating to this property as these :

"Paragraph 12. I have caused a *pucca* two-storeyed building erected within a plot of land measuring about 3 *bighas* 2 *cottas* The public library rooms having been located in the ground floor of this building and the *baitakkhana* rooms having been located on the floor above, books are collected on the ground floor and newspapers and books, etc., are purchased from time to time and they are being read and used and shall be read and used by the general public according to special rules . . . Upon the demise of my eldest son Hara Mohan Mukherjee, the Malik of the said land and building, his son Rash Behari Mukherjee has become 'the holder of the right and possessor' (according to plaintiffs) or 'the owner and possessor' (according to defendants Nos. 1 and 2) of the said lands and buildings according to previous arrangement. God forbid, if at the time of his death he leaves no male child then his uterine Shib Narayan Mukherjee and 'on his death' (according to the plaintiffs) or 'in his default by death' (according to defendants Nos. 1 and 2) his eldest son 'in male line of succession' (according to plaintiffs) or 'generation after generation' (according to defendants Nos. 1 and 2) shall become 'the holder of the right and possessor' (according to the plaintiffs) or 'owner and possessor' (according to defendants Nos. 1 and 2) thereof. God forbid if there be no male child of my two said grandsons or of their (family) then my existing son Peary Mohan Mukherjee or his eldest son shall become the holder of the right and possessor (according to plaintiffs) 'owner and possessor' (according to defendants Nos. 1 and 2) and shall continue as such. But none of my heirs nor any other person shall have power to remove the public library from the ground floor or to transfer aforesaid land and building.

Paragraph 13.—Although my aforesaid grandson and his 'after taker' (according to plaintiffs) or heir (according to defendants Nos. 1 and 2) shall be 'right holder in succession' (according to plaintiffs) or 'owner in succession' (according to defendants Nos. 1 and 2) of the said land and building, the big hall, the room to the west thereof, five rooms to the north and south, the small circular room on the north-western corner together with the verandahs on the east and south and stairs to the ground on the east and west all situated on the ground-floor of the building shall appertain to the Public Library and the staircase on the south-western corner of the ground-floor and the spiral staircase which is situated outside on the northern side shall appertain to the *baitakkhana* above. The expenditure on account of purchasing newspapers, new books and instruments, salaries of officers, lighting charges, etc., all on account of the Library are being met and shall be met from the profit of the dedicated *putni taluks* specified afterwards in schedule marked 'Tha' and from the interest of Rs. 5,000. After keeping in view the income from the *taluks* dedicated to the Library and fixing the expense accordingly, appointment of officers, purchase of newspapers and books, etc., and other functions are being performed and shall be performed by a committee and shall not be performed by anybody else. Now my son Peary Mohan Mukherjee and my grandsons Rash Behari Mukherjee and Sib Narayan Mukherjee and my step-brother Naba Krishna Mukherjee and Monmatha Nath Chatterjee of this village and Chandra Sekhar Banerjee, husband of my youngest daughter, have been appointed by me to be members of the said committee. The number of members of the said committee shall never exceed six. Of them

the eldest male heir of the family, of each of my sons and their heirs shall become a member. Having regard to this provision, if any of the aforesaid present resigns from his post or dies, a fit person according to the decision of the majority of members shall be appointed in the vacancy. A member shall continue to be such during his lifetime unless he resigns from his post on account of serious illness or old age or any other reason. All the work of the Library shall be conducted according to the opinion of the majority of the members of the committee, but if the committee be equally divided in their opinion, then my grandson Rash Behari Mukherjee and upon his demise his representative shall have the casting vote.

Paragraph 14.—The *taluks* which I have dedicated for the purpose of carrying on the expenses of this Library were settled in *darpatni* with my son Hara Mohan Mukherjee on a *selami* of Rs. 5,000. In order to discharge the liability of *sadar* rent of the *mahals* Govt. loan papers were purchased with the *selami* and kept in the custody of the said Hara Mohan Mukherjee, upon his demise the said Govt. loan papers shall now remain with Rash Behari Mukherji according to the provisions specified above, but except for discharging the liability of the rent of the aforesaid *mahals* he shall have no power to sell or make a gift of the said loan papers for any other reason.

Paragraph 15.—The members of the committee shall have no right to the rooms on the upper floor and the lower floor of the Library; my grandson Rash Behari Mukherjee shall have the right to these rooms but he shall have no power to sell them. The *pucca* kitchen, the stable and the rooms, for the *durwans* on the northern and southern side of the building are set apart for the residence of the servants of the Library and the servants of the *baitakkhana* on the floor above the Library. Rash Behari Mukherji or his representative shall meet from the Library funds the costs of repairing these rooms. The flower garden on the eastern side of the Library shall be under the management of the committee. The expenses on account of the garden and on account of the repairs of the Library rooms shall be met from the Library funds.

Paragraph 16.—Nobody shall have any objection if any of my heirs or their families organize dances, amusements, music, etc., in connection with any marriage ceremony or *sradh* ceremony or *puja*, etc., or hold any conference in the rooms on the floor above the Library. Everybody shall have equal right to hold these functions."

Babu Joy Kissen died in 1888. Rash Behari died in the year 1921 leaving no male issue. Shib Narayan died in the year 1923; defendant No. 1 is his eldest son. On June 14, 1928, defendant No. 1 executed a lease in favour of defendant No. 2, the son of Peary Mohan Mukherjee, of the entire land and the building for a term of 15 years. The material portion of this lease is this :

"According to the provisions contained in the will of late Joy Krishna Babu I am the sixteen annas owner of the Library building; only the Public Library is to occupy the middle floor of the said building and the servants of the Library are to put up in some portions of the out-houses. It is provided in the will that the repairing expenses of the out-houses and the middle floor would be met from the funds of the Library. After causing estimates to be prepared by competent engineers and contractors I find that a thorough repair of that building will cost Rs. 20,000 or Rs. 25,000. It being extremely inconvenient in my present circumstances to maintain that building by incurring such a large expense, I could not do the same up till now. Now, as

you have agreed to give a thorough repair to that building at your own expense, I execute this document and agree and promise as follows : I grant you a rent free *ijara* settlement of the property described in the schedules, including the land underneath, building, compound, out-houses and all rights and interest for a term of 15 years from the date of this instrument..... You will have to incur large expenses for repairing that building so I fix no rent for the *ijara*..... The out-houses on the northern and southern portion of this property exclusive of their possession by the Public Library according to the provisions of the will of Joy Krishna Babu are included in this lease..... The sum that will be spent by you in making proper, i. e., 'thorough repairs' of this property shall be deemed to be the 'premium' for this lease, but the same not having been determined at present, I fix the same approximately at Rs. 25,000 (twenty-five thousand rupees), for the stamp of this instrument. Be it expressed that even if your costs for repairs or 'addition', 'alteration' and 'fittings connection' etc., exceed or fall short of Rs. 25,000 (twenty-five thousand rupees), the term of this lease shall not be more or less than 15 years and in the event of your desiring to purchase this property within the term of this lease and serving me with notice, I shall remain bound by the covenant to execute in your favour a *kobala* for out and out sale and free from incumbrances on receipt of a consideration of thirty-five thousand rupees. Be it further expressed that your total costs of repairs, 'addition, alteration' and indispensably necessary fittings connection' etc., must not be less than twenty thousand rupees..... Excluding from the said property the right of possession and enjoyment by the Uttarpara Public Library under the terms of the will executed on July 11, 1879 by the late Joy Krishna Mukherjee the rest of the property is the subject-matter of this instrument."

On July 30, 1931, the present suit was instituted by the three grandsons of Peary Mohan and six other residents of Uttarpara in the Court of the District Judge of Hooghly under s. 92, Civil P. C., with the sanction of the Collector of Hooghly. The allegations in the plaint, so far as they are material for the purposes of this appeal, are these : Babu Joy Krishna Mukherjee dedicated to the Uttarpara Public Library the properties mentioned in Sch. 'C' to the plaint, viz: (1) In the ground floor of the main building, big hall and the room to the west thereof, five rooms in the north and the south, small circular room at the north-western corner together with one storeyed verandahs on the south and the east and staircases leading to the ground floor on the east and the west ; (2) out-houses on the north and south of the main building ; (3) vacant land known as Phulbagan (flower garden measuring about one and half *bighas*, to the east of the said building ; (4) wall and masonry *ghat* on the bank of the Ganges.

He confirmed the said arrangement by the provisions made in cls. 12, 13, 14 and 15 of his last will. The persons named and described at the end of para. 12 of the said will, viz., Rash Behari Mukherjee and Shib Narayan Mukherjee, were but trustees, and

at present defendant No. 1 is but a trustee holding these rooms, the flower garden and out-houses in trust and for the use and benefit of the Uttarpara Public Library. The said library is now in charge of the committee appointed in pursuance of cl. 13 of the said will and the principal and the *pro forma* defendants (defendants Nos. 1 to 6) are all members of the said committee. Defendant No. 1 is the president of the said committee. Under the terms of the will the members of the committee of management have been constituted trustees of the library and they are holding the properties of the said library including the properties described in Sch. C in trust for the library. The bathing *ghat* to the east of the flower garden appertains to the trust estate having been constructed from the said library funds. Defendant No. 1 taking advantage of his position of the trustee of the said premises on behalf of the said library and asserting his personal right to the entire premises including the flower garden and the bathing *ghat* has leased out the said premises with the underlying and adjoining lands including the aforesaid flower garden and the bathing *ghat* to defendant No. 2 for a term of 15 years by a *patta* dated June 14, 1928. There was absolutely no necessity for the said lease for the repair of the library rooms and out-houses, etc., as sufficient provision has been made therefor in the aforesaid will. The said *ijara* is null and void and not at all operative with regard to the library rooms, out-houses, flower garden and bathing *ghat* which appertain to the trust estate of the Uttarpara Public Library. A cloud has been thrown upon the rights of the Uttarpara Public Library by the recitals in the said *ijara* lease. It has therefore become necessary in the interests of the Library to remove this cloud by the institution of a suit for declaration of the rights of the Uttarpara Public Library as conferred by the will on a proper construction thereof and also for the removal of defendants Nos. 1 and 2 from their offices as members of the committee.

Prayers of the plaintiff in the plaint, so far as they are relevant for the purposes of the present appeal, are : (a) A declaration that the properties described in Sch. C to this plaint including the flower garden to the east of the library rooms and the bathing *ghat* to the west of the flower garden appertain to trust estate created in favour of the Uttarpara Public Library and that the trust properties cannot be alienated by defendant No. 1. (b) A declaration that the lease executed in favour of defendant No. 2 by de.

defendant No. 1 on June 14, 1928, is null and void regarding the properties described in Sch. C including the said flower garden. (c) Removal of defendants Nos. 1 and 2 from their office as members of the managing committee of the Uttarpara Public Library. (d) Appointment of members of the committee of management in their place. On September 2, 1931, defendant No. 4 filed a written statement supporting the plaintiffs. On October 6, 1931, defendant No. 2 resigned his membership of the managing committee of the library. Santanu Banerjee (son of the daughter of Rash Behary) was appointed in his place as a member of the committee by the other members of the managing committee.

On December 2, 1931, defendant No. 2 filed his written statement stating *inter alia* (1) that he has ceased to be one of the alleged trustees mentioned in the plaint and as such he is liable to be dismissed from the category of the defendants; (2) that he has been advised to state that no valid trust has been created by the will of Joy Kissen in favour of Uttarpara Public Library; (3) that one of the ground floor rooms of the premises were permitted to be used by the local people by the leave and license of Joy Kissen Mukherjee and his successors-in-interest as a reading room; (4) that the plaintiffs have got no right to use any portion of the said building by virtue of any right accruing to them or any of them on the basis of the alleged trust; (5) that the *ijara* lease in his favour is not null and void; (6) that with the knowledge, consent and acquiescence of the plaintiffs he has exercised his tenancy right with regard to the said premises and has caused thorough repairs to be done to the said building at a cost of over Rs. 50,000 as the said building was prior to such repairs in an utter state of disrepair and in a tottering condition; (7) that he has not committed any breach of trust.

On December 17, 1931, defendant No. 3 filed a written statement supporting the plaintiffs. On January 4, 1932, defendant No. 1 filed his written statement. His defence is in substance the same as that of defendant No. 2. On the same day defendants Nos. 5 and 6 filed their written statement. They state *inter alia* that they do not admit the validity or otherwise of the trust in favour of the Uttarpara Public Library, but they leave the determination of such question entirely to the Court. On November 17, 1932, plaintiffs filed an application before the District Judge for amendment of the plaint stat-

ing *inter alia* that they have come to know on the inspection of the account books, minute books etc., of the library several instances of mismanagement. Sixteen instances were specified in this petition out of which the following only were pressed by the plaintiffs against defendant No. 1 in this Court:

(a) That though properties mentioned in Sch. C of the plaint appertain to the trust estate defendant No. 1 asserted his personal right to them; (b) that the parcel of land lying to the west of the railings of the compound of the building and measuring 4 *chittacks* 10 sq. inches appertains to the trust estate of the Uttarpara Public Library and fetched an annual income of Rs. 150. Defendant No. 2 has evicted the tenants and has caused a loss to the trust estate. Defendant No. 1 acquiesced in it; (c) that the northern and southern out-houses appertaining to the trust estate used to be let out by the said committee at a monthly rent of Rs. 7. The contractors engaged by defendant No. 2 have evicted the tenants without any protest from defendant No. 1; (d) that defendant No. 1 was a party to the appointment of Santanu in place of defendant No. 2 as a member of the committee in contravention of the terms and provisions of Joy Kissen's will and there is no one on the committee at present representing the family of Peary Mohan Mukherjee, second son of the donor.

This petition was allowed and the plaint was amended. Santanu was added as defendant No. 7 in this suit. A prayer for declaration that his election was illegal and void was added. Schedule C of the plaint was amended by including in it the strip of land measuring 4 *chittacks* 10 sq. inches on the Grand Trunk Road outside the compound railings on the west. On January 8, 1934, defendant No. 1 filed an additional written statement stating *inter alia* :

(1) That the 4 *chittacks* of land to the west of the railings never belonged to the testator. It was not given to the library. (2) That the northern and southern out-houses were allowed to be used by the library servants under the terms of the will though not exclusive but jointly with the servants of the *malik* of the house. The northern out-houses were never let out and the letting out itself is an unauthorized act. When the repairs of the whole house including the library portion was taken up it was necessary that some of the contractor's men should remain on the spot, so they were allowed to occupy the southern out-houses. (3) That the ap-

pointment of defendant No. 7 as a member of the committee in place of defendant No. 2 is not in contravention of the terms and provisions of the will.

On January 8, 1934, defendant No. 7 filed his written statement stating that he has been validly appointed according to the terms of the will of Joy Kissen and that he cannot be removed under the present suit under s. 92 as he was not concerned with any of the acts alleged in the plaint or in the amending petition which have been done prior to his appointment. The suit was dismissed by the District Judge on October 6, 1934. Hence this appeal by the plaintiffs. Defendants Nos. 1 and 2 have also filed cross-objections against certain findings of the District Judge. Plaintiffs in this suit pray for a declaration that the properties mentioned in Sch. C to the plaint appertain to the trust estate executed in favour of the Uttarpara Public Library and that the election of defendant No. 7 as a member of the committee is illegal and void. The contention of defendants Nos. 1 and 2 is that such declaration cannot be given under s. 92, Civil P. C. Mere declarations are outside the scope of s. 92 of the Code. But where reliefs contemplated by the section are claimed and such reliefs cannot be granted without the determination of the question whether a public trust exists or whether a particular property appertains to a public trust the Court in a suit under s. 92 can determine the question whether a public trust exists or a particular property appertains to such public trust. A suit for a mere declaration that a trustee has not been validly appointed may be outside the scope of s. 92. But in a suit under s. 92 the Court has to determine whether a trustee has been validly appointed or not if determination of such a question is necessary for giving reliefs claimed in the suit which properly come under that section. That the library is a trust for a public purpose of a charitable nature within the meaning of s. 92, Civil P. C., is not disputed in this case. It is also an admitted fact that the defendants are trustees of this public trust within the meaning of this section.

In the trial Court plaintiffs prayed for the removal of all the defendants on various grounds. In this Court they abandoned their prayer for removal of defendants other than defendant No. 1, and pressed for the removal of only defendant No. 1 on the four grounds mentioned above, and also on an additional ground, *viz.*, that he denied the trust altogether in his written statement and in his

memorandum of cross-objections in this Court. The contention of the plaintiffs is that defendant No. 1 committed breach of trust by asserting his personal right in the properties mentioned in Sch. C of the plaint in the lease executed by him in favour of defendant No. 2 on June 14, 1928. There is no substance in this charge. The lease by defendant No. 1 expressly excludes from the lease the right of possession and enjoyment by the library under the terms of Joy Kissen's will of 1879. The case of the plaintiffs in this Court is that the parcel of land lying to the west of the railings of the compound of the building appertains to the trust estate of the Uttarpara Public Library and that defendant No. 1 committed breach of trust by his acquiescence in the eviction by defendant No. 2 of the tenants who were occupying certain shops on this strip of land constructed out of the library fund and were paying Rs. 150 annually as rent to the library. The District Judge has found that this narrow strip of land does not fall within the boundaries of the 3 *bighas* 2 *cottas* of land, mentioned in cl. 12 of Joy Kissen's will. He has further found that the library has no right to this strip of land. Plaintiffs' contention in this appeal with regard to this 4 *chittaks* of land is this. It falls within the boundaries of the 3 *bighas* 2 *cottas* of land.

After Babu Joy Kissen's death in the year 1888, the committee of the library built certain structures on this strip of land from the library fund with the approval and consent of Babu Rash Behari Mukherjee. These structures were let out as shops and the rent realized from the tenants thereof was utilized for the purposes of the library with the consent of Babu Rash Behari and his successors-in-interest till the year 1931. This narrow strip of land, therefore, has become a part of the library properties either by a grant from Rash Behari Mukherji or his successors-in-interest or by adverse possession for more than 12 years. Plaintiffs' case in the plaint is that the properties mentioned in Sch. C to the plaint were dedicated to the library by Babu Joy Kissen. This strip of land was not included in this schedule when the plaint was filed. It was included in this schedule when the plaint was amended on the basis of the petition filed by the plaintiffs on November 17, 1932. This case was abandoned by the plaintiffs in this Court. Plaintiffs' case in this Court, *viz.*, that this narrow strip of land has become a part of the library properties either by grant from Rash Behari and his successors-in-interest or by adverse possession for more than 12 years is a new case

and I cannot allow them to make this case at this stage as it involves questions of fact.

In this view of the matter, the decision on the question whether this strip of land falls within the boundaries of the premises in question is wholly unnecessary for the disposal of this suit. The finding of the District Judge on this question is, therefore, set aside and the question is left open. The shops on this strip of land were certain sheds which were attached to the compound wall. They were removed with the consent of all the members of the managing committee when defendant No. 2 effected thorough repairs of all the buildings and the compound walls in pursuance of the terms of the lease granted to him by defendant No. 1 in 1928 to 1931. Defendant No. 1 alone, therefore, cannot be held responsible for the removal of these shops. Plaintiffs have abandoned in this Court their prayer of removal of the other members of the managing committee on this ground. It is not disputed in this case that the library rooms have been thoroughly repaired at the expense of defendant No. 2. If the eviction of the tenants on this strip of land is not an act of breach of trust on the part of the other members of the managing committee it is difficult to see how it can be treated as a breach of trust on the part of defendant No. 1. Further, plaintiffs have failed in this case to substantiate their case in the plaint that this strip of land was dedicated to the library by Joy Kissen. Defendant No. 1 is not, therefore, liable to be removed on this ground.

The next charge urged against defendant No. 1 in this Court is that he acquiesced in the eviction by the contractors engaged by defendant No. 2 for the repair of the buildings of the tenants who had been occupying the southern out-houses appertaining to the trust estate and paying a monthly rent of Rs. 7 to the library. By the will of Joy Kissen all the out-houses were set apart for the residence of the servants of the *baitakkhana* and the library. Rash Behari and his successors-in-interest were directed to repair these out-houses out of the library fund. The library had not sufficient funds for repairing the library rooms or the out-houses. The contractors employed by defendant No. 2 required the southern out-houses for storing the materials for repair. The committee were, therefore, justified in allowing the contractors to occupy the southern out-houses. The plaintiffs have not pressed this charge against other members of the managing committee. In these circumstances I hold that defendant No. 1 is not liable to be re-

moved on this ground. Mere assertion in a suit under s. 92, Civil P. C., by a trustee that trust properties are private properties is not by itself a sufficient ground for his removal. If he committed any breach of trust before the suit, his conduct in the course of the suit is an important element to be taken into consideration in deciding whether the breach should be condoned and he should be allowed to retain the office.

The provisions of Joy Kissen's will relating to the property have not been construed by any Court before. There is a statement in Joy Kissen's will that according to previous arrangement Hara Mohan had become the *malik* of the lands and buildings and after his death Rash Behari and his successors had acquired certain rights of ownership in the said land and buildings. Plaintiffs in their plaint stated that Babu Joy Kissen Mukherjee dedicated to the library the properties mentioned in Sch. C of the plaint and that he confirmed the said arrangement by his last will. The properties were mortgaged by Rash Behari on the footing that they were his absolute properties. On the basis of this mortgage the properties were sold and purchased by one Pramila Sundari Devi. On June 17, 1928, defendant No. 1 had to take a conveyance of this property from Pramila for a consideration of Rs. 2,000 apparently to put an end to the dispute. The rights of Rash Behari and his successors-in-interest to this property were not judicially determined before this litigation. Plaintiffs themselves have prayed for construction of the provisions of Joy Kissen's will relating to this property in the suit. Defendant No. 1 did not seriously dispute in the trial Court that the library had the right to use certain rooms in the ground floor and that its servants had the right to reside in the out-houses along with the servants of the *baitakkhana*. In this Court, the learned Advocate for defendant No. 1 did not challenge the finding of the District Judge that those rooms in the ground floor were dedicated to the use of the library and that the servants of the library have right to reside in the out-houses jointly with the servants of the *baitakkhana*. The construction of the provisions of the will relating to the flower garden is not free from difficulty. There are no express words in the will stating that the library would have the right to enjoy the amenities of this garden. In the absence of any express words it is not unnatural that doubts would arise regarding the right of the library to this garden.

Plaintiffs' contention is that the testator

intended that the amenities of the flower garden would be enjoyed only by the library and this intention is implied in the last portion of para. 15 of Joy Kissen's will. The case of defendant No. 1 is that the testator's intention was that the amenities of the garden would be enjoyed only by Rash Behari and the other donees mentioned in cl. 12 of the will. A trust is created when the author of the trust indicates with reasonable certainty by any words or acts (a) an intention on his part to create that trust, (b) the purpose of the trust, (c) the beneficiary and (d) the trust property: see s. 6, Trust Act, *Parma Nand v. Nihal Chand* (1), at pp. 261-262. The Court has no power to give effect to a hypothetical intention by supplying lacunæ in the will and thereby making a new will for the testator. The Court cannot speculate as to what the testator may suppose to have intended to write. The only intention of the testator which the Court can carry out are intentions either expressly or impliedly expressed in the will. No indication of intention is sufficient to induce the Court to hold that a certain bequest has been made, unless, as a matter of fact, the bequest is made either expressly or by necessary implication in the will. Necessary implication does not mean natural necessity but so strong a possibility of intention, that a contrary intention cannot be supposed: *Williamson v. Adam* (2). This definition has been simplified by James, L. J. in *Crook v. Hill* (3), thus :

"The question then resolves itself into this : whether, having regard to the language of this will, guarding ourselves scrupulously against indulging in conjecture, or in an attempt to do what we think the testator would have done if he had been better informed or better advised, but taking into consideration the whole of the will, and the whole of the surrounding circumstances at the time the will was made, which are legitimately to be brought in for the purpose of explaining his expressions though not for the purpose of altering or adding to them, there is in this case so strong a probability of intention to include, or not to exclude the children in question, as that a contrary intention cannot be supposed."

By cl. 15 of the will the flower garden has been placed under the control or management of the managing committee of the library and they have been directed to maintain it out of the library fund. What is

(1) 65 I A 252 (261-262); 175 Ind. Cas. 459; A I R 1938 P C 195; I L R (1938) Lah. 453; 32 S L R 821; 1938 O L R 309; 1938 A L R 502; 4 B R 673; 11 R P C 6; 42 C W N 1013; 48 L W 62; 1938 O W N 693; 67 C L J 540; (1938) 2 M L J 228; 40 P L R 829; (1938) M W N 885; 19 P L T 712; (1938) A L J 799; 40 Bom. L R 907 (P C).

(2) (1812) 1 Ves. & B 422.

(3) (1871) 6 Ch. 311.

the implication of these provisions? The repairs of the library rooms and of the out-houses in which the library has some interest are to be effected out of the library fund. The flower garden adjoins the library rooms. At the same time, the *baitakkhana* is above the library rooms and although the out-houses are to be repaired out of the library fund, the servants of the *baitakkhana* have the right to reside in them jointly with the servants of the library. It can be therefore, said with reasonable certainty that the intention of the testator was that only the amenities of the flower garden would be enjoyed by the library as well as by Rash Behari and the other donees mentioned in cl. 12 of the will as a contrary intention cannot be reasonably supposed. Plaintiffs' contention is that the wall and the masonry *ghat* on the bank of the Ganges were dedicated to the library of Joy Kissen. Defendant No. 1 denies this. There is nothing in the will of Joy Kissen to show that the wall and the *ghat* were dedicated either expressly or by necessary implication. The mere fact that some steps of the masonry *ghat* and the wall were constructed out of the library fund by the library committee long after Joy Kissen's death is irrelevant to the question whether Joy Kissen intended to dedicate the wall and the *ghat* to the library.

The question whether defendant No. 7 has been validly appointed as a member of the managing committee of the library in place of defendant No. 2 arises for decision in this suit as the plaintiffs' allegation in this suit is that defendant No. 1 was a party to the election of defendant No. 7 in place of defendant No. 2 in contravention of the directions given in Joy Kissen's will.

The direction of the testator in para. 13 of the will is that the eldest male heir of each of his sons and their heirs shall be a member of the committee. He had three sons: Hara Mohan, Peary Mohan and Raj Mohan. At least three members of the committee, therefore, must be the three eldest male heirs of each of his sons and their heirs. Defendant No. 1 represents Hara Mohan's branch. Defendant No. 3 represents Raj Mohan's branch. Defendant No. 2 represented Peary Mohan's branch. After his resignation there is no representative of Peary Mohan's branch in the committee as defendant No. 7 is not a representative of Peary Mohan's branch. In the vacancy caused by the resignation of defendant No. 2, the committee should have appointed somebody from Peary Mohan's branch in accord-

ance with the directions of the testator. The appointment of defendant No. 7 in place of defendant No. 2 is, therefore, invalid. But as this appointment was made by all the members of the committee and as the plaintiffs have abandoned this prayer for removal of the other members of the committee on this ground I am not prepared to remove defendant No. 1 on this ground. For the reasons given above, I hold that defendant No. 1 is not liable to be removed from his office as a member of the committee.

There was a dispute between the parties as to whether the 3 *bighas* 2 *cottas* of land with the buildings thereon and the four *chittaks* of land to the east of the Grand Trunk Road will revert on the death of defendant No. 1 to Joy Kissen's estate absolutely. The District Judge has held that this property will revert after the death of defendant No. 1 to Joy Kissen's estate absolutely. Defendants Nos. 1 and 2 have assailed this finding of the District Judge in their cross-objections. The decision on this question is not necessary for the disposal of this suit. The finding of the District Judge on this point is therefore set aside and the question is left open. The appellants and the respondents did not urge before us the other grounds taken in the memorandum of appeal and the cross-objections filed by them respectively in this Court. The result, therefore, is that the appeal and the cross-objections are allowed in part. The judgment and decree of the trial Judge are modified in the manner indicated above. Defendants Nos. 1 and 3 to 6 are directed to appoint a person in place of defendant No. 2 as a member of the managing committee of the library keeping in view the provisions contained in para. 13 of Joy Kissen's last will. In view of the facts and circumstances of this case we direct the parties to bear their own costs in this Court.

Narsing Rau, J.—I agree and would like to add a few words. The case concerns the Uttarpara Public Library, an endowment famous in Bengal and mentioned even in the *Encyclopædia Britannica*, which describes Uttarpara as

"famous for the public library founded and endowed by Jai Krishna Mukherji, which is specially rich in books on local topography. (Edn. 11: See under Uttarpara)."

It appears from Ex. 245 that the founder conceived the idea of such a library as early as 1854 and actually established it in 1859, constructing a magnificent building for the purpose on the bank of the Hooghly and spending more than a lakh of rupees on books.

By certain provisions of his last will dated July 11, 1879 he set apart for the use of the library the greater part of the ground floor of this two storeyed building, some out-houses and also, it is contended by the plaintiffs, "a flower garden on the eastern side of the library." The main controversy in this appeal is, or at any rate, during most of the argument was, with regard to the flower garden. According to the plaintiffs appellants it is part of the trust property set apart for the use of the library; according to defendants Nos. 1 and 2 (who are amongst the respondents) it is not part of the trust property. It is not in dispute that the flower garden existed at the date of the will and continued to exist until about 1905, but the flowers have long since disappeared and what now remains is two grass plots with a passage in the middle leading down to the river. The relevant provisions of the will are contained in paras. 12, 13, 14 and 15. Paragraph 12 of the will, after referring to the two storeyed building, goes on to say (as translated in the District Judge's judgment):

"The public library rooms having been located on the ground floor of this building and the *baitak-khana* having been located on the floor above, books are collected on the ground floor and newspapers and books, etc., are purchased from time to time and they are being read and used and shall be read and used by the general public according to special rules."

Then comes a somewhat obscure and controversial provision which, according to one reading, gives the ownership of the land and the building to the testator's grandson Rash Benari Mukherjee and his heirs or successors; but it is provided that none of them shall have the right to remove the public library from the ground floor. Paragraph 13 provides that although the aforesaid grandson and his heirs or successors shall be the owners of the land and the building (the precise translation of this part of the paragraph is also disputed), certain room and verandahs on the ground floor are to "appertain" to the public library. Then follows a provision as to how the expenditure of the library is to be met. The testator then goes on to say that the library is to be administered by a committee of not more than six members including the eldest male heir in the line of each of the testator's sons. (of whom there were three). Paragraph 14 describes the property out of whose income the expenditure of the library is to be met. Paragraph 15 is in the following terms (as translated in the District Judge's judgment):

"The members of the committee shall have no

right to the rooms on the upper floor and the lower floor of the library; my grandson Rash Behari Mukherjee shall have the right to these rooms but he shall have no power to sell them. The *pucca* kitchen, the stable and the rooms for the *darwans* on the northern and southern side of the building are set apart for the residence of the servants of the library and the servants of the *bitakkhana* on the floor above the library. Rash Behari Mukherjee or his representative shall meet from the library funds the cost of repairing these rooms. The flower garden on the eastern side of the library shall be under the management of the committee. The expenses on account of the garden and on account of the repairs of the library rooms shall be met from the library funds."

The Bengali word translated above as "management" is "*kartritwa*"; it is said on behalf of the plaintiffs-appellants that a better rendering would be "control." It will thus be seen that the testator in express terms placed the flower garden under the control or management of the committee. It is common ground that the members of the committee are the trustees of the public library in the sense that the use of the ground floor rooms and verandahs vests in them for the benefit of the library, so that the position is that the flower garden has by the terms of the will been placed under the control or management of the trustees of the library. The question is whether it can be said to be part of the trust property. The main contention on behalf of defendants Nos. 1 and 2, who are amongst the respondents in this appeal, is that the flower garden finds no place in para. 13 of the will, which describes the property "appertaining" to the public library. Accordingly, it is said the garden must be held not to "appertain" to the library. Further it is said, by virtue of the opening sentence of para. 13 of the will, the ownership of the land vests in the testator's grandson and his heirs. The result is that the ownership of the garden, unlike that of the property appropriated to the library under para. 13, vests in them without any subtraction as to use, and the garden cannot therefore form part of the trust property.

To my mind this argument is unconvincing. The most that can be inferred from the non-mention of the garden in para. 13 of the will, is that it does not appertain exclusively to the library, as do the ground floor rooms and verandahs mentioned in that paragraph; but it does not follow that the garden does not appertain jointly to the library and the *baithakkhana*. It is easy, and may often be necessary, to partition a building by floors and allocate one floor to one purpose and another floor to another purpose. This is what the testator has done

in para. 13 of the will. But it is neither necessary nor convenient to make a corresponding partition of a garden in the compound of the building. It is therefore, not surprising that the testator did not attempt any such thing in the case of the flower garden. The natural presumption is that a garden in the compound of a building is intended for the benefit of all the occupants of the building, unless there are words allocating the whole of it to the occupants of some particular floor. There are no such words in the will and we are therefore, entitled to infer that the garden appertains both to the library and to the *baithakkhana*. There are several circumstances in the present case which support this view and which show that the library was not intended by the testator to be excluded from the amenities of the garden. In the first place it is obvious that when a garden in the compound of a public library is placed under the control or management of the library committee, that in itself is an indication of the founder's intention that the garden must be managed primarily for the benefit of the library. It would be contrary to all reason to suppose that after endowing a library of great distinction in an imposing building on one of the finest sites available in the locality, the founder, when he came to dispose of the garden immediately adjoining the building, disposed of it for the exclusive benefit of somebody else, notwithstanding the fact that he has expressly given the control or management of the garden to the library committee. A man who has not spared expense or effort in providing various special amenities can hardly have intended to exclude the library from the ordinary amenities of a garden. In the next place it is significant that the testator has expressly directed that the expenses of the management of the garden must be met from the library fund. In the third place, when we look to the actual use that has been made of the garden and its site, we find that the evidence is all one way, namely in favour of the library. It has already been mentioned that the flower garden has, for some reason or other, been allowed to disappear; on several occasions since its disappearance the site has been allowed to be used for other purposes. On two or three occasions, the committee went so far in their vandalism as to let it out to circuses and the like, but at no time have they ventured to appropriate the income arising from such use to any purpose save that of the library fund. Yet another piece of evidence is furnished

by Ex. M (1), a lease granted by the founder in 1862 in which the western boundary of the land leased is described as "the land of the flower garden appertaining to the library." This was of course many years before his will of 1879; but no particular reason can be discovered for any change of intention on his part and as already pointed out, the indications are all the other way.

In view of all these circumstances, the conclusion seems irresistible that the garden was intended by the testator to appertain at least in part to the library and to my mind this intention has been indicated with reasonable certainty (to use the language of s. 6, Trusts Act) in the provisions of the will. The garden must therefore to that extent be regarded as part of the trust property. It is clear from the opening sentence of para. 13 of the will that what appertains to the library in respect of the ground floor rooms and verandahs is something less than the ownership, because otherwise there would be no meaning in describing the ownership as remaining with the testator's grandson and his heirs or successors. What appertains to the public library under para. 13 would therefore, appear to be only the use of the ground floor rooms and verandahs; and in my view, what appertains to the library by the implications of para. 15 is the joint use of the garden, the manner and extent of the use being regulated by the library committee in the exercise of the powers of control or management given to that committee by the aforesaid para. 15. Towards the conclusion of the argument, we were pressed by the Advocate for the respondents to leave open the question whether the flower garden is or is not part of the trust property. He urged that as there was admittedly a trust and as there was admittedly some trust property, it was unnecessary in the particular circumstances of the present case to decide whether the garden is or is not included in the trust property.

We cannot however ignore the fact that this particular question was a part of issue No. 7 framed by the trial Court. Evidence was produced upon it; the District Judge has recorded a finding (in the negative) in respect of it, and a large part of the argument before us was devoted to it. Moreover, we cannot tell what the findings upon the other issues may be, in the event of an appeal from the decision of this Court. It seems to me therefore that in accordance with the observations of their Lordships of

the Judicial Committee in *Tara Kant Banerjee v. Puddomoney Dossee* (4), at p. 488 repeated in *Mahomed Sulaiman v. Birendra Chandra Singh* (5), we are bound to record our opinion in this particular issue as on other important issues.

D.

Decree modified.

(4) 10 M I A 476 (488); 5 W R P C 63; 1 Suther §31; 2 Sar. 184 (P C).

(5) 50 I A 247; 74 Ind. Cas. 906; A I R 1922 P C 405; 50 C 243; 44 M L J 388; 32 M L T 115; 27 C W N 749; 37 C L J 561 (P C).

LAHORE HIGH COURT

First Appeal No. 376 of 1939

November 15, 1940

TEK CHAND AND DIN MOHAMMAD, JJ.

Guru AMARJIT SINGH THOUGH COURT
OF WARDS, DEPUTY COMMISSIONER,
JULLUNDUR—DEFENDANT—APPELLANT

versus

COMMITTEE OF MANAGEMENT FOR
GURDWARA THAMJI SAHIB
PANCHVIN PADSHAHI AND GURDWARA
GANGSAR PANCHVIN PADSHAHI—
PLAINTIFF AND ANOTHER—DEFENDANT—

RESPONDENTS.

Punjab Court of Wards Act (II of 1903), s. 19—Suit against ward for declaration that plaintiff is entitled to muafidari rights in lands owned by ward—Rights neither vesting in ward nor under superintendence of Court of Wards—Notice under s. 19, if necessary—Suit under s. 25-A, Sikh Gurdwaras Act (VIII of 1925), against ward in respect of rights in property belonging to ward—Entire property under superintendence of Court of Wards—Notice under s. 19, if essential—Sikh Gurdwaras Act (VIII of 1925), ss. 8, 10—Power of tribunal under s. 8—Whether can adjudicate of right, title and interest of Gurdwara in property mentioned in list under s. 7 (3) of Act.

In a suit for a declaration that the plaintiff is entitled to muafidari rights in land owned by a ward, when the muafidari rights do not vest in the ward nor are they under the superintendence of the Court of Wards, no notice under s. 19, Punjab Court of Wards Act is necessary.

Where a tribunal declares a well and two cisterns to belong to a ward (Guru) subject to certain rights therein in favour of the public, and subsequently a suit is brought against the ward under s. 25-A, Gurdwaras Act, in respect of these rights and the entire property of the ward is under the superintendence of the Court of Wards, a notice under s. 19, Punjab Court of Wards Act is necessary. 63 Ind. Cas. 606 (1), distinguished.

Under s. 8, Sikh Gurdwaras Act, the tribunal has only to determine the nature and character of the institution and not to adjudicate upon the right, title or interest of the Gurdwara in the properties mentioned in the consolidated list published under s. 7 (3) of the Gurdwaras Act. That is a matter which has to be decided in proceedings on the petition under s. 10. The remarks of the tribunal in its judgment and decree under s. 8 regarding the right, title and interest of the Gurdwara in the properties mentioned in

the consolidated list must be regarded as *obiter* and have, therefore, no legal effect as against the declaration of rights as embodied in the decree under s. 10. [p. 886, col. 2.]

F. A. from the decree of the Sikh Gurdwaras Tribunal, Lahore, dated July 12, 1939.

Messrs. *Achhru Ram* and *J. N. Talwar*, for the Appellant.

Sardar Harnam Singh, for the Respondents.

Tek Chand, J.—This is an appeal from the decree passed by the Sikh Gurdwaras Tribunal under s. 35-A, Sikh Gurdwaras Act, in favour of the Committee of Management of Gurdwara Thamji Sahib Panchvin Padshahi and Gurdwara Gangsar at Kartarpur, District Jullundur (respondent No. 1) against Guru Amarjit Singh through the Court of Wards (appellant) and Hira Singh (respondent No. 2) for possession of certain properties. On September 12, 1926, a petition under s. 7, Sikh Gurdwaras Act, was presented to the Provincial Govt. by 82 Sikhs praying that Gurdwara Gangsar Panchvin Padshahi situate at Kartarpur, District Jullundur, be declared to be a Sikh Gurdwara. The petition was accompanied by a list containing a description of the immovable properties, inclusive of the Gurdwara and certain *muafi* rights, which the petitioners claimed to belong to the Gurdwara. This petition with the accompanying list was published in the *Punjab Govt. Gazette*, dated August 30, 1930, (Notification No. 234/628-G). Within ninety days from the date of the publication of the notification, a petition under s. 8 was presented by Guru Amarjit Singh minor through the Court of Wards, claiming that Gurdwara Gangsar was not a Sikh Gurdwara. Another petition under s. 10 was also presented by the Guru through the Court of Wards, denying that the properties mentioned in the consolidated list belonged to the Gurdwara and alleging that they belonged to him. The Provincial Govt., in due course, forwarded the petitions to the Sikh Gurdwara's tribunal. The tribunal first tried the petition under s. 8 and, on January 19, 1934, gave judgment declaring that Gurdwara Gangsar was a Sikh Gurdwara as defined in the Act. The decree embodying the declaration also stated that

"the said Gurdwara includes the well with 'two bathing places' and the room and verandah in which Granth Sahib is opened. It does not include the Shivala."

From this decree Guru Amarjit Singh through the Court of Wards appealed to this Court, but the appeal was dismissed and the decree of the tribunal affirmed on

November 28, 1934. The tribunal then took up the trial of the petition under s. 10 and on February 28, 1935 it passed a decree in favour of Guru Amarjit Singh through the Court of Wards, declaring :

"(1) That the Gangsar well and its two cisterns and the site round about it, i. e., the whole of the site shown on the notification plan lying in *khassra* Nos. 4016 and 4008 belong to the Guru who has the right to irrigate the Moti Bagh and to fill the Indersar tank with waters of the well. At the same time the public have the right to bathe in the waters of this well and to worship it and to worship at the Chabutra Kham marked A and room for Granth Sahib marked B on the notification plan ;

(2) that the Guru is the owner of 17 *kanals* 15 *marlas* of land in village Kartarpur and the Gurdwara has in it whatever rights may attach to it by virtue of its being a *muafidar* ;

(3) that the institution Gangsar has no right, title or interest in 6 *kanals* 14 *marlas* of land *khassra* No. 4008.

(4) that the *muafi* in dispute belongs to the institution Gangsar subject to the *muafi* rules of the Govt.; and

(5) that the land in village Dhesian Kahna belongs to the Guru petitioner and the Gurdwara Gangsar has no right, title or interest in it."

No appeal was preferred to this Court against this decree by either party. On January 12, 1938, the Provincial Govt. issued notification No. 12 constituting a statutory committee for Gurdwara Gangsar. On March 27, 1938, within one year from the date of the notification, the committee presented a petition before the tribunal under s. 25-A of the Act praying that a decree be passed in its favour for possession of the properties mentioned therein, which, it was alleged, had been declared by the tribunal in its previous judgments as belonging to the Gurdwara Gangsar. The defendants named in the petition were Guru Amarjit Singh through the Court of Wards and Hira Singh Brahman of Kartarpur. The petition is not a very artistically drawn up document and para. 8, which contains the prayer, is very vaguely worded. It runs as follows :

"It is therefore prayed that a decree for possession of the property mentioned in para. 3, or any right, title or interest therein to which the plaintiff committee may be entitled, be passed in favour of the plaintiff committee against the defendants with costs."

In para. 3 of the plaint it had been stated that on the petition under s. 10 the tribunal had decided on February 28, 1935 :

"(a) That the public have the right to bathe in the waters of the well and to worship it and to worship the Chabutra Kham marked A and the room for Granth Sahib marked B on the notification plan; (b) that the Gurdwara has in it all the rights attached to an area of 17 *kanals* 15 *marlas* of land in *khewat* No. 1, *khatauni* No. 1219, *jamaabandi* 1921-22 of *Mauza* Kartarpur by virtue of its being a *muafidar*; and (c) that the *muafi* in dispute entered in the Register No. 203 as given in the notification also belongs to the Gurdwara."

At a subsequent stage of the proceedings before the tribunal, the plaintiff committee withdrew the prayer in respect of item (c) above and the trial proceeded with regard to items (a) and (b) only. The claim was resisted by Guru Amarjit Singh through the Court of Wards substantially on two grounds: (1) that the petition under s. 25-A was not maintainable as no notice had been served on the Court of Wards, at least two months before its institution, as required by s. 19, Punjab Court of Wards Act, II of 1903; and (2) that no decision had been given by the tribunal under s. 10 that the property in dispute belonged to the Gurdwara. It was further averred that the rights which had been given to the Gurdwara in the properties in dispute were not capable of possession.

The tribunal, in an interlocutory order, passed on June 10, 1938, held that s. 19, Punjab Court of Wards Act, did not apply and that no notice under that section to the Court of Wards was necessary. It then proceeded to the trial of the petition on the merits and, eventually, passed a decree in favour of the plaintiff committee for possession of (a) the rights of *muafidari* in the 17 *kanals* 15 *marlas* of land mentioned in the plaint; and (b) of the Gurdwara Gangsar which includes the well with two bathing places and the room and the verandah in which Guru Granth Sahib is opened and which is shown on p. 11 of the notification, Ex. P-1 (with the exception of the rectangle marked as Shivala) subject (1) to the rights of ownership of defendant No. 1 in the site and his rights to irrigate the Moti Bagh and to fill the Indersar tank with waters of the well, (2) to the rights of the public to bathe in the waters of the well and to worship it and to worship at the Chabutra Kham marked A and room for Granth Sahib marked B on the notification plan.

It will be noticed that the decree as passed by the tribunal goes much beyond the prayer in the plaint, which has been reproduced *in extenso* in an earlier part of the judgment. On appeal before us, the findings of the tribunal on the question of notice as well as on the merits have been challenged and I shall deal with them separately. It has already been pointed out that the petition under s. 25-A is against Guru Amarjit Singh through the Court of Wards. It is common ground that this petition is triable as a suit, and if under the law notice is necessary for institution of a suit for the same relief against the Court of Wards, it would be equally necessary for institution of proceedings under s. 25-A. Section 19,

Court of Wards Act, lays down that:

"No suit relating to the person of any ward or to any property under the superintendence of the Court of Wards shall be instituted in any Civil or Revenue Court until the expiration of two months after notice in writing has been delivered to, or left at, the office of the Deputy Commissioner of the district specified in the order of assumption in the notification under s. 9,....."

As stated above, the dispute relates to (a) the Gurdwara Gangsar including the well with two cisterns or bathing places described as *hauz mardana* and *pona zenana* in the notification plan (Ex. P1) and the room in which Guru Granth Sahib is opened together with the verandah in front, and (b) the rights of *muafidari* in 17 *kanals* 15 *marlas* of land. As regards (b) i. e., the claim in respect of the *muafidari* rights, it is difficult to see how notice under s. 19 is necessary. Admittedly, the *muafidari* rights in question do not vest in the Guru, nor are they under the superintendence of the Court of Wards. Mr. Achhru Ram, therefore, frankly conceded that the objection of want of notice to the Court of Wards under s. 19 of Act II of 1903 was untenable so far as this part of the claim is concerned. On the merits also, he admitted that in proceedings on the petition under s. 10, the Gurdwara having been declared to be entitled to the rights of *muafidari* in 17 *kanals* 15 *marlas* of land belonging to the Guru, the finding of the tribunal in its judgment under appeal cannot be assailed. The appeal relating to item (b), therefore, fails and must be dismissed.

The position with regard to the claim in respect of item (a), however, is different. In this item are included the well and the two bathing places or cisterns. The tribunal in its judgment and decree passed on February 28, 1935, on the petition under s. 10, had declared that the well and the cisterns belonged to the Guru, that he had the right to irrigate the Moti Bagh and to fill the Indersar tank with waters of the well, and that, at the same time, the public had the right to bathe in the waters of the well and to worship at the Chabutra Kham marked A and room for Granth Sahib marked B on the notification plan. The well and the two cisterns thus being the property of the Guru, subject to certain rights of the public, and the entire property of the Guru being, admittedly, under the superintendence of the Court of Wards, there can be no doubt that notice under s. 19, Court of Wards Act, was necessary before proceedings in a Civil Court could be instituted in respect thereof. In coming to the contrary conclusion the tribunal, in the judgment under appeal, clearly

misunderstood its previous decision on the petition under s. 10 and erroneously assumed that the property in the present suit had been declared to belong to the Gurdwara. In its judgment, in the s. 10 petition, dated February 28, 1935, the tribunal, after a lengthy discussion had definitely found that "the rights of ownership in the well and the two cisterns belonged to the Guru subject to the provision that the public had the right to bathe and worship there."

The contention of the Sikh worshippers that the well and the cisterns were endowed property was clearly and unequivocally rejected. In face of this finding and the explicit wording of the decree, dated February 28, 1935, it is difficult to see how it could be said that the well and the cisterns had been declared to be the property of the Gurdwara. The tribunal, in the judgment under appeal, refer to the allegation in the plaint that the well and the cisterns belonged to the Gurdwara. But such an allegation cannot change the real nature of the claim which is for possession of the property which had already been adjudged to belong to the Guru and is at present under the superintendence of the Court of Wards. In support of its conclusion, reliance was placed by the tribunal upon *Tara Singh v. Ganda Singh* (1), but that case has no bearing whatever on the facts of the present case. There, the Court of Wards, purporting to act under s. 8, Court of Wards Act, had wrongfully assumed supervision of the property of a third party, in which the ward had no share. It was held that its action was *ultra vires*, and the person affected thereby could sue without giving notice under s. 19 to the Deputy Commissioner. In the case before us, the cisterns and the well are under the superintendence of the Court of Wards, as the property of the ward, and, therefore, s. 19 clearly applies. The claim relating to these properties must, therefore, fail on this ground alone.

The decision of the tribunal is equally untenable on the merits, so far as the well and the cisterns are concerned. The decree passed by the tribunal in the petition under s. 10, the terms of which have been set out *in extenso* above, does not declare that the Gurdwara has any right, title or interest in the well and the cisterns. They have been declared to belong to the Guru, whose ownership is subject to the right of the "public" to bathe and worship. Obviously, the plaintiff committee does not represent the "public," nor does it claim any right on behalf of the "public." Mr. Harnam Singh frankly admitted that this was so. He urged, however,

(1) 2 L 151: 63 Ind. Cas. 606; A I R 1921 Lah. 240; 81 P L R 1921.

that the claim of the plaintiff committee was not based on the declaration of rights of the parties as embodied in the decree of February 28, 1935, but it was based on the decree, dated January 19, 1934, passed on the petition under s. 8, which had been affirmed by the High Court on November 28, 1934, where it has been held that the Gurdwara Gangsar was a Sikh Gurdwara and that "it included the well and the two bathing places and the room and the verandah in which Guru Granth Sahib was opened."

A perusal of the plaint, of which the operative part is contained in paras. 3 and 8, does not support this contention. But even if this were so, it does not make any difference. It is no doubt true that the tribunal, in its judgment and decree of January 19, 1934, purported to define the extent of the building of the Gurdwara. But these remarks in the decree were clearly *obiter*. That decree was passed in proceedings on the petition under s. 8, in which all that the tribunal had to decide was whether the institution, known as Gurdwara Gangsar at Kartarpur, was a Sikh Gurdwara as defined in the Act. It had, at that stage, only to determine the nature and character of the institution and not to adjudicate upon the right, title or interest of the Gurdwara in the properties mentioned in the consolidated list, inclusive of the Gurdwara building. That was a matter which had to be decided in proceedings on the petition under s. 10. The remarks of the tribunal in its judgment and decree of January 19, 1934, defining the extent of the Gurdwara building and stating that it included the well and the two bathing places have, therefore, no legal effect as against the declaration of rights as embodied in the decree of February 28, 1935. In that decree, the Guru was declared to be the owner of the well and the cisterns, subject to the right of the public to bathe and worship. No special rights in these properties were reserved for the Gurdwara and, therefore, the committee cannot claim any right, title or interest in them on behalf of the Gurdwara.

The committee's claim in item (a) included a prayer for possession of the room marked B on the plan in which Guru Granth Sahib is opened and Chabutra Kham in front thereof, marked A. In the memorandum of appeal, the appellant had asked for a reversal of the decree in respect to this room and the Chabutra. Before us, Mr. Achhru Ram, stated, however, that the rooms and Chabutra were originally in possession of Hira Singh and the appellant does not contest this part of the decree. Hira Singh has not appealed

and has apparently accepted the decision of the tribunal in this behalf. This part of the decree, therefore, must be maintained. The result is that the appeal is accepted in part and in modification of the decree of the tribunal, the plaintiff committee's claim for possession of the well and the two cisterns (or bathing places described as *hauz mardana* and *pona zenana* on the notification plan) is dismissed. In other respects, the decree of the tribunal is affirmed. In the circumstances the parties are left to bear their own costs in both Courts.

Din Mohammad, J.—I agree.

D. Order accordingly.

RANGOON HIGH COURT

First Appeal No. 112 of 1939

March 4, 1940

ROBERTS, C. J. AND BLAGDEN, J.

TAN SOON LI—APPELLANT

versus

BURMA OIL CO. LTD.—RESPONDENT

Abandonment—Fire breaking out at wax refinery—Wax flowing into river and collected by general public and brought and sold in market—Company not asserting right to wax—Company held, must be deemed to have abandoned its right to ownership to wax—Estoppel held arose by inaction—Issuing of press announcement subsequent to completion of salvage held immaterial—Contract—Finder of goods—Suit against purchaser from finder for return of goods—Onus to prove ownership.

A fire broke out at a refinery of a company used in connection with the manufacture of wax and tons of molten wax escaped into the adjoining river and creeks wherefrom it was collected by the general public and was freely bought and sold in the market. The company permitted the salvage, which they themselves were unable or unwilling to undertake, to continue; they took no steps to prevent trading in the wax. No steps were taken by the company to inform the general public of any intention to assert ownership over the wax:

Held, that the company must be deemed to have abandoned its right of ownership over the wax and the issue of a press announcement after the salvage was complete, in assertion of its right by the company was immaterial. [p. 890, col. 2.]

[English case-law relied on.]

Held, further, that the company having stood by at a time when its officials knew perfectly well that members of the general public were trading in the wax and having permitted persons to believe that the company had no further interest in it the estoppel arose by reason of their inaction as there was no prosecution instituted as a warning, no notice in the press, no evidence of cautions given to the general public. [p. 891, col. 1.]

[Case-law referred to.]

In a suit for the return of the goods, against the purchaser from the finder of the goods, it is for the plaintiff to prove that the goods are his and not for the defendant to show that they were his. *Perry v. Glissold* (5), relied on. [p. 891, col. 2.]

F. A. against a decree of the Assistant District Court, Insein, dated June 5, 1939.

• **Dr. Ba Maw**, for the Appellant.

Mr. E. C. V. Foucar, for the Respondent.

Roberts, C. J.—On Thursday July 7, 1938, a fire broke out at refinery of the respondent company at Syriam used by them in connexion with the manufacture of wax. Some 2500 tons of molten wax escaped into the Rangoon river and adjoining creeks, some into mid-stream and some on the river banks on which it was stranded with the ebb tide. At the time there was a strike among the labourers of the company. On Friday morning July 8, Mr. Copeman, a Shipping Assistant of the company, received instructions to try and salve the wax, and took three launches, six sampans and a cargo boat in order to do so. He collected wax in mid-stream and he saw a number of persons not in the employment of the company who were also collecting wax. He did not stop them and explained in evidence that he had no authority to do so. The attempt at salvage by the company was only made on this one day. It was difficult to get the requisite labour and the destruction and debris caused by the fire was extensive. Great numbers of villagers went out to gather wax on their own account on July 8, and succeeding days: their operations took place along the bank for several miles, and hundreds of people went out in river craft of all descriptions and waded in mud along the creeks filling with wax any kind of container they could bring for the purpose. A one-ton lorry made a succession of trips between the Syriam jetty and the town laden with wax which was freely bought and sold in the streets. For weeks afterwards, there was a brisk trade in wax: no one was prevented from carrying it on. There was wax in almost every house in Shriam, and it was piled in heaps in the open and was offered for sale there and elsewhere, openly, and was taken away in boats and road vehicles of many kinds.

There is no sort of doubt that everyone who dealt in this wax knew that it was wax which was or had been the property of the company and had escaped into the river as a consequence of the fire and in spite of the efforts of the company to save it. Mr. Mallinson the Officiating Works Manager of the company in his evidence said:

"Some people returned the wax collected by them I did not make any attempt to stop the villagers from collecting the wax. I assumed that they would return

the wax to us on receipt of, collection charges. There was no intention on the part of the company to abandon this wax. . . . Some villagers returned the wax saying 'this is your wax'. They did not ask for money. We did not pay anything to them."

He added that other villagers came and said they had wax in their sampans and were offered Rs. 5 per sampan. He does not say it was explained to them that this was offered to them as compensation for their trouble and the expense incurred in preserving the goods for the company as owners. They refused the amounts and took away, the wax.

They were not warned that the wax remained the property of the company. Nothing was done by the company to assert their rights of ownership in any of the wax not in their possession till July 14, when it was discovered that a firm named Messrs. Hee Kee held a quantity of wax and a letter (Ex. E) was written to them to say that

"this wax is our property and we have not relinquished our ownership of it. We are prepared to pay reasonable collection and delivery charges on quantities returned to us."

Other letters were written to various firms on later dates to the same effect. But as far as the general public were concerned nothing was done till the publication of a notice, Ex. 50, in various newspapers on August 18. This notice runs as follows:

"Notice is hereby given that the wax which as a result of the fire at Syriam Refinery on July 7, flowed in a molten state into the adjoining Pegu and Rangoon rivers, from where it has since been collected by unauthorized persons, still remains the property of the Burmah Oil Co., Ltd. Persons who do not take immediate steps to return the wax to the Burmah Oil Co., Ltd. are liable to be prosecuted for theft. The Burmah Oil Co., Ltd., requires the return of this wax to its Syriam Refinery or Dunneadaw Installation and upon application is prepared to send a lorry to collect it. Reasonable salvage and collecting charges will be paid on all quantities returned."

Before this notice, said Mr. Mallinson in his evidence,

"the B. O. C. took no action to inform the public about their intention to recover the wax. It was not practicable to go and collect the wax from various villagers. The company waited till the wax got into the hands of the fewer number of people."

Mr. Murray who was in charge of the wax department said in evidence:

"No notice of our intention to recover the wax was given to the public at large before the issue of notice Ex. L. . . . I know that a certain amount of wax was being sold openly. Before the issue of the notice we thought it unnecessary to inform the public that we would give them the salvage charge."

Then he said they thought everyone knew that the wax belonged to the company, and then they learnt that traders were buying it:

"So far as I know the Rangoon office did not take steps at that time to notify the salvors to bring back the wax to us on payment or to stop selling."

In the course of further cross-examination he stated:

"I cannot explain why the Syriam office did not take action to intimate to the people not to buy and sell the wax. As regards the Rangoon office it did nothing beyond writing letters to a few persons after they had bought the wax till August 17, 1938. . . . The chief reason for issuing the notice was that we realized that quite a lot of people were still ignorant of our intention and we wanted to inform them about our intention not to abandon the wax."

One of the persons who bought a quantity of wax was the appellant. He purchased three boat loads on August 4, August 14, and August 20, respectively. No one has contended that at the time of the last purchase he knew of the existence of Ex. L or had any notice other than Ex. L given to him by the company prior to an interview with the company's representative on August 26, and a letter written by them to him on the next day. He refused to return the wax and was prosecuted in a Criminal Court although he answered their letter and set up a claim of right, stating that he had made careful inquiries at Syriam and neighbouring places whether he could buy the wax lawfully and was fully satisfied that the company had abandoned it as derelict. He contended that the conduct of the company in having waited till the bulk of the wax had passed into the hands of several merchants precluded them from asserting their title to it at so late a stage. At this trial Mr. E. W. Davies the manager of the Refinery Department gave evidence for the prosecution. He has since left this country and this evidence was admitted in the present case under s. 33, Evi. Act, and relied on by the company in their reply to the written statement of the appellant. He said:

"The company took no steps whatever to prevent the villagers collecting the damaged wax. The buying and selling of the damaged wax was actually going on to a limited extent and without concealment. I think it was sold in the Syriam jetty bazaar and various villages. No warning was given to the public till we issued the notice in the vernacular papers. We stood by like that on account of the strike, fire and other troubles and because it was not a practical proposition to recover the wax from hundreds of small holders. When we learnt that a large quantity of wax had got into the possession of a few Rangoon merchants we began to take action and we did so because we believed it was their intention to compete against the B. O. C. with the B. O. C.'s own property. . . . By August 19, local candle manufacturers were using this damaged wax for making candles and selling them. This was bound to affect our trade in candles to some extent. It was for this reason we made our press announcement to warn the public in general."

Mr. Lin Bin Hock called for the company said that for four or six days before he received the letter written to him on July 14, he purchased wax openly and nobody ob-

jected. He did not see the B O. C. collecting wax. The criminal prosecution of the appellant having proved unsuccessful the company brought an action against the appellant for recovery of the wax or alternatively for its value and the learned Additional District Judge of Insein held they were entitled to recover it and granted a decree accordingly. This appeal has been brought against his judgment and decree.

Dr. Ba Maw for the appellant contended that the company abandoned the wax between July 9 and July 13. Some of it was lost beyond recovery and no steps were taken to inform the general public of any intention to assert ownership over the wax which was being freely brought and sold in the neighbourhood of the refinery. The company could have taken the step which they took on August 17, much earlier if they had desired to do so and could have issued a notice to the public. When wax was brought to them and the finders merely gave it to the company it was accepted but other persons were allowed to remain in possession of wax when they expressed unwillingness to accept Rs. 5 a sampan. They were not told that this amount was offered as collection charges, nor were they warned that the company still claimed to be owners of the wax. They were permitted to sell it as though it was their own property. Though it is true that in individual cases unknown to the appellant the company wrote letters saying that the wax was still theirs it was not until the middle of August that the company ever endeavoured to assert the rights of an owner as against the general public and then only because they thought that traders on a large scale were entering into competition with them. If this had not taken place and the wax had remained in the hands of villagers in small amounts no action would have been taken.

The company permitted the salvage, which they themselves were unable or unwilling to undertake, to continue; they took no steps to prevent trading in the wax. Then when all the work of salvage had been done and as the result of open buying and selling the wax had found its way into the hands of a few merchants they decided it would be profitable to deny their abandonment of the wax. Now on August 10 the company caused a letter to be written to a firm which had openly purchased wax demanding its return "or unless you pay us Rs. 280 per ton you will be liable to immediate prosecution for theft." This was wax which the company knew had been shipped

to Hongkong and other places. Mr. Mallinson, and Mr. Pringle of the Indo-Burma Petroleum Co., called by the plaintiffs, valued the damaged wax at Rs. 25 per ton.

It was on August 4, that appellant bought the first boat load of wax. He endeavoured to support his case by alleging in evidence that with two other Chinese, the vendor and broker, he went to the office of Mr. Roper, the General Manager of the company, on or about August 2, and through an interpreter asked Mr. Roper whether the company wanted the wax back and that Mr. Roper said he did not. This story has been disbelieved and the evidence of the alleged interview is not now relied on. But Dr. Ba Maw urges that however untruthful his client may have been this does not and cannot affect the fact that the company had abandoned the wax long before his purchase of it, apart from the operation of any rule of estoppel. The first purchase by the appellant was 28 days after the fire: the wax was in a damaged state. No one had been interfered with or prosecuted for dealing with it. No notice had been issued to the public. There had been in fact an abandonment by the company but the company's officials changed their minds and wished they had not abandoned the wax when they discovered the competition which was bound to affect their trade.

Secondly, it is said there is the question of estoppel. The company intentionally permitted the public of which the appellant was a member to believe that the company had no further interest in the wax and to act upon that belief. Accordingly the company cannot now set up their title to it. In *Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.* (1) it was pointed out that estoppel by representation depended upon the existence of a duty and the judgment of Blackburn, J. in *Swan v. North British Australasian Co.* (2) shows that there must be the neglect of some duty that is owing to the person led into that belief, or to the general public of whom the person is one, and not merely imprudence on the part of the person against whom the estoppel is sought to be founded. Baron Parke in

(1) 1 L R (1938) Mad. 360; 172 Ind. Cas. 745; A I R 1938 P C 52; 32 S L R 313; 65 I A 75; 1938 O L R 68; 4 B R 260; 10 R P C 169; 1938 O W N 205; 1938 A L R 100; 42 C W N 321; 19 P L T 147; 1938 A L J 273; 47 L W 329; (1938) 1 M L J 268; 66 C L J 510; (1938) M W N 552 (P C).

(2) (1853) 2 H & C 175; 159 E R 73.

Freeman v. Cooke (3) explained that :

"If whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true and believe that it was meant he should act upon it, and did act upon it as true the party making the representation would be precluded from contesting its truth: and conduct by negligence or omission where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth may often have the same effect. As, for instance, a retiring partner omitting to inform his customers of the fact, in the usual mode, that the continuing partners were no longer authorized to act as his agents, is bound by all contracts made by them with their persons on the faith of their being so authorized."

The illustration shows that "duty" is referred to in a wider sense than a mere duty the breach of which gives rise to a cause of action. In *Gregg v. Wells* (4) Lord Denman said :

"A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving."

It is contended that the general public was induced to believe and did believe as a result of the action of the company in standing by that the wax was to be regarded as a substance in which they had no further interest and which belonged to the salvors. It was not necessary for every member of the public to inquire at the company's office, although the appellant during the course of this action at one time feared it might have been and pretended that he had done so. The company now contends that the position was that they were bound under s. 168, Contract Act, to pay the finders compensation, but their willingness to do so was concealed from the public at the time. During the months of July and early August at least this was not put forward as the position; there is no single instance given in evidence of even the smallest sum paid by them as compensation to finders before their letters beginning on July 14, intimated their willingness to pay such moneys to the particular recipients: the company was not troubling to get the wax back from those members of the general public who they now assert were finders of their property.

Except as affecting the question of costs it does not seem to me to matter that the appellant, after the criminal prosecution chose to try and strengthen his case in the civil action brought against him by giving an account of an alleged interview with Mr.

Roper. What concerns us is the belief which existed in his mind as a member of the public at the time he bought the wax. There is no evidence that he knew of any of the letters such as Ex. E written to individuals in July, and indeed it has never been contended that he had any such knowledge. The appellant's letter to the manager of the company (Ex. N) written on August 31, sets out his position and is precisely the case which is urged before us in appeal. It is conceded that a finder of wax on the day after the fire had a duty to offer to return it to the company but that does not touch the point at issue here which is whether the company's conduct between the date of the fire and August 4, was such as to amount to an abandonment of any wax which had not been offered to them or had been refused by them; and was also such as to raise an estoppel from denying that a purchaser of it in the month of August was the true owner.

It is not necessary for us to decide whether they abandoned the wax which was the subject of the letter written to Messrs. Hoe Kee on July 14, although Dr. Ba Maw has contended that all their wax was abandoned before this date. After such a fire and in all the circumstances of the case it might be difficult to say that the company had stood by and allowed Messrs. Hoe Kee to believe they were acquiring a good title in so short a space of time. But having had it brought to their knowledge in mid July that traders were acquiring wax in this way I am of opinion that they then certainly did abandon the wax which they could not trace. Their notice to the public published in the press on August 18, was a complete change of front induced by their fear of competition after abandonment. So far as estoppel is concerned, it may well be said they stood by as far as the general public was concerned despite the knowledge which their letters to Messrs. Hoe Kee on July 14, and to others show that they then possessed. They did not try to prevent sales but to intervene after sales had taken place. Mr. Murray has said that in some cases in which disputes arose a considerable time after the fire there were settlements out of Court and the company paid Rs. 25 per ton for salvage and delivery charges. The evidence of Mr. Mallinson and Mr. Pringle is that that Rs. 25 to Rs. 30 per ton was its full value to them and there is some ground for the contention that the company were really buying back the wax at that figure.

(3) (1848) 2 Ex. 654; 18 L J Ex. 114; 12 Jur. 777.

(4) (1839) 10 A & E 90; 2 P & D 296.

It was very discoloured and dirty and contained a lot of water.

In my opinion, therefore, the company abandoned the wax in suit. Nothing was done by them until the discovery that it might be profitable to pounce upon the true owner. The criminal prosecution launched against him was preposterous. I also hold that the company is estopped from denying his title. The learned Additional District Judge has considered the matter as though the appellant were a finder of the wax directly after the fire and has referred to s. 403 (2), I.P.C. But the respondent company stood by at a time when its officials knew perfectly well that members of the general public were trading in the wax and permitted persons to believe that the company had no further interest in it. The estoppel arose by reason of their inaction. There was no prosecution instituted as a warning, no notice in the press, no evidence of cautions given to the general public. The judgment and decree of the learned Additional District Judge must be set aside. We are informed that the respondent company is no longer in possession of the wax and there must be an enquiry in the District Court as to the amount to be paid to the appellant for damages in lieu thereof, since we have no evidence which enables us to determine the proper sum to be awarded by reason of the appointment of a Receiver in the suit.

With regard to the question of costs we have been most unfavourably impressed by the palpably false evidence given at the trial by the defendant concerning a fictitious interview with Mr. Roper. This was not even pleaded and the defendant said that he abstained from pleading it for the very purpose of causing surprise. Some of his evidence however, was unchallenged and on his unchallenged evidence together with the evidence of the plaintiffs themselves we think he had a good defence. The order as to costs must be that each side pays its own costs in the Court below and the appellant must have his costs in the appeal, Advocate's fee thirty gold *mohurs* and also the costs of the enquiry as to damages.

Blagden, J.—The plaint in this case is dated December 16, 1938 and thereby the plaintiff company prayed *inter alia* for a decree directing the return to them of "all wax in the possession of the defendant" irrespective of its origin. In this demand they have wisely not persisted and the dispute before us had centred round some 136 tons of wax which the defendant had bought

from one Tan Cheng Hong during the previous August, which 136 tons of wax I shall hereinafter call "the wax in suit." There is no dispute that the wax in suit had once been the plaintiffs' wax, forming as it did part of a much larger quantity of wax which escaped from their premises in a molten state on July 7, 1938: whether it was still their wax we have to decide. There is no dispute that before commencing their suit the plaintiffs did that which was essential to perfect their cause of action (if any) by demanding the return of the wax in suit and receiving a refusal. The defendant may or may not have been within his rights in refusing to return the wax in suit, but in any event he was not a mere wrongdoer but a purchaser for value; and, of course, it is common ground that immediately before the presentation of the plaint he was in possession of the wax in suit. It is true that at a subsequent stage in the proceedings the plaintiffs applied for and obtained the appointment of a Receiver, as a result of which the defendant lost possession. But this order was made to preserve the subject-matter of the dispute and not to re-judge it: and at the trial the defendant should have been deemed to be still in possession. That being so, it was for the plaintiffs to prove that the wax in suit was theirs and not for the defendant to show that it was his: see the judgment of the Privy Council in *Perry v. Cissold* (5). This I mention because if there were any serious doubt as to whose the wax in suit was on December 16, 1938 the defendant would have been entitled to the benefit of that doubt, an important point which seems to me to have been somewhat lost sight of in the judgment now under appeal.

Dr. Ba Maw on the appellant's behalf made to us three submissions. First and foremost he contended that on the facts proved or admitted in this case (which I need not recapitulate) the plaintiffs must in law be held to have abandoned the property they formerly had in the wax in suit. He said that abandonment took place on July 8, 1938 (when the plaintiffs ceased their own salvage operations) or at all events a matter of several weeks before, as far as we know, the defendant came on the scene at all. It is quite sufficient for his purpose if the abandonment was complete by August 4, when the defendant made his first purchase, and save for the purpose of testing the

(5) (1907) A C 73; 76 L J P C 19; 95 L T 890; 23 T L R 232.

validity of his argument it is not necessary to consider the precise moment when, if at all, it took place.

Mr. Foucar submitted (1) that there is in law no such thing as abandonment of property and (2) that in any event the facts here do not point to abandonment. The first proposition is in my opinion far too wide. Authority is not lacking for the legal possibility of abandoning one's property. In *Reg. v. Moore* (6) Rolfe, B. and in *Reg. v. Edwards* (7) the C. C. C. R. in England unhesitatingly recognized that such a thing might take place though both were of opinion that on the facts before them it had not done so; see also *Rex v. White* (8) where the proper direction to a jury on a charge of theft where there is ground for supposing the property in question may have been abandoned is considered. In Archbold's Criminal Law, 28th Edn., p. 545 it is said on the authority of 2 East P. C. 606 and St. Dig. C. L. 2nd Edn., 253 "things of which the ownership has been abandoned are not capable of being stolen," while in Madras it seems to have been held on facts identical with those in *Reg. v. Edwards* (7) that abandonment was in fact complete: see 4 M. H. C. App. 30, cited in Ratanlal and Thakore's Law of Crimes, Edn. 13, p. 928. I may add that in *Mitchil v. Alestree* (9) Twisden, J. asserts that a man loses such property as he has in a tame fox if it escapes and resumes its wild nature: To hold that he is in a better position if, for example, he deliberately turns the animal loose hoping never to see it again, and then changes his mind when one of his neighbours has shot it, would, I think, be repugnant to common sense.

The question whether in this case we can say, the question of abandonment or no abandonment being one of fact, that abandonment did take place before the defendant bought the wax in suit is much more difficult. We must and do make every allowance for the difficulties in which at the material time the plaintiffs were placed by the strike (though this seems to have been nearing its end), by the fire, and by the immense quantity of the wax which had escaped. We must bear in mind that the original escape of the wax took place in spite and not because of the actions of the plaintiffs

for, it is much easier to infer that a man has abandoned that which he has deliberately thrown away than that of which he has lost possession by the act of God or of a third party. But as against this it must be remembered that the wax escaped into a river which like all rivers "wound somewhere safe to sea." If nothing was done by anybody about retrieving it most of it must within quite a short time have been irretrievably lost and, after the first day, the plaintiffs for their part did nothing about retrieving it. For myself I attach particular importance to the fact that the plaintiffs ceased their salvage operations after one day and very little to their motive in so doing which, after all, the general public cannot have known though it might or might not have guessed. Mr. Foucar rightly stressed to us the practical difficulties of doing at that stage more than they did, but most properly admitted that they could at least then have advertised, as they did five weeks later. Whether they owed anyone but themselves a duty to do so, I will not, for the moment, discuss: but I do not think that in all the circumstances it was the least that a person in their position who did not intend to abandon the wax would have done. In my judgment we are justified in saying and bound to say that on the evidence before him and in particular that of the plaintiffs' own witnesses the only conclusion at which the learned Judge could properly have arrived was that at some time between July 8 and 14, 1938, the plaintiffs had abandoned their property in the wax then unsalved; so that it became first the property of nobody, and then the property of the first person to reduce it into possession. As I have said it is for the plaintiffs to show title and therefore in the absence of evidence that the wax in suit had before the plaintiffs abandoned it been salved by some third party (i. e. was stolen wax) we must conclude that the wax in suit formed part of the abandoned wax, as it is overwhelmingly probable that it did. Putting it at the very lowest (and this is quite sufficient for Dr. Ba Maw's case) we should in my judgment hold that had he properly directed himself the learned Judge must have been left in reasonable doubt as to the plaintiffs' title and should therefore have dismissed the suit.

It may well be that at a quite early stage the plaintiffs began to repent them of their decision and sought, ultimately by taking drastic steps, to undo what they had done. But this seems to me to make no difference since from its very nature abandonment must

(6) (1861) L & C 1; 30 L J M C 77; 7 Jur. (N S) 172; 3 L T 710; 9 W R 276; 8 Cox C C 416.

(7) (1877) 13 Cox C C 384; 36 L T 30.

(8) (1912) 23 Cox C C 190; 107 L T 528; 76 J P 384.

(9) (1868-88) 1 Vent 295.

be irrevocable. Dr. Ba Maw's second submission only becomes material if we are wrong in our views on his first. He contends that failing abandonment in fact the plaintiffs are estopped from denying abandonment. Mr. Foucar on the other hand says that they never represented to any one that they had abandoned any wax; or if they did that they owed no duty to the defendant and, in the absence of such a duty, cannot be estopped. In support of the latter proposition he relies on *Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.* (1).

He further contends that to rely on estoppel the person who seeks to do so must have been not only misled but misled despite his being a reasonable man, and as authority for this he cites Parke, B. in *Freeman v. Cooke* (3). The defendant, he says, was not misled at all, or, if misled was unreasonable in reaching the conclusion he did. In my judgment there was, at least, a representation of abandonment. My reasons are the same as my own and my Lord's reasons for thinking there was in fact an abandonment, and I will not repeat them. The doctrine that there can be no estoppel where there is no duty owing by the party said to be estopped to the party misled, or to the general public of whom that person is one, probably originated in the judgment of Blackburn, J., in *Swan v. North British Australasian Co.* (2) (qualifying the observations of Ashhurst, J., in *Lickbarrow v. Mason* (10) and received the approbation of the House of Lords in *Jones & Co. v. Waring and Gillow Ltd.* (11) and of the Privy Council in *Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.* (1). Moreover Blackburn, J., at p. 181* described the duty referred to as a "duty which the law casts" upon the party said to be estopped, which indicates that mere moral duty will not suffice.

What however, is meant by "duty" in this connection? It may mean only an obligation the mere breach of which will of itself involve the defaulting party in a legal liability or it may also include an obligation which a party need only fulfil if he proposes to assert a particular right or to rely on a particular defence in subsequent proceedings. The illustration, given by Blackburn, J., himself in his subsequent citation

from the judgment of Parke, B. in *Freeman v. Cooke* (3) of the outgoing partner who fails to notify the fact of his retirement shows clearly that he used the word "duty" in the wider sense. Such a person may indeed be made liable for the debts of the continuing partners: but, if the latter duly meet their obligation no one in the world has any right to complain that he kept his retirement a secret. Moreover, in the course of the argument in *Freeman v. Cooke* (3), Parke B. says that in the majority of cases in which an estoppel exists

"the party must have induced the other so to alter his position that the former would be responsible to him in an action for it;" there can be no majority without a minority. It also seems clear that to found an estoppel there need be no duty, even in the wide sense I have tried to indicate, to make a representation. It is quite sufficient if there is a duty to speak the truth if speaking at all. A person who is minded to allow the public a short cut across his field is not bound to indicate by a sign-post the path which he is dedicating. But if he does put a sign-post he cannot, while it is up, maintain trespass against users of the path, and the reason is that the law casts on him a duty, in the sense indicated above, not to blow hot and cold. Here we have to deal with the much more difficult case of a passive and not an active misrepresentation. Mr. Foucar says that at the worst his clients were foolish and that a man or company is not bound to abstain from folly. As a general proposition that is true enough. But if a man's folly becomes the proximate cause of damage to his neighbours that is a very different story, and one daily illustrated in the use (or misuse) of internal combustion engines. Here again, the fact that it was into a river that the wax escaped is of great importance. In this respect the present case resembles those English cases in which a man whose goods have been wrongfully seized in execution stands by knowing that a sale under the execution is intended rather than those in which he stands by knowing only of the seizure. He has been held to be estopped in the former but not in the latter circumstances: see *McCardie, J.'s* judgment in *Jones Brothers Holloway Ltd. v. Woodhouse* (12) at pp. 127 and 128.

It was here no fault of the plaintiffs that the wax escaped; but they must and according to Mr. Murray's own evidence, they did know before they advertised that the situa-

(10) (1787-94) 2 T R 63; 1 H Bl 357; 6 East 21; 1 R R 425.

(11) (1926) A C 670; 95 L J K B 913; 135 L T 548; 32 Com. Cas. 8; 70 S J 756; 42 T L R 644.

*Page of (1853) 2 H. & C.—[Ed.]

(12) (1923) 2 K B 117 (127 & 128); 92 L J K B 638; 129 L T 317; 67 S J 518.

tion of the escaped wax was after July 8, 1938 such that reasonable doubt did in fact exist among the public as to whose it was and that other people were taking trouble and incurring expense in dealing with the wax and would thereby suffer damage if the plaintiffs later successfully claimed it. Many cases might be thought of in which the duty to warn a person that he is heading for danger is, at most, a moral duty. I do not think the present is one of them. In my judgment the omission to take reasonable steps to assert their title to the escaped wax when ceasing their pursuit thereof, which again, in my opinion, gave the public reasonable grounds for thinking they no longer claimed a title to it, was just such an omission as s. 115, Evi. Act, contemplates. This section has been said more than once to be a codification of the English Law of estoppel and, in England, Courts of Equity have long recognized the principle that a man cannot with impunity stand by having a charge or encumbrance on property and allow others to make advances on it on the faith of its being unencumbered. See for example *Troughton v. Gitley* (13), and the very pertinent observations of Lord Granworth in *Ramsden v. Dyson* (14) at p. 140 and of Thesiger, L. J. in *De Bussche v. Alt* (15) at p. 314 both cited in the judgment of McCardie, J., to which I have just referred. The former says:

"If a stranger begins to build on my land supposing it to be his own, and I perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own."

The latter says this:

"If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act."

Nor was this principle unknown in the English Common Law Courts. In *Cornish v. Abington* (16) Pollock, C. B. says:

"If any person, by a course of conduct or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement or licence, whether the party intends that he should do so or not, it has the effect that the party using that language or who has so conducted himself, can

(13) (1737-84) Ambler 629.

(14) (1866) L. R. 1 H. L. 129 (140); 12 Jur. (N. S.) 506; 14 W. R. 926; 149 R. R. 543.

(15) (1878) 8 Ch. D. 286 (314); 47 L. J. Ch. 381; 38 L. T. 370.

(16) (1859) 4 H. & N. 549; 28 L. J. Ex. 262; 7 W. R. 504.

not afterwards gainsay the reasonable inference to be drawn from his words or conduct."

As to the question whether reasonableness is essential in the person relying on estoppel, in my opinion, that was here in fact nothing unreasonable in the belief, if it existed, that the wax in question had been abandoned. Mr. Foucar said it was unreasonable to suppose the Burmah Oil Company would give anything away. There is certainly this much to be said for his argument, *viz.*, that when some villagers brought wax back to them and did not expressly ask for remuneration, they did not give them one anna for their trouble; while conversely, from others they demanded under a threat of prosecution Rs. 280 for what they now say was worth Rs. 25. Neither of these facts indicates magnanimity: but in fact in my judgment the wax had been abandoned and it cannot be unreasonable to believe what is true. We, at all events, having held the fact believed to be true, can hardly held the belief in it to be unreasonable. Even if I am wrong in this, I do not consider that Mr. Foucar's contention as to reasonableness is right, when one is enquiring whether a party believed a representation or not it is undoubtedly most material to enquire whether it would have been reasonable for him to do so, the more extravagant the story the less likely he is to have believed it. Given, however, that he in fact believed, the requisite that the belief should be reasonable is conspicuously absent from the Evi. Act, s. 115. A passage in Baron Parke's considered judgment in *Freeman v. Cooke* (3) (which I have already referred) is relied on. Parke, B. first says that it is essential to an estoppel at least that he (the party estopped) "means his representation to be acted upon, and that it is acted upon accordingly." He then, by way of qualification of what he has just said, uses the words on which Mr. Foucar specially relies

"and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth."

He then proceeds (making no further reference to the reasonableness or unreasonableness of the party misled)

"and conduct, by negligence or omission where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth may often have the same effect."

Compare the similar words of Abinger, C. B. in *Cornish v. Abington* (16) already quoted. Neither of these passages in so far

as they mention the reasonableness of the belief induced, is read in its context, a definition, but each is rather an illustration of circumstances in which an estoppel commonly arises. But if either was meant to be a definition, it is not the same definition as that in the Evi. Act, and we are administering the Law of Burma and not that of England. Mr. Foucar rightly points out that the Privy Council has said that the section is an enactment of the English Law. Whether that means that we must read into the section words that are not there in order to make it precisely tally with the language of individual English jurists however eminent, used long before the passing of the Act, I should be inclined to doubt. But as we hold that the belief, if in fact it existed, was here a reasonable belief we need not decide the point.

As to the existence of the belief in question, the case has been somewhat complicated by the defendant's conduct in seeking at what was obviously a very late stage to fortify an already excellent case which has stood him in good stead in the quite unjustifiable criminal proceedings that had been taken against him, by adding to it at the trial of this action, a story which is now admitted to be completely false. On this point, however, there is nothing that I can usefully add to my Lord's judgment. The worst of liars may, at times tell the truth and as my Lord has shown the essential part of the defendant's case was not really challenged. I respectfully agree that complete justice can be done to the plaintiffs if we make the order as to costs which my Lord has proposed. The only other point in the case (which now does not arise) concerns ss. 168 and 169, Contract Act. As to this, I do not as at present advised see any reason why a finder of goods should not transfer to another such rights in those goods as he has. Mr. Foucar could advance no reason why the owner should be freed from any liability to pay compensation by such accidents as the death or bankruptcy of the finder and I see nothing contrary to public policy in a voluntary transfer of those rights, although clearly there can be no transfer of the property in the goods where s. 169 is not satisfied. In view, however, of our conclusions on the other points in the case we need not decide this one. Finally, I should like to thank both the learned Advocates for the assistance they have given to us, and in particular to myself as a newcomer to this Court.

s.

Order accordingly.

NAGPUR HIGH COURT

Miscellaneous Appeal No. 123 of 1938

March 27, 1939

GRILLE, J.

BAPUSAHEB AND OTHERS—

APPELLANTS—JUDGMENT-DEBTORS

versus

BHAGIRATTHISAO GAJRAJ AND

ANOTHER—RESPONDENTS

C. P. Debt Conciliation Act (II of 1933), s. 15 (1) —Member of joint family incurring debt in individual capacity—Creditor attaching his share in house belonging to family—Debtor dying—Brothers of deceased obtaining certificate under s. 15 (1) in respect of debt of deceased brother—Creditor, if can proceed with execution in respect of share attached by him.

A member of a joint family had incurred a debt in his individual capacity on a bond. He was sued on this bond and a decree was passed against him. In execution of this decree the creditor attached a house. His brothers, three in number, raised an objection to the attachment and succeeded in getting their three-quarters interest in the house released, but the attachment in respect of the debtors' brother remaining quarter share subsisted. After the death of the debtor his brothers made an application to the Debt Conciliation Board in respect of their own family debts some of which were conciliated and an agreement under s. 12 (2) of the Debt Conciliation Act followed. and a certificate under s. 15 (1) of the Act was issued in respect of them. Among these debts was the debt due by their deceased brother and this debt fell within the ambit of the certificate under s. 15 (1). When the creditor attempted to carry on with his execution proceedings in respect of the quarter share of the house which he had attached, the executing Court held that the execution could not proceed in view of the certificate granted by the Debt Conciliation Board; but the Court directed that the attachment should continue. In appeal the order was set aside the Court holding that the debt was not a debt of the three brothers, at all, and he ordered the execution case to proceed according to law:

Held, that despite the wide definition of "debt" in s. 2 of the Debt Conciliation Act, this debt was not a debt of the three brothers at all, there was no liability on their part to pay the debt at all, since they had not inherited any property from their deceased brother. The interest which their deceased brother had in the family property disappeared on his death except in so far as that interest had been attached. The brothers, then, had placed before the Debt Conciliation Board a fictitious debt in order to avoid the embarrassment which would arise by the sale of the deceased brother's interest in the attached house, and the issue of a certificate in respect of a debt which was not the debt of the persons making the application to the Debt Conciliation Board was one beyond the Board's jurisdiction and was ineffective in so far as that particular debt was concerned.

Misc. A. from an order of the Court of the Additional District Judge, Bilaspur, dated April 30, 1938.

Mr. G. R. Deo, for the Appellants.

Mr. R. B. Choudhury, for the Respondents.

Order.—One Rambhau, who was a member of joint family, had incurred a debt in

his individual capacity on a bond. He was sued on this bond and a decree was passed against him. In execution of this decree the creditor attached a house under the belief that it was the sole property of Rambhau. His brothers, three in number, raised an objection to the attachment and succeeded in getting their three-quarters interest in the house released, but the attachment in respect of Rambhau's remaining quarter share subsisted. Rambhau then died. His brothers then proceeded to make an application to the Debt Conciliation Board in respect of their own family debts some of which were conciliated and an agreement under s. 12 (2) of the Debt Conciliation Act followed, and others were not conciliated and a certificate under s. 15 (1) of the Debt Conciliation Act was issued in respect of them. Among the debts put forward by these brothers was the debt due by their brother Rambhau, and this debt fell within the ambit of the certificate under s. 15 (1). When the creditor attempted to carry on with his execution proceedings in respect of the quarter share of the house which he had attached, the executing Court held that the execution could not proceed in view of the certificate granted by the Debt Conciliation Board; but in view of the argument that, if the attachment was raised the creditor's remedy would disappear entirely as Rambhau's share would pass to his brothers by survivorship, the Court directed that the attachment should continue. In appeal the Additional District Judge, Bilaspur, set aside the order in the executing Court, holding that the debt was not a debt of the respondents, that is to say, the three brothers, at all, and he ordered the execution case to proceed according to law. The three brothers have now preferred this miscellaneous appeal.

It is contended on behalf of the appellants that, rightly or wrongly, a certificate has been issued by the Debt Conciliation Board which has held the debt to be a debt of the three brothers, and that execution cannot proceed although the learned Counsel states

that he does not ask that the attachment on the property should be released. I am of opinion that despite the wide definition of "debt" in s. 2 of the Debt Conciliation Act, this debt is not a debt of the appellants at all, and their learned Counsel is wrong when he states that they are liable to pay to the extent of the property of their deceased brother in their hands. They have not inherited any property from their deceased brother Rambhau; they have obtained it by survivorship, and as admittedly Rambhau had no separate property of his own, there is nothing of his which could be called assets which could pass into the appellants' hands. When a creditor is dealing with an unsecured debt due from a member of a joint family in his individual capacity and the debtor dies, the creditor has no remedy unless he happens to have attached the debtor's interest in the family property during his lifetime. Here what had been attached is not Rambhau's interest in the whole of the family property, but only his interest in one particular item, namely, a house. That is all to which the creditor can look for the purpose of satisfying his claim. There is no liability on the part of the appellants to pay the debt at all, since they have not inherited any property from Rambhau. The interest which their deceased brother had in the family property disappears on his death except in so far as that interest has been attached. The brothers, then, have placed before the Debt Conciliation Board a fictitious debt in order to avoid the embarrassment which will arise by the sale of the deceased brother's interest in the attached house, and the issue of a certificate in respect of a debt which is not the debt of the persons making the application to the Debt Conciliation Board is one beyond the Board's jurisdiction and is ineffective in so far as that particular debt is concerned. The result is that the appeal fails and is dismissed with costs. Counsel's fee Rs. 15.

D.

Appeal dismissed.

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A fire broke out at a refinery of a company used in connection with the manufacture of wax and tons of molten wax escaped into the adjoining river and creeks wherefrom it was collected by the general public and was freely bought and sold in the market. The company permitted the salvage, which they themselves were unable or unwilling to undertake, to continue; they took no steps to prevent trading in the wax. No steps were taken by the company to inform the general public of any intention to assert ownership over the wax.

Held, that the company must be deemed to have abandoned its right of ownership over the wax and the issue of a press announcement after the salvage was complete, in assertion of its right by the company was immaterial.

Held, further, that the company having stood by at a time when its officials knew perfectly well that members of the general public were trading in the wax and having permitted person to believe that the company had no further interest in it the estoppel arose by reason of their inaction as there was no prosecution instituted as a warning, no notice in the press, no evidence of cautions given to the general public. *TAN SOON LI v. BURMA OIL CO. LTD.* Rang. 887
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- 1927—II. See Madras Hindu Religious Endowments Act.
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Administration—Application in administration suit to spend money on marriage expenses of minor plaintiff—Marriage against the provisions of Child Marriage Restraint Act (XIX of 1929)—Parties to marriage domiciled in Bikanir—Marriage to be performed in Bikanir—Source of income in British India—Application held could not be granted.

In an administration suit an application was made for liberty to spend out of the estate certain sum to meet the marriage expenses of the plaintiff who was a minor and had not reached the age of 16. Both the bridegroom and the bride were domiciled in Bikanir where the marriage ceremony was to be performed. The source of income was, however, in Calcutta:

Held, that the Court should not facilitate conduct which the Legislature in British India had made penal under the provisions of the Child Marriage Act, even if such marriage was not punishable according to law of Bikanir. **HANSRAJ BHUTERIA v. ASKARAN BHUTERIA** Cal. 730

Admission. See Evidence Act, 1872, s. 21 431
Defendant admitting execution of document but pleading it to be of no effect—It is no admission of liability.

An admission by a party that he had executed the document on which the plaintiff relies, accompanied by a pleading that the document is of no effect, is no admission at all of the defendant's liability. **U MIN SIN v. KO KYE** Rang. 31

Adoption. See Hindu Law 845
Adverse Possession—Acts of temporary and flimsy character cannot destroy real owner's title.

Where a house has fallen in ruins for a long time and the land has presented the appearance of a mere *ahata* with a *dalan* bounded on all sides by the houses of neighbours, such acts of possession as tethering of cattle, using the land as a play ground, cooking food on the occasions of ceremonies and even planting trees by the persons who are no other than the members of the real owner's family, cannot possibly arouse the notice of the real owners even if the real owner has been living in the same town; much less would they constitute adverse possession against him if he has been living away from the land since very long time, since occasional acts are acts of a temporary and flimsy character which do not destroy the title of the real owner. **IQBAL ALI v. S. HUMAYUN QADIR** Oudh 50
Burden of proof—Permissive possession not set up—Question, how to be approached.

It is the duty of the plaintiffs claiming title by adverse possession to establish affirmatively that they had acquired statutory title to the property by reason of adverse possession for the requisite period. Where no case of permissive possession has been set up by defendant in the pleadings, and the permissive character of possession has never arisen as an independent issue calling for a decision in the case, it is wholly wrong to approach the question of adverse possession by determining whether the defendant has proved a case of permissive possession or not and hold adverse possession upon the weakness of that case. **IQBAL ALI v. S. HUMAYUN QADIR** Oudh 50

Adverse possession—concl'd.*Essentials of adverse possession—Onus of establishing essentials.*

The title of the owner must be deemed to carry with it the legal possession and must be deemed to subsist, unless and until there is an open and hostile assertion of title accompanied by exclusive possession of an effective nature to the knowledge of the actual owner. To constitute a plaintiff's title by adverse possession, the possession required to be proved must be adequate in continuity, in publicity, and in extent, and is displaced by evidence of partial possession by the defendant, and the onus of establishing these essential elements is upon the adverse possessor. **IQBAL ALI v. S. HUMAYUN QADIR Oudh 50**

Hostile and notorious possession—Situation, user and nature of property to be considered.

In determining the question whether possession is hostile and notorious so as to charge the real owner with notice of the adverse claim the nature, the situation and the user of the property must be considered. **IQBAL ALI v. S. HUMAYUN QADIR Oudh 50**

Question as to, is mixed one of law and fact—Whether proved facts substantiate plea of adverse possession is matter of law—If can be challenged in second appeal.

The question of adverse possession is a mixed question of fact and law. Though the facts found by the Court of first appeal must be accepted as final in second appeal, the question whether the proved facts substantiate the plea of adverse possession is a matter of law which can be challenged in second appeal. **IQBAL ALI v. S. HUMAYUN QADIR Oudh 50**

Title by adverse possession, if can originate during minority of person sought to be defeated by adverse possession.

Title by adverse possession cannot originate during the minority of the person sought to be defeated by adverse possession. To acquire adverse possession there must be acts of exclusion or ouster amounting to open assertion of hostile title, knowledge of which must be attributable to the person sought to be excluded so as to enable him to resist the acts. A minor is not in a position to know of or to resist acts of ouster and there can be no overt acts amounting to open assertion of a hostile title against a minor. **KHEM-CHAND DAYARAM v. DAYARAM JESSOMAL Sind 137**

Agra Pre-emption Act (XI of 1922), s. 4
—Co-sharer executing waqf and divesting himself of entire property ceases to be co-sharer.

A co-sharer who executes a waqf deed and divests himself of his entire property, ceases to be a co-sharer as defined in s. 4, Agra Pre-emption Act and hence is not entitled to maintain a suit for pre-emption. **BANWARI RAM v. MUHAMMAD YAR KHAN All. 72**

Agra Tenancy Act (III of 1926), ss. 80, 253
—Order of ejectment made before expiry of 15 days' notice under s. 80—Appeal—Conditional order, if can be passed.

In an appeal against an order of ejectment passed before expiry of 15 days required by notice under s. 80, it is not possible for the Appellate Court to pass a conditional order saying that it set aside the trial Court's order on the condition that the whole amount was paid within certain time. **RATI RAM v. NIADER MAL All. 640**

s. 253—S. 253, scope of—Order of ejectment passed before expiry of 15 days' notice—Appeal and then revision from order—Judgment-debtor not making attempt to pay amount in meanwhile—If can take advantage of technical irregularity.

Once the High Court is seized of the revision, then,

Agra Tenancy Act—concl'd.

it becomes its duty to cast its eye not merely on one part of the proceedings but the whole of them. What comes under the review of the High Court are the proceedings as a whole from start to finish and the object of the scrutiny of the High Court is that so far as possible justice may be done in the proceedings as a whole.

A landlord obtained a decree for arrears of rent against the tenant. The notice under s. 80 (2) was served on the judgment-debtor on July 23, 1937. On August 7, 1937, the Assistant Collector treating the matter as if there had been a default in complying with the notice, made an ejectment order although 15 days required by notice had not expired at the time of such order. There was an appeal and also a revision to the High Court and the tenant although he had ample time to pay the amount made no attempt to pay it.

Held, that though the order of the Assistant Collector was technically irregular there was no injustice to the judgment-debtor and he could not be allowed to take advantage of the technical irregularity upon an application for revision. **RATI RAM v. NIADER MAL All. 640**

Amendment. See Pleadings 72, 117, 769
Appeal. See Practice 37, 256, 380*Letters Patent—Case certified to be fit for appeal to Letters Patent, includes order for costs made or refused in that case.*

When a "case" is certified to be fit for appeal to the Letters Patent the word 'case' includes an order for costs made or refused in that case, which is obviously ancillary to the substantive order made in the case. **SAIN DASS v. LAKHAJEE Rang. 306**

Parties—Held on facts that appeal was incompetent in the absence of a party which was a necessary party.

A person as an agent of another executed a promissory note in favour of C. C. instituted a suit on the note claiming relief alternatively against the agent and the principal. The suit was decreed against the principal and dismissed against the agent. No appeal was filed against the dismissal and consequently it became barred. The principal, however, appealed against the decree against him and contended that the agent and not he, was liable on the promissory note. The agent, however, was not impleaded as necessary party to the appeal:

Held, (1) that when the right of appeal against the dismissal of the suit against the agent was barred, the agent was no longer an interested party. He was entitled to hold the decree in his favour: it was a substantive right of a very valuable kind of which he could not be lightly deprived;

(2) that the appeal by the principal was incompetent unless the agent was added by him as necessary party;

(3) that it was not necessary for C to have appealed against the agent's dismissal from the suit. It was incumbent on the principal, if he desired to appeal against the judgment in favour of the agent, to do so;

(4) that the order of the Court would be that the decree of the trial Court against the principal would be restored. **SAIN DASS v. LAKHAJEE Rang. 306**

Arbitration—Award—Suit to set aside—Award under Burma Co-operative Societies Act, ignoring law of limitation—Suit to set aside such award, if maintainable.

Courts are always inclined where possible to support the validity of an award and will not lend themselves to a consideration of what a Court of Law would have done, when the parties have agreed on the one hand

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or when there is a statutory obligation placed upon them on the one hand, to refer their disputes to a tribunal which is not a Court of Law. But, on the other hand, that tribunal must come to a decision which is a quasi judicial decision or must make an award which has been arrived at after proper consideration of the case. An arbitrator is bound to give effect to all legal defences including a defence under any statute of limitation.

Consequently where an award made by an arbitrator appointed under the Burma Co-operative Societies Act, has ignored the law of limitation, a suit to set aside the award is maintainable. *CO-OPERATIVE TOWN BANK, v. U KYAW THA* Rang. 220

Assam Debt Conciliation Act (X of 1936), ss. 7, 8 (3)—Debt Settlement Board, whether has inherent final jurisdiction to determine existence and amount of debt.

A Board in Assam has no inherent final jurisdiction to determine questions relating to the existence and amount of a debt though the Board might have to consider such question incidentally, for example, under s. 4 of the Act, in order to enable it to decide whether or not it had jurisdiction to deal with a particular application. *PULIN BEHARI DAS v. REASAT ALI* Cal. 265

s. 8 (3)—Finality under s. 8 (3), nature of.

Decision of the Debt Conciliation Board on the question of jurisdiction is final under s. 8(3), Assam Debt Conciliation Act, but the finality only attaches to the actual decision with regard to jurisdiction and not to any incidental finding on which that decision may be based. *PULIN BEHARI DAS v. REASAT ALI* Cal. 265

ss. 8 (3), 16 (4)—Decision by Board that debt does not subsist as it is time-barred amounts to decision that it has no jurisdiction to deal with the debt—Jurisdiction of Civil Court, if ousted under s. 8 (3) or s. 16 (4) to deal with it.

Where the Board holds that a particular debt was not subsisting as it was time-barred, the order amounts to an order that it has no jurisdiction to deal with the particular debt as it was time-barred, and therefore, finality only attaches to the order in so far as it purports to decide that the Board had no jurisdiction to deal with the matter, but, in so far as the order may have purported to decide whether the alleged debt was in existence or its amount, no finality would attach thereto and therefore it would not oust under s. 8(3) or s. 16(4) the jurisdiction of the Civil Court to deal with the debtor. *PULIN BEHARI DAS v. REASAT ALI* Cal. 265

s. 21—Application under s. 4—Board holding particular debt to be time-barred—Civil Court, if should suspend proceedings in respect of such debt though application may be pending before Board.

Where an application under s. 4 is made to the Board for the settlement of debts, and the Board holds that a particular debt mentioned in the application is time-barred the Civil Court is under no obligation to suspend the execution proceedings before it in connection with that decree even though the application under s. 4 may be pending before the Board. *PULIN BEHARI DAS v. REASAT ALI* Cal. 265

Association—Association maintained not merely by subscription of members but by donations is not club—Member when can sue management, stated.

Where an Association is maintained not by mere subscriptions from its members but by donations, it is not a club. A member of an association cannot sue the management because it does some act of which he

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disapproves, provided of course that he is not personally damaged by expulsion or punishment or by loss to property of which he may be a joint owner. *KOWTHA SURENARAYANA RAO v. PATIBANDLA SUBRAHMANYAM* Mad. 760

Award. See Arbitration

Banker and Customer Fiduciary—relation between—When arises—Amount credited in suspense account awaiting directions of creditor—No pass or cheque books issued nor contract as to interest entered into—Relation between parties is fiduciary—Creditor is entitled to preferential claim.

The mere fact that a person had no prior banking transaction with the Bank will not by itself be sufficient to exclude the possibility of the person's having become a customer of the Bank when he paid in the amounts. Again the mere fact that a customer gives directions to a banker to apply in a particular manner moneys standing to his credit will not necessarily make the relationship between the parties fiduciary.

Where the account books of the parties to show that the amounts were credited in *anamath* or suspense account to await the instructions of the creditor as regards their disposal and the usual procedure of giving pass books and cheque books was not followed and no agreement was entered into regarding the interest payable on the deposits, the amounts must be deemed to have been received by the Bank in a fiduciary capacity and not as between a Bank and its customer. Consequently such a creditor is entitled to preferential claim over other customers of the Bank. *OFFICIAL ASSIGNEE v. NATESAM PILLAI* Mad. 728

Bengal Agricultural Debtors Act (VII of 1936), ss. 2, (8) (iii), 34—Decree passed for cash equivalent of bhag produce in suit for non-payment of share bhag produce by defendant, whether "debt" within meaning of Act—Execution proceedings in respect of such decree, if can be stayed under s. 34.

Where a decree is passed in a suit instituted by the decree-holder against the judgment-debtors for non-payment of their share of the *bhag* produce due in respect of a certain plot for a cash equivalent of the produce, such a decree is not a debt within the meaning of the Ben. Agri. Debtors Act and is, therefore, exempted from its operation. The execution proceedings in respect of such decree cannot, therefore, be stayed under s. 34. *HEMENDRA NATH ROY CHOWDHURY v. PURNA CHARAN HAULI* Cal. 367

s. 2 (9) (a)—Bargadar, whether "debtor."

The reference in sub-s. (9) (a), s. 2 to a person "who cultivates land himself" must mean a person other than a *raiyyat* or an under-*raiyyat* who has some interest in the land, which would entitle him to employ hired labourers, *adhiars*, *bargadars* or *bhagdar* for the purpose of cultivating it, but such hired labourers and the other persons mentioned would not themselves be included within the definition of "debtor." *HEMENDRA NATH ROY CHOWDHURY v. PURNA CHARAN HAULI* Cal. 367

s. 34. See Bengal Agricultural Debtors Act, 1936, s. 2, (8) (iii)

s. 34—Notice under, correctly giving number of case to be stayed—Omission of one of two decree-holders and addition of one who was not judgment-debtor, whether affect validity of notice.

Where the notice under s. 34, Ben. Agri. Debtors Act correctly gives the number of the execution case which is to be stayed, an omission of one decree-

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holder and an addition of a person who was not a judgment-debtor are mere formal defects which can not possibly affect the validity of the notice. *PYAR MOHAN MANJHI v. HASHAN ALI KHAN ARMANALI KHAN* Cal. 317

Bengal Excise Act (V of 1909), ss. 54, 83

(b)—*Offence under s. 54 (b)—Cognizance taken on challan submitted by Inspector of Police—Proceedings held did not comply with s. 83 (b) and were, therefore, void.*

Police reported an offence under s. 51 (b), Ben. Excise Act to the Collector of Excise who wrote to the Deputy Commissioner of Police, saying that he sanctioned the prosecution of the two accused and that he authorized an officer of the Police department to investigate the cases and to submit a report to the Magistrate under s. 83 (b) of the said Act. The Magistrate took cognizance on a *challan* submitted by the Inspector of Police :

Held, that it could not be said that the Police Officer who filed the *challan* of which cognizance was taken answered to the description required by s. 83, namely "an excise officer authorized by the Collector in this behalf." In the circumstances the whole proceedings were void. *FAKIR MAHAMMAD v. EMPEROR* Cal. 777

Bengal Food Adulteration Act (VI of 1919),

s. 6 (1) and (3)—*Accused taking consignment of mustard oil at Railway Station for sale—Sanitary Inspector taking sample while goods were still on railway premises—Oil found adulterated—Accused, if can be convicted—Fact that accused had no time to examine goods, if good defence.*

The accused took delivery of some tins of mustard oil at the Railway Station for the purpose of selling them. On the same day while the goods were actually on the railway premises a sample was taken from these tins by the Sanitary Inspector and it was found that the mustard oil contained therein was adulterated:

Held, that although the goods had actually left the railway premises, they were nevertheless being stored for sale by the accused within the meaning of s. 6 (1) of the Bengal Food Adulteration Act. The requisite initial onus had been discharged by the prosecution. The accused came into physical possession of the consignment as soon as he took delivery thereof at the Railway Station and from the moment that he took such delivery until the goods were actually exposed for sale in his shop there could be no doubt that he was actually storing them with a view to their ultimate disposal by sale. The fact that he could have had no opportunity to examine the nature of the goods between the time when he took delivery of them and the time when a sample was taken was no defence in view of s. 6 (3). *HARI RAKSHAK DUTT v. CHAIRMAN, DISTRICT BOARD, BIRBHUM* Cal. 136

Bengal General Clauses Act (I of 1899),

s. 8—S. 8, construction of—*Rights in respect of transactions completed prior to repeal saved—Remedies in respect of such rights are also saved.*

Section 8, Ben. General Clauses Act contemplates a case where the repealing enactment repeals a substantive right as well as the procedure by which it was enforced, and in such cases if the rights are saved in respect of transactions completed prior to the repealing of the statute, the remedies in respect of such rights as laid down in the repealed statute are also saved and the litigant can institute or continue proceeding in the same way for the enforcement of his rights as the repealing Act had not come into force. *DHIRENDRA NATH ROY v. IJJETALI MIAH* Cal. 511

Bengal General Clauses Act—concl'd.

ss. 8, (8) (e)—*Words "instituted, continued or enforced" in s. 8 (e), interpretation.*

The words "instituted, continued or enforced" in s. 8, cl. (e), Ben. General Clauses Act are to be taken with each of the words "investigation, legal proceeding or remedy" so far as they seem to be appropriate, *DHIRENDRA NATH ROY v. IJJETALI MIAH* Cal. 511

Bengal Non-Agricultural Tenancy (Temporary Provisions) Act (IX of 1940),

s. 3—*Phrase "on account of the nonpayment of rent"—Meaning explained.*

The words in s. 3, Ben. Non-Agricultural Tenancy (Temporary Provisions) Act "on account of the nonpayment of rent" are not used for purposes of indicating that the cause of action for ejectment must be the non-payment of rent. The Legislature meant that if a tenant was in arrears, a suit for ejecting such a tenant would be a suit for ejectment "on account of the non-payment of rent." *KUMAR PURNENDU NATH TAGORE v. NARENDRA NATH SAMANTA* Cal. 581

Bengal Public Demands Recovery Act (III of 1913), s. 7—Bar of suit contemplated

by s. 46—*Question between auction-purchaser and representatives of certificate debtor—No bar.*

Where the question is between the auction-purchaser and the representatives of the certificate debtor and not between the certificate holder and the certificate debtor or their representatives s. 46 has no application.

The concurrent findings of the Courts below that the sale in the certificate proceedings was not vitiated by fraud is a finding of fact and binds the High Court in second appeal. *NISAR MOHAMMAD KHAN v. TAUQUIR AHMAD* Pat. 479

s. 7—*Certificate against dead person—Effect of on interest of legal representatives.*

The entire proceedings based upon the certificate issued against a dead person are wholly inoperative to affect the heirs of the deceased. It is open to the Certificate Officer under s. 11 to amend the certificate by addition, omission or substitution of the name of the certificate-debtor. In the absence of such amendment the heirs are wholly unaffected by the certificate sale. *NISAR MOHAMMAD KHAN v. TAUQUIR AHMAD* Pat. 479

s. 7—*Certificate sale—Accounts opened in name of co-sharers—Quota of arrears dues paid—Certificate sale of entire estate for arrears—Liability.*

Where separate accounts had been opened in the name of plaintiffs-co-sharers on November 7, 1933, their share is liable for the cess for the January and March *kist* of 1933, even though they had paid their quota, when the certificate proceedings had been started to realise the dues from all the co-sharers who were then alive not only for their quota but also on account of the quota of the other co-sharers who were in default. The payment by the plaintiffs of their quota does not do away with the liability of the entire estate to pay the arrears which were due from the whole estate. *NISAR MOHAMMAD KHAN v. TAUQUIR AHMAD* Pat. 479

s. 7—S. 29, applicability—*Section assumes that certificate was in proper order.*

Section 29, Public Demands Recovery Act, assumes that the certificate was a proper certificate where the certificate issued in the name of a dead person was never altered and no substitution was made by bringing in the names of the legal representative upon the record. Section 29 has no application. The heirs without bringing a suit to set aside sale can bring a suit for declaration that the sale does not affect their interest. *NISAR MOHAMMAD KHAN v. TAUQUIR AHMAD* Pat. 479

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s. 29. See Bengal Public Demands Recovery Act, 1913, s. 7 **479**

s. 46. See Bengal Public Demands Recovery Act, 1913, s. 7 **479**

Bengal Tenancy Act (VIII of 1885), s. 26-G—Held on construction that mortgage was not usufructuary but one by conditional sale.

Held, on construction of the mortgage-deed, that the mortgage was not a usufructuary mortgage as contemplated by s. 58 (d), T. P. Act. Although the mortgagees were given possession of the mortgaged properties and they were entitled to appropriate the rents and profits towards the interest due, yet the essential element of a usufructuary mortgage was wanting, namely that the mortgagee would retain possession of the properties till the mortgage money was paid. The transaction was substantially a mortgage by conditional sale though certain rights of a usufructuary mortgage were also given to the mortgagees. The expressions *kot kobala* and *saf kobala* which were used in the document were quite sufficient to show that the mortgage was by conditional sale. **MAHENDRA NATH SARDAR v. KALIPADA HALDAR** Cal. 508

s. 269—Usufructuary mortgage—Mortgagor representing that holdings mortgaged were mokarari—If estopped from saying that holdings are occupancy.

Where a mortgagor executing a usufructuary mortgage represents to the mortgagee that the properties mortgaged were *mokarari* holdings held by him at a fixed rent, he is not estopped from saying that these were occupancy holdings which would attract the operation of s. 26-G, Ben. Ten. Act. **MAHENDRA NATH SARDAR v. KALIPADA HALDAR** Cal. 508

s. 26-J—Recovery of transfer-fee by landlord must be by application.

The recovery of the balance of transfer fees by the landlord must be by an application and not by a suit. **DHIRENDRA NATH ROY v. IJJETALI MIAH** Cal. 511

ss. 26-J, 188 (1) (i)—Rights under s. 26-J accrued before its repeal—If can be enforced by application under s. 26-J read with s. 188 (1) (i) even after their repeal.

A right acquired by the landlord under s. 26-J of the old Ben. Ten. Act to recover the balance of landlord's fees and compensation before the repeal of the section by Act VI of 1938, can be enforced by an application under s. 26-J read with s. 188 (1) (i) even after the repeal of those sections. **DHIRENDRA NATH ROY v. IJJETALI MIAH** Cal. 511

s. 146-A, as amended by Act IV of 1928—All persons on rent roll not made parties—Decree obtained, if rent decree.

Where the landlord has not joined as defendants in his suit all the persons whose names were borne in his rent-roll as tenants, the fundamental condition for invoking the principle of representation under s. 146-A, Ben. Ten. Act (as amended in 1928), is lacking, and the decree obtained would not be a rent decree. **HARAN CHARAN MANDAL v. HIRALAL NASKAR** Cal. 172

ss. 170, 171, 174—Purchaser of non-transferable holding, whether has interest in holding—Whether can make deposit under s. 170—Whether entitled to statutory lien on property saved by his deposit.

A purchaser of a non-transferable occupancy holding either in whole or in part, acquires an interest in the holding which is operative against the *raiyat* and against the rest of the world except only the non-

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assenting landlord. On the sale of the holding in execution of a rent decree, the interest of such a person would be extinguished. The purchaser comes within the category of persons whose interests are affected by the sale within the meaning of s. 170 or s. 171 as well as of s. 174, and is competent to make a deposit under s. 170 and can claim a statutory lien over the property which he saves by the payment, so that he can recover from the property itself, if not from the tenant personally for whose benefit he professes to act. **HARAN CHARAN MANDAL v. HIRALAL NASKAR** Cal. 172

s. 174. See Civil Procedure Code, 1908, s. 47 **805**

Bengal Village Local Self-Government Act (V of 1919), s. 17-A—Question whether person is properly elected as president of Union Board—Jurisdiction of Civil Court to decide.

The Civil Courts have jurisdiction unless their jurisdiction has been definitely taken away. There is no section in the Bengal Village Local Self-Govt. Act which takes away the jurisdiction of the Civil Courts to decide that certain person is not properly elected as a president of a Union Board. **GOLAM MORTUZA MOULIK v. MANIRUDDIN AHAMAD** Cal. 116

s. 17-A—Rules for election of president—Suit for declaration that rival candidate is not properly elected president—Plaintiff, if can be declared president.

In a suit by a candidate for a declaration that his rival candidate is not properly elected as a president of the Union Board, the plaintiff is not entitled to a declaration that he (the plaintiff) is the president unless it has been found that under the rules made by the Local Govt. he has been duly elected as president. **GOLAM MORTUZA MOULIK v. MANIRUDDIN AHAMAD** Cal. 116

Berar Inam Rules, 1859—Devolution—Grantee's co-sharer's lineal descendants becoming extinct—Escheat to Crown—Reversion to representatives of original grantee.

If the share which is assigned to a co-sharer in the inam certificate is regarded as a distinct and independent grant, it will no doubt escheat to Govt. on extinction of the co-sharer's line. But where it is covered by a major grant, it does not escheat to the Crown but merges in the major grant of which it was a part and reverts to the representatives of the original (major) grantee. **SHRIRAM v. BANYA BAI** Nag. 454

Husband of deceased incumbent, if can come in as heir.

A widow of an inam grantee is a member of his family whereas a husband of a woman born in grantee's family is not a member of that family. The grant is made for the benefit of the grantee's family and cannot be enjoyed by any one who is outside that family. **SHRIRAM v. BANYA BAI** Nag. 454

r. 5 (2)—Inams—Succession—Certificate silent as to rule of devolution—Personal law, applicability.

Where the inam is a Crown grant it will be governed by s. 3, Crown Grants Act which excludes the application of the personal law. If there is any ambiguity in the inam certificate or if the inam certificate is silent as to the rule of devolution the question will have to be resolved in accordance with the Inam Rules of 1859. In matters not expressly mentioned in the *sanad* or certificate or other documents evidencing the special terms of the grant in the particular case, devolution and the incidents of an inam estate in Berar are regulated by the Berar Inam Rules of 1859. **SHRIRAM v. BANYA BAI** Nag. 454

rr. 5 (2), 3—Deshpandia allowance, when

Berar Inam Rules—concl'd.

inam—*Succession thereto—Dastaki, what is.*

Deshpandia allowance in Berar is an inam and is governed by the Inam Rules and succession thereto is prescribed by r. 5 (2).

Under r. 32 of the Rules framed under s. 14 of the Pensions Act, 1872, (Act XXIII of 1871), as applied to Berar, the cash allowance payable to Deshmukhs and Deshpandias in commutation of their emoluments as ex-pargana officials is paid to the person whose name has been recorded as *dastaki*. Under r. 36 of the aforesaid rules the *dastaki* is bound to distribute the allowance among all persons who are entitled to any share in it. These allowances are intended for the maintenance of the grantees and their descendants. *SHEIRAM v. BANYA BAI* Nag. 454

Bihar Agricultural Income Tax Act (VII of 1938)—*Validity—Bihar Act not invalid due to non compliance with s. 299, Government of India Act or Para. XVIII of Instrument of Instructions.*

The Bihar Act cannot be held to be invalid on the ground of failure to comply with s. 299 Govt. of India Act by reason of the provisions of s. 109 (2) (a) of that Act. So also it cannot be held to be invalid by reason of the Governor's failure to reserve the bill as directed by para. XVIII of the Instrument of Instructions in view of s. 52 (2), Govt. of India Act. *JHALAK PRASAD SINGH v. PROVINCE OF BIHAR* Pat. 663 S B

s. 2 (a)—*Definition of "agricultural income" in Bihar Act and Income Tax Act compared.*

The word "revenue" in s. 2 (1), Income Tax Act is used to denote income or a revenue receipt as opposed to a capital receipt and, therefore, covers all income from agricultural land other than rent. No real distinction can be drawn between the expressions "rent or revenue" in Income Tax Act and "rent or income" in Bihar Agri. Income Tax Act and it cannot be said that by the use of the words "rent or income" the Provincial Govt. are taxing something more than is permissible by the definition in the Income Tax Act. *JHALAK PRASAD SINGH v. PROVINCE OF BIHAR* Pat. 663 S B

s. 2 (a)—*Held, that incomes derived by assessee in this case from such sources were not derived from land used for agricultural purposes or from agricultural land and could not be assessed to tax under Act—Words and phrases—'Bankar', 'lahkar' and 'phalkar' meaning explained.*

Where the 'bankar' income was derived by the assessee from virgin jungles or jungle land not actually cultivated and the trees appeared to have grown naturally in the jungles without the intervention of human agency:

Held, that the growth of these trees could not be said to result from the cultivation of the soil and the income referred to as "bankar" was not derived from agricultural land or from agriculture and, therefore, it could not be assessed under the Bihar Agri. Income Tax Act.

Lac is not the result of any cultivation but is the creation of a particular insect when placed on particular trees. Where nothing appears to be done by the assessee beyond placing the insect on the trees, it cannot be held that 'lahkar' income is derived from land used for agricultural purposes or from agriculture.

"Phalkar" is income derived from wild jungle fruits, and it cannot be said that the fruit gathered is the result of any cultivation, but, on the contrary, it is the result of the absence of cultivation. Trees and bushes yielding these fruits grow on cultivated soil but on land not under cultivation and frequently the

Bihar Agricultural Income Tax Act—
contd.

more neglected and wild the land is the thicker grow these wild bushes and trees yielding such crop. Practically in all cases the crop is the result of want of cultivation and not the result of cultivation.

Held, that it was not established that the income described as "phalkar" in the case was income derived from land used for agriculture or from agriculture and, therefore, not assessable to agricultural income-tax. *THE PROVINCE OF BIHAR v. PRATAP UDAI NATH SAHIDEO OF RATUGARH* Pat. 238 S B

s. 2 (a)—*Income of raiyats and tenure-holders of revenue free land, if covered by definition of "agricultural income."*

It is open to the High Court so to limit the definition given in the Bihar Act as to bring it within the competence of the local Legislature.

The income of a *raiyyat* does not fall within s. 2 (a) (1) of the Bihar Agri. Income Tax Act but rather falls within s. 2 (a) (2) (1) of that Act. His income is derived from land by agriculture and clearly falls within the definitions given in both the Bihar Act and the Income Tax Act.

The income of tenure-holders of revenue free land falls within the definition given in both the Bihar Agri. Income Tax Act and the Income Tax Act and, therefore, the Bihar Agri. Income Tax Act cannot be held to be *ultra vires* upon this ground. *JHALAK PRASAD SINGH v. PROVINCE OF BIHAR* Pat. 663 S B

s. 2 (a)—*Income Tax Act, s. 2 (1)—Word 'local rate' in s. 2 (1), Income Tax Act, if covers cess.*

The expression "local rate" used in Income Tax Act in the definition of "agricultural income" is wide enough to cover cess which is a term used in Bihar for local rates levied on immovable property for the benefit of local authorities. Hence the addition of the words "local cess" in the definition of "agricultural income" given in the Bihar Act does not affect the matter in any way and does not in any way extend the field of taxation. *JHALAK PRASAD SINGH v. PROVINCE OF BIHAR* Pat. 663 S B

s. 2 (a)—*Regulation I of 1793, construction—Effect of—Tax under Bihar Act, if infringement of rights granted to zemindars by Permanent Settlement Regulation.*

Regulation I of 1793 contains no assurance or undertaking to the *zemindar* that he would for ever thereafter be immune from taxation such as that imposed by the Bihar Agri. Income Tax Act. The Regulation merely contains an assurance that the *jama* or land revenue payable by the *zemindar* would never be increased.

• The tax imposed on agricultural income by the Bihar Agri. Income Tax Act, 1938, is in no way an infringement of the rights granted to *zemindar* by the Permanent Settlement Regulations.

The tax imposed by the Bihar Act is a tax on income though limited to income derived from agricultural sources it is in no sense a tax on the land or payment in the nature of *jama* because it is imposed on the income derived from the land and not on the land itself. It cannot therefore be said that the Bihar Agri. Income Tax does in any way purport to affect, vary or repeal any provision in the Permanent Settlement Regulations particularly Ben. Regulation, I of 1793 *JHALAK PRASAD SINGH v. PROVINCE OF BIHAR* Pat. 663 S B

s. 2 (a)—*Whether 'bankar' 'lahkar' and 'phalkar' incomes are incomes from agriculture or lands used for agricultural purposes, is question of fact—Duty of authorities to state facts when stating case to High Court.*

Bihar Agricultural Income Tax Act—
contd.

"Bankar" is income derived from the sale of wood from jungles, whereas 'lahkar' is income from letting lands and trees for cultivation of lac. "Phalkar" is income from the fruit of jungle trees and bushes. The question whether the income from these sources can be said to be derived from land used for agricultural purposes or from agriculture, is in the main, one of fact and the authorities should bear this in mind when stating a case to the High Court. If the land is not so used, then the income is not taxable under the Bihar Agri. Income Tax Act. THE PROVINCE OF BIHAR v. PRATAP UDAI NATH SAHIDEO OF RATUGARH Pat. 203 S B

ss. 2 (a), 3, 4—Bengal Cess Act (IX of 1880), ss. 4, 41, 100, 105 — Collector acting under Cess Act acts as officer of Crown as such and not as agent of 'local authorities'—Bihar Act is ultra vires only in so far as it covers income from revenue free agricultural land in a Municipality.

Under the Ben. Cess Act, 1880, the rate of cess to be levied is fixed by the District Board and the proceeds are paid into a district fund. The assessment and collection of cess is however, ordinarily made by the Collector, and the Collector, when he performs his duties under the Cess Act is in no way a servant of the District Boards. He does not act under their supervision but under the supervision of the higher Govt. authorities. Hence when the Collector performs the duties cast upon him by the Ben. Cess Act he performs them as Collector that is, as an officer of the Crown and not as an agent of the local authorities.

What s. 100, of the Ben. Cess Act empowers the Board of Revenue to do is to invest a person with the powers of a Collector under the Act. Once such a person is invested with such powers, he is, as far as those duties are concerned, a Collector, and he performs his duties not as a servant or agent of the District Boards but as a Collector. Even such a person must be regarded as a Collector and he performs his duties as a Collector, that is, as an officer of the Crown as such. The cess in Bihar is therefore assessed and collected by officers of the Crown as such and that being so there is no real difference between the two definitions of the "agricultural income" in the Income Tax Act and the Bihar Agri. Income Tax Act as far as the assessment and collection of cess is concerned.

Revenue free agricultural land in a Municipality is subject to a local rate collected under a Bihar and Orissa Municipal Act, and, therefore, comes within the definition given in the Agri. Income Tax Act. As the local rate, however, is collected by the servants of the Municipality and not by the officers of the Crown as such, the income derived from such lands is not within the definition of agricultural income given in the Income Tax Act. Hence, in so far as the definition of "agricultural income" in the Bihar Agri. Income Tax Act, covers income from revenue free agricultural land in a Municipality it is ultra vires but this does not make the whole Act ultra vires. JHALAK PRASAD SINGH v. PROVINCE OF BIHAR Pat. 663 S B

ss. 2 (a), 3, 4—Income Tax Act (IX of 1922), s. 2 (1)—Bihar Act whether ultra vires as a whole because definition of "agricultural income" given in Act is wider or narrower than that given in Income Tax Act.

The omission to include (c) of the definition contained in the Income Tax Act in the definition contained in the Bihar Agri. Income Tax Act cannot make the latter Act ultra vires. In effect the Bihar Govt. are proposing to tax less than they are entitled to do. The greater must include the less, and if the Provincial

Bihar Agricultural Income Tax Act—
contd.

Govt. are entitled to tax all agricultural income as defined in s. 2 (1), Income Tax Act, then they are clearly entitled to tax a part only of such income. It is impossible to hold that the omission to tax some forms of agricultural income could render the whole of the Bihar Act ultra vires and of no effect. JHALAK PRASAD SINGH v. PROVINCE OF BIHAR Pat. 663 S B

s. 2 (a), 6 (b)—Whether non-recurring premia or salami paid to proprietors of land when granting lease, is agricultural income of proprietors within s. 2 (a) is question of fact—Test of determination—Held, such payments were not agricultural income and could not be taxed.

It is impossible to lay down a hard and fast rule that a salami or premium can in no case be taxable. The question in each case would depend on the facts and circumstances of that particular case. Salami may in certain cases be regarded as payment of rent in advance and in such cases the salami could rightly be regarded as income. Where, however, salami cannot be regarded as payment of rent in advance it cannot be regarded as income and would, therefore, not be taxable. Where the premium or salami represents the whole or part of the price of the land, it could not be income. Income connotes a periodical monetary return coming in with some sort of regularity, or expected regularity, from definite sources. The premium, or salami, which is paid once for all, is not a recurring payment and does not satisfy the test of income.

It is for the income-tax authorities to show that there do exist facts which would make the salami income. Prima facie, salami is not income.

Where it is impossible upon the facts as stated to say that the single non-recurring premia and salamis paid to the assessee once only as consideration for the settlement of agricultural land at the time of granting of a lease constituted a part of the assessee's income, it cannot be held to be agricultural income within the meaning of s. (a) of the Bihar Agri. Income Tax Act and is not assessable under that Act. THE PROVINCE OF BIHAR v. PRATAP UDAI NATH SAH DEO OF RATUGARH Pat. 203 S B

ss. 2 (a), 6 (b), 25 (6)—Cess imposed by Bengal Cess Act (IX of 1880), on tenure-holders and raiyats and collected by proprietors of land, can be assessed as agricultural income of latter as defined in s. 2 (a).

The cess as imposed by the Ben. Cess Act (Act IX of 1880 B. C.) on tenure-holders and raiyats and collected by the proprietors of the land can be assessed as agricultural income of the latter as defined in s. 2 (a), Bihar Agri. Income Tax Act. The cess received by the proprietors of land from the tenure-holders and raiyats is income derived from land used for agricultural purposes. All such land is expressly made liable to cess by the Ben. Cess Act and it is payable by the tenure-holders and raiyats by reason of their relation to the land, and further it is received by the proprietors by reason of their rights as proprietors of the land. The liability to pay such cess and the right to receive it only exists as long as the relationship of proprietor and tenure-holder or proprietor and raiyat exists. When the proprietor ceases to be a proprietor, he no longer has any right to the cess and similarly when the interests of the tenure-holder or raiyat cease, their liability to pay cess comes to an end. The liability to pay and the right to receive cess is so closely connected with the land that it can truly be said that it is income derived from the land. That being so, the cess forms part of

Bihar Agricultural Income Tax Act—
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their agricultural income and is liable to be taxed under the Bihar Agri. Income Tax Act. **THE PROVINCE OF BIHAR v. PRATAP UDAI NATH SAHI DEO OF RATUGARH** Pat. 203 S B

s. 25 (6)—Agricultural income-tax authorities must follow decisions of Patna High Court—*They are not entitled to follow decisions of other High Courts or rely on their own experience, in case of conflict of authorities.*

The Agricultural Income-tax Authorities in Bihar must in view of s. 25 (6), Bihar Agri. Income Tax Act, regard cases decided by the Patna High Court under the Act as binding upon them and they will not be entitled in the case of a conflict of authorities to follow decisions of other Courts or to rely on their own experience. **THE PROVINCE OF BIHAR v. PRATAP UDAI NATH SAHI DEO OF RATUGARH** Pat. 203 S B

Regulation (I of 1793)—Bihar Agricultural Income Tax Act repeals by necessary implication provisions of Regulation I of 1793 which are inconsistent with it.

A subsequent general Act will repeal the provisions of an earlier special Act if the provisions of the subsequent Act are clear and unambiguous and clearly apply to the matters dealt with by the earlier special legislation. Under the Bihar Agri. Income Tax Act, all agricultural income is made taxable without distinction, and that being so any protection afforded to agricultural income by any earlier Act is repealed by this subsequent Act. The Court is, therefore, bound to hold that the Bihar Agri. Income Tax Act repeals by necessary implication any provision in the earlier Regulation I of 1793 which is inconsistent with it. **JHALAK PRASAD SINGH v. PROVINCE OF BIHAR** Pat. 663 S B

Regulation (I of 1793)—Govt. of India Act, 1935 s. 108 (2)—Regulation I of 1793 is not Act of Parliament—Bihar Act is not therefore invalid by reason of s. 108 (2), Government of India Act.

The Ben. Regulation I of 1793 is an enactment of the Governor-General in Council and not an enactment of the Parliament in England, and hence the Bihar Agri. Income Tax Act, is not invalid by reason of the provisions of s. 108 (2) (a), Govt. of India Act.

The expression "Governor-General's Act in s. 108 (2) (b) refers to Acts which are contemplated in s. 44, Govt. of India Act, 1935, that is to Acts enacted by the Governor-General after the Govt. of India Act came into force. The Permanent Settlement Regulation was in no sense an Act of the Governor-General but was an Act of the then Governor-General in Council. That being so s. 108 (2) (b), Govt. of India Act, can in no way render the legislation invalid. **JHALAK PRASAD SINGH v. PROVINCE OF BIHAR** Pat. 663 S B

Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939), s. 11—Decree on promissory note passed before commencement of Act—Application under s. 11 for instalments—If can be allowed.

A obtained a decree against B on the basis of a promissory note before the enactment of Bihar Money-lenders Act, 1939. In execution of the decree B applied under s. 11 of the Money-lenders Act of 1939, to pay the decretal amount by instalments. The Court rejected the application on the ground that the provisions of the Act regarding instalments did not apply to a suit on a promissory note;

Held, that the liability under the promissory note had merged into the decretal debt before the

Bihar Money-lenders (Regulation of Transactions) Act—concl'd.

commencement of the Act. It had ceased to be a debt evidenced by or based on the promissory note, and had become a judgment-debt. The Court, therefore, ought to consider whether the case was one in which it should exercise its powers under s. 11 of the Act. **GOPAL PRASAD v. RAMPRASAD** Pat. 104

s. 11—Notification of July 19, 1939, if includes Banks registered under old Act VI of 1882.

The Govt. of Bihar Notification No. 1000-VIA-7/39-Com. issued on July 19, 1939, refers in specific terms to joint stock Banks registered under the Indian Companies Act, 1913, and no others. This cannot be taken to include Banks which were registered under some other Act e. g., registered under the old of 1882. **THE CHOTA NAGPUR BANKING ASSOCIATION LTD. v. RADHA GOBINDA SINGH** Pat. 649

s. 11—Order fixing instalments—Appealability.

No appeal lies against an order fixing instalments under s. 11, Bihar Money-lenders Act. **THE CHOTA NAGPUR BANKING ASSOCIATION LTD. v. RADHA GOBINDA SINGH** Pat. 649

s. 15—Exemption under—Whether available where judgment-debtor's usufructuary mortgage is in possession of holding.

Section 15 does not speak of land in the possession of the judgment-debtor. What it does is to exempt from sale 'one acre of the land comprised in the holding.' Hence it cannot be said that the whole of the holding can be brought to sale in execution of a mortgage decree obtained by a prior mortgagee, because it is in possession not of the judgment-debtor but of his subsequent *sudbarnadar* (usufructuary mortgagee). **SARWAN CHAUDHURY v. CHANARPAT THAKUR** Pat. 369

Bihar Municipal Election Rules, 1937, r. 13 (1). See Penal Code, 1860, s. 21, Expl. 2 108

r. 13 (1)—Scope—Chairman, if must make formal appointment in writing.

Rule 13 (1) of the Bihar Municipal Election Rules, 1937, does not require the Chairman to make the appointment in writing. The rule is not intended to deal with the manner of appointment at all, and only lays down which authority is to appoint a person to prepare the rolls. **BRIJBEHARI v. EMPEROR** Pat. 108

Bihar and Orissa Co-operative Societies Act (VI of 1935), ss. 24-A, 24-A (3)—Scheme sanctioned—Creditor of bank subsequently obtaining decree—He cannot execute decree but must obtain satisfaction of his dues in manner provided by scheme—Order of District Judge on appeal from Registrar's order sanctioning scheme.

A composition arrived at in pursuance of the provisions of a statute such as the Bihar and Orissa Co-operative Societies Act does not stand on the same footing as a private agreement. Where a person who is a party to the scheme, obtains subsequently a decree against the bank, the decree is not executable and the decree-holder must obtain satisfaction of his dues only in the manner provided in the scheme. **MAHAMAYA OJHA v. LAHERIA SARAI CENTRAL CO-OPERATIVE BANK, LTD.** Pat. 468

s. 24-A (3)—No question of jurisdiction involved—Order of District Judge is final.

Where no point of jurisdiction arises an order of the District Judge on appeal from the Registrar's

Bihar and Orissa Co-operative Societies Act—concl.

order sanctioning the arrangement is under s. 24-A (3) final. *MAHAMAYA OJHA v. LAHERIA SARAI CENTRAL CO-OPERATIVE BANK, LTD.* Pat. 468

Bihar and Orissa Mining Settlements Act (IV of 1920), s. 25 (f)—By-laws framed under, by Jharia Mines Board of Health s. 1 (h). See Bihar and Orissa Mining Settlements Act, 1920, s. 26 (3) 403

s. 25 (1)—By-laws framed by Jharia Mines Board of Health, s. 2, Part III, validity—Word 'nuisance' means nuisance affecting public health.

Section 2 of Part III of the by-laws framed by the Jharia Mines Board of Health under s. 25 (1) of the Bihar and Orissa Mining Settlements Act, is valid. It is quite consistent with the provision of s. 25 (1) (x) of the Mining Settlements Act. Though in that section of the by-laws the word 'nuisance' only has been used, it must be understood to mean "nuisance affecting the public health." *JHARIA MINES BOARD v. KARTAR AD. DHARM* Pat. 403

s. 25 (1)—By-laws framed under by Jharia Mines Board of Health Part. III, s. 2. See Bihar and Orissa Mining Settlements Act, 1920, s. 26 (3) 403

s. 26 (3)—Act itself, whether punishes nuisance as such.

It cannot be said that the Mining Settlements Act, itself does not punish nuisance as such. Section 26 (3) (b) of the Act clearly makes punishable any contravention of any by-law. Any by-law framed under the Act has the same force and validity as the provisions of the Act itself. *JHARIA MINES BOARD v. KARTAR AD. DHARM* Pat. 403

ss. 26 (3) (b), 25 (1)—By-laws framed under, by Jharia Mines Board of Health, s. 1 (h), Part III, s. 2—Definition of 'nuisance' in s. 1 (h) of by-laws, not exhaustive—Court must find out whether there has been nuisance affecting public health.

The definition of nuisance in s. 1 (h) of the by-laws framed under s. 25 (1) of the Bihar and Orissa Mining Settlements Act by the Jharia Mines Board of Health is not exhaustive. The definition is no doubt unreasonable in so far as it makes the Medical Officer of Health the sole judge of 'nuisance' and leaves no option to the Court but blindly to act upon his opinion. But as the definition is not exhaustive the Court must in each case find out whether there has been any nuisance affecting the public health. *JHARIA MINES BOARD v. KARTAR AD. DHARM* Pat. 403

Bihar and Orissa Municipal Act (VII of 1922), s. 192—Offence under—Sentence—Rigorous imprisonment in default of payment of fine cannot be awarded.

A person committing an offence under s. 192 of the Bihar and Orissa Municipal Act is liable to be fined but is not liable to imprisonment otherwise than in default of payment of the fine. Therefore, by reason of s. 67 of the I. P. C., the imprisonment to be awarded in default of payment of the fine must be 'simple'. *PANDEY PARASNATH KAI OF UPPER BAZAR, RANCHI v. THE MUNICIPAL CORPORATION OF RANCHI* Pat. 213

Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act (IX of 1938), ss. 15, 16—Holding paying produce rent—S. 16 applies and not s. 15.

Section 15 of the Bihar Restoration of Bakasht

Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act—cont.

Lands and Reduction of Arrears of Rent Act has no application to the case, where the rent of the holding is not a money rent but is produce rent. Such a holding comes within s. 16, and proceedings for reduction of rent of such a holding can properly be made under s. 16 of the Act. The Rent Reduction Officer, therefore, has jurisdiction to reduce the rent of such a holding. *SREE KANT LAL v. AJODHYA SINGH* Pat. 99

ss. 16, 18—Application under s. 16—All three conditions under s. 18, if must be complied with.

Section 18 (1) of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, 1938, deals with disposal of applications under s. 16. The Collector must dismiss the application of the tenants unless the latter have complied with the three requirements of the sub-section, namely, (2) (a) (i), (2) (a) (ii) and (2) (a) (iii). If they have not complied with the whole three, they have no right to claim a reduction of rent. *SREE KANT LAL v. AJODHYA SINGH* Pat. 99

ss. 16, 18—Inherent want of jurisdiction and wrong exercise of jurisdiction, distinction.

Where there is no inherent want of jurisdiction the revenue authorities have jurisdiction under s. 18 to entertain the application under s. 16. It may well be that they had to decide three facts in favour of the applicants before they could give them relief, and in a sense the existence of these three facts would be necessary to confer jurisdiction; but it is for the Court to consider whether the facts gave it jurisdiction to grant the relief, and the fact that it found the facts wrongly cannot make its decision wholly null and void. Where it had jurisdiction to entertain the matter, it is no answer to say that it had decided wrongly in the exercise of its jurisdiction. *SREE KANT LAL v. AJODHYA SINGH* Pat. 99

ss. 16, 18—Order reducing rent and granting instalments made—Executing Court, if can sell property under original decree.

The executing Court has no right whatsoever to sell the property once the order is made reducing the arrears and granting instalments. Section 19 (2) of the Act provides for the decree-holder's rights should the judgment-debtor default in performance of the new order. A sale under the original decree in contravention of the plain terms of the Collector's order is a sale wholly without jurisdiction, and must be set aside. *SREE KANT LAL v. AJODHYA SINGH* Pat. 99

ss. 16, 18—Relationship of landlord and tenant existing when rent accrued—Whether must be subsisting when application is made under s. 16 (1).

If a relationship of landlord and raiyat existed between the parties during the period in which the rent accrued, then it matters not whether such relationship is subsisting when application is made under s. 16 (1) of the Act to reduce the arrears due to the ex-landlord. If a landlord transfers his ownership and sues for arrears of rent, he can only obtain a money decree; but that is no reason at all why the tenant should be deprived of a benefit which is conferred upon him by the plain terms of the Act, namely, a right to claim reduction of arrears against the person entitled to receive the rent, namely the ex-landlord. *SREE KANT LAL v. AJODHYA SINGH* Pat. 99

Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act—concl'd.

— ss. 16, 18, 19—*Effect of reduction of arrears under ss. 16 and 18.*

Where the decree has been reduced and converted into an instalment decree it gives the decree-holder no right whatsoever to proceed with the execution except in a particular manner when default is made in payment of instalments. The effect of reduction of arrears under ss. 16 and 18 is dealt with under s. 19 of the Act. It is clear from s. 19 of the Act that the moment the Rent Reduction Officer has reduced the arrears and granted instalments, execution of the decree as it originally stood cannot proceed. **SREE KANT LAL v. AJODHYA SINGH** Pat. 99

— ss. 18, 16—*Execution—Executing Court can ignore orders made without jurisdiction.*

The decision of the Collector cannot be treated as wholly null and void for want of jurisdiction merely because he has decided wrongly that the tenant was entitled to relief. If the order is wholly without jurisdiction, the executing Court, of course, would be at liberty to ignore it. The executing Court, however, cannot ignore an order made with jurisdiction, on, matter how erroneous it may be. Where the Revenue Officer acts with jurisdiction his order must be observed by the executing Court. **SREE KANT LAL v. AJODHYA SINGH** Pat. 99

— ss. 18, 16—*Rent Reduction Officer reducing rent under s. 18 on application under s. 16*

—*Non-compliance with all conditions under s. 18*
—*Rent reduction officer, whether acts without jurisdiction.*

Where the judgment-debtors are occupancy raiyats paying produce rent they are entitled to make an application to the Rent Reduction Officer under s. 16 of the Act and the Rent Reduction Officer has full jurisdiction to call upon the decree-holder to answer the application and to hear the parties and make such orders as he deems proper in the circumstances. There is a confusion between the existence of jurisdiction and the exercise of jurisdiction. A Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken, the decision, however, wrong cannot be disturbed. **SREE KANT LAL v. AJODHYA SINGH** Pat. 99

Bihar Tenancy Act (VIII of 1885, as amended in 1934), s. 26-N, whether applies where transferee had been lawfully ejected in execution of proper rent decree before amending Act came into force.

Though s. 26 N, Bihar Ten. Act, was expressly made retrospective it could not affect rent decrees which had been obtained and which had been fully executed previous to the section coming into force. The section would apply to all cases which had not been the subject-matter of litigation or which were actually the subject-matter of litigation when the amending act came into force, namely, on June 10, 1935. The section can have no application whatsoever when the transferee had been lawfully ejected before the Amending Act of 1934, came into operation.

Hence where a decree when obtained was a proper rent decree and in execution of that decree the auction purchaser had obtained the possession of the lands purchased by him and ejected the transferees of the tenant in due course of law before the Amending Act of 1934 was even passed and long before the Act actually came into force, s. 26-N cannot affect the rights of the auction purchaser. **RAJA JHA v. RAMCHANDRA JHA** Pat. 199

Bihar Tenancy Act—concl'd.

— s. 104-H. See Court Fees Act, 1870, Sch. II, Art. 17 III 378

— s. 177-A (b)—*Exemptions in s. 177-A, if confined to rent exemptions—House of judgment-debtor when exempt from sale under s. 177-A (b), stated—It must belong to raiyat and occupied by him as such.*

Section 177-A, Bihar Ten. Act, gives exemptions which are not, in terms at any rate, confined to rent execution.

Under the Proviso to s. 177-A (b) the houses of raiyats and under-raiyats are saved from execution sales when the execution relates to decrees for arrears of rent due in respect of lands other than the sites of the houses. But execution against the site of a house on a decree for arrears of rent due in respect of other land would obviously be a money execution as distinguished from a rent execution, and it is precisely in such cases that sub-s. (b) of s. 177-A exempts houses from sale. It cannot be said that s. 177-A does not apply to money executions, and that, therefore, the house of the judgment-debtor can be sold. But what cl. (b) of s. 177-A saves is a house belonging to the raiyat and occupied by him as such. **BIKRAMA LAL v. RAM RAN BIJAYA PRASAD SINGH** Pat. 226

Bombay Abkari Act (V of 1878), s. 45 (c)

—*License prohibiting accused from selling liquor outside his shop—Accused taking out liquor from cask in shop, bottling it and delivering to servants in shop for transmission to customers at their houses—Sale held, completed within licensed area—Accused held could not be convicted under s. 45 (c).*

The accused who was a licensed vendor of country liquor was prohibited by a clause in his license from selling liquor outside the shop mentioned in the license. He took out quantity of liquor out of a big cask, bottled it and delivered it to his servants in the shop premises and the servants delivered the bottles to the customers in their houses and recovered the price there:

Held, that the servant of the accused in the circumstances could very well be treated as a bailee for the purpose of transmission to the buyer, within the meaning of s. 23 (2), Sale of Goods Act, and delivery to such servant, which admittedly took place in the licensed place, would be effective delivery to the buyer himself. As the sale, therefore, was completed within the licensed area the fact that the price was paid at the houses of the customers was immaterial for the completion of sale does not depend upon payment of the price of the goods sold. The accused could not, therefore, be convicted under s. 45 (c), Bom. Abkari Act. **EMPEROR v. KUNVERJI KAVASJI KAVARANA** Bom. 302

Bombay Municipal Boroughs Act (XVIII of 1925), s. 159—What is to be proved under s. 159, stated—Waste water of dyeing and bleaching department of mill, if necessarily offensive—Secretary of mill is not as such liable to be convicted under s. 159 as having control over premises.

The secretary of a mill is not as such liable to be convicted under s. 159 as being in control of the premises. *Prima facie*, the secretary of a mill would be a person to attend to the office and clerical work, but he would certainly not be a person to control the working of the mill or to see in what manner the waste water is to be discharged. That would be for the manager. If the secretary of the mill has control of the mill, there ought to be evidence to that effect. **EMPEROR v. CHAMPAKLAL CHUNILAL BANKAR** Bom. 345

Burma Courts Manual, Para. 102. See Criminal Procedure Code, 1898, s. 17 (1). **370**

Burmese Buddhist Law—Ecclesiastical Law—Death of owner of Poggalika property—Effect.

On the death of owner of Poggalika property the property becomes Sanghika property. U ZAWTIPALA v. U THATDAMA **Rang. 597**

Ecclesiastical Law—Owner of Poggalika property executing deed, declaring property to be dwiwhantaka of himself and other persons—Registration, necessity of.

A deed by the owner of Poggalika property declaring the property to be dwiwhantaka property of himself and some other person is the creation of an interest in immovable property and, therefore, it must be registered under the provisions of s. 17 (1) (b), Regis. Act. U ZAWTIPALA v. U THATDAMA **Rang. 597**

Ecclesiastical law—Sanghika kyaungdaik—Election of presiding monk—Majority of Sangh expressing desire to elect certain monk—Election, if valid.

Where the majority of the Sangha did desire that a monk should be elected presiding monk of Sanghika Kyaungdaik and so expressed their will at the meeting, then it must be held that he was validly elected. U ZAWTIPALA v. U THATDAMA **Rang. 597**

Marriage—Law of divorce.

A husband who believes his wife to be guilty of adultery may obtain her admission of guilt and the dissolution of marriage may take place by mutual consent on the footing that the husband retains the *hnazon* property. If he cannot do this and a separation ensues by reason of his own desertion, then he has three years in which to bring a suit for a decree of divorce, but if by reason of their differences his wife has deserted him, he has only one year. In the suit for a decree of divorce he may, if he can prove the factum of adultery, but unless he does so the dissolution of marriage becomes effective at the expiration of one or other of these periods whichever may apply. He is no longer a husband and he cannot "prove the adultery in a suit for divorce brought by him." Nor, can he bring a suit for a declaration that the dissolution of the marriage tie was effected in circumstances that his former wife has been guilty of adultery. And, if he cannot bring a suit of this kind, he cannot raise a defence of this kind in a suit brought against him. U SIN v. MA MA LAY **Rang. 482**

Payin property of husband—Wife's vested interest in—Whether affected by rule in Manukye Book X, s. 28.

All property acquired by either or both the spouses before or during marriage passes into common enjoyment and both spouses have a vested interest in all such property; that is, "passing into common enjoyment" is a consequence of marriage and not a test of the vesting of property. The interest of the wife in the payin property of her husband is one-third. She cannot be deprived of such vested interest in the property of her husband by the rule in Manukye Book X, s. 28 to which vested interest the law of inheritance can have no application. MA AYE TIN v. DAW THANT **Rang. 313**

Scope of operation of Manukye Book X, s. 28.

The wording of s. 28 of the Book X of the Manukye does not restrict its operation to the vested interest of the deceased in the undivided family property only but appears to extend its operation to the property of the deceased generally which is in the possession of the parent. The rule applies whether the parent is natural or adoptive as adoptive parents stand in the same position as the natural parents and have the same rights

Burmese Buddhist Law—conold:

so long as the relationship constituted by adoption subsists. MA AYE TIN v. DAW THANT **Rang. 313**

Succession—Husband and wife dying within short time of one another—Property inherited by one during marriage from collaterals—Mode of succession to.

Where property is inherited during marriage from collaterals by one party only, it should be treated not like property inherited from parents nor as jointly acquired property, but on the same footing as payin property or as inherited *lettetpwa* in cases of divorce by mutual consent, and should go to the extent of two thirds to the relatives of the party who inherited it and to the extent of one-third to the relatives of the other party in case of death of both parties within a short time of one another. MA PWA SHIN v. MA GALE **Rang. 201**

Widow or widower is proper person to administer estate and is entitled to letters of administration.

It may be laid down as a general rule that the widow or widower is the proper person to administer the estate. The widow or widower usually has possession of the whole of the estate at the time of the death of the other spouse, and is in most cases entitled to the whole or a large part of it. Though it would be rash to lay down an absolute rule that in no circumstances should letters of administration be granted to any other person, it would require very special reasons to justify such a grant. U TUN YIN v. U BA HAN **Rang. 439**

C. P. Debt Conciliation Act (II of 1938), s. 9—Admission by debtor, of agreement to pay sum due on bond—S. 9 does not operate.

Where there is an admission by the debtor of an agreement to pay the sum due on a bond, it is not necessary to prove the bond. Therefore s. 9 of the Debt Conciliation Act does not operate. That section does not declare that no suit could be brought on the debt. It merely states that some documents cannot be proved. UDHAO v. NARAYAN **Nag. 120**

s. 15 (1)—Member of joint family incurring debt in individual capacity—Creditor attaching his share in house belonging to family—Debtor dying—Brothers of deceased obtaining certificate under s. 15 (1) in respect of debt of deceased brother—Creditor, if can proceed with execution in respect of share attached by him

A member of a joint family had incurred a debt in his individual capacity on a bond. He was sued on this bond and a decree was passed against him. In execution of this decree the creditor attached a house. His brothers, three in number, raised an objection to the attachment and succeeded in getting their three-quarters interest in the house released, but the attachment in respect of the debtors' brother remaining quarter share subsisted. After the death of the debtor his brothers made an application to the Debt Conciliation Board in respect of their own family debts some of which were conciliated and an agreement under s. 12 (2) of the Debt Conciliation Act followed, and a certificate under s. 15 (1) of the Act was issued in respect of them. Among these debts was the debt due by their deceased brothers and this debt fell within the ambit of the certificate under s. 15 (1). When the creditor attempted to carry on with his execution proceedings in respect of the quarter share of the house which he had attached, the executing Court held that the execution could not proceed in view of the certificate granted by the Debt Conciliation Board;

C. P. Debt Conciliation Act—concl'd.

but the Court directed that the attachment should continue. In appeal the order was set aside the Court holding that the debt was not a debt of the three brothers, at all, and he ordered the execution case to proceed according to law :

Held, that despite the wide definition of "debt" in s. 2 of the Debt Conciliation Act, this debt was not a debt of the three brothers at all, there was no liability on their part to pay the debt at all, since they had not inherited any property from their deceased brother. The interest which their deceased brother had in the family property disappeared on his death except in so far as that interest had been attached. The brothers, then, had placed before the Debt Conciliation Board a fictitious debt in order to avoid the embarrassment which would arise by the sale of the deceased brother's interest in the attached house, and the issue of a certificate in respect of a debt which was not the debt of the persons making the application to the Debt Conciliation Board was one beyond the Board's jurisdiction and was ineffective in so far as that particular debt was concerned. *BAPUSAHEB v. BHAGIRATHISAO GAJRAJ* Nag. 895

C. P. Local Fund Audit Act (IX of 1933), s. 14—Application under—Appeal to High Court—Court-fee payable.

The District Judge acting under s. 14, C. P. Local Fund Audit Act is not intended to act as a Court but as a special tribunal, in much the same way as it does under the Workmen's Compensation Act. The appeal from his decision to High Court is not from a Court but from a Special Tribunal. Moreover the jurisdiction which s. 14 confers is not revisional, nor can the "appeal" to the High Court be called a "reference." S. 4, Court Fees Act, therefore, does not apply nor does Art. 1 of Sch. I. No *ad valorem* court-fee can, therefore, be demanded on the memorandum of appeal to High Court arising out of application under s. 14. *MORESHWAR PARASHRAM DAMLE v. COMMISSIONER, CHHATTISGARH DIVISION, RAIPUR* Nag. 731

Cantonments (House Accommodation) Act (VI of 1923), s. 29. See Limitation Act, 1908, s. 29 as amended in 1922 404**Charge—Charge by decree—Registration of, necessity of.**

A provision should be made in India for the compulsory registration of charge decrees, whether declaratory or executable. *GHASIRAM v. KUNDANBAI* Nag. 861

Charge created by decree—Its effect.

When a decree declares a charge on certain property not only are the immediate parties to a decree bound by it but so also are all who claim through or under them and date their title from after the decree or the institution of the suit as the case may be, that is to say, not only are the parties bound but also their privies. One effect of this is that the question of notice does not ordinarily arise. *GHASIRAM v. KUNDANBAI* Nag. 861

Charge for allowances granted under will may attach to general estate although testator had not provided for their payment out of specified properties.

A charge for allowance granted under a will may attach to the general estate although the testator in his will may not make provision for the charge or allowances to be paid out of specified properties.

A will provided that the testator's two sons should each get at the rate of Rs. 50 a month from his estate

Charge—cont'd.

month by month "for defraying the expenses of maintenance etc., of their sons, daughters, wives and their own selves" after the testator's death. There was a further provision that the sons should get "at the rate of Rs. 2,000" from the testator's estate for defraying the expenses of the marriage of each of their daughters. The will further provided for a monthly allowance at the rate of Rs. 8 a month to be paid to the testator's youngest daughter, who was a widow, out of the testator's estate so long as she lived :

Held, that even though the testator did not provide that the allowances were to be paid from specific property, the allowances granted by the will formed charges. *UPENDRA NATH DAS v. DURLAV CHANDRA KUNDU* Cal. 133

Decree creating charge and further directing judgment-debtor to do particular thing and decree merely declaring charge—Difference—Transferee for value without notice of charge declared by decree, whether takes free of charge—Property subject to charge sold—Burden to prove want of notice.

If a Court orders a defendant to pay the plaintiff a certain sum of money on a specified date and directs that if it is not paid property which it specifies is to be sold, those orders must be carried out and the judgment-debtor cannot evade them by transferring the property so charged to another, however, innocent that other may be. The doctrine of estoppel by record applies. The doctrine of *lis pendens* may also apply in some cases, though not necessarily always. But whether *lis pendens* applies or not the doctrine of estoppel by record does. In such a case the transferee from the judgment-debtor after decree is bound to carry out its orders in the same way and to the same extent as the judgment-debtor himself. It is not necessary for the decree-holder to sue the transferee all over again. But when the decree is merely declaratory and does not direct the doing of a particular thing, that is to say, when it is not executable, then an important difference arises, and the transferee, though bound by the decision in the sense that it is *res judicata*, is not necessarily bound to the same extent and in the same way as the judgment-debtor: pleas are available to him which would not be available to his transferor. He is not estopped from putting in issue the consequences of that charge because that could not have been put in issue.

Where a charge decree is merely declaratory and thus incapable of execution, the *bona fide* purchaser for value without notice takes free from the charge, the reason being that the legal estate prevails over a mere equity except where the legal owner takes with notice.

Where a decree has declared a charge on certain property and that property is subsequently sold, the burden of proving want of notice of charge is on the purchaser. *GHASIRAM v. KUNDANBAI* Nag. 861

Decree merely declaring charge and not providing for its execution, whether operates as notice of charge.

When the decree provides for the payment of future maintenance and makes provision expressly or impliedly for its own execution, then it does not put an end to the suit and consequently whether the matter be placed on the ground of *lis pendens* or on that of estoppel by record (the two do not necessarily overlap) the result is the same. But when the decree is merely declaratory and inexecutable, the suit *qua* suit is at an end and then these rules do not apply and the

Charge—concl'd.

decree *qua* decree does not operate as notice of charge.
GHASIRAM v. KUNDANBAI Nag. 861
Child Marriage Restraint Act (XIX of 1929), See Administration 730

Chota Nagpur Encumbered Estates Act (VI of 1876), s. 3—Word 'heir' in s. 3 scope of.

As the Act is obscure the word 'heir' has been loosely used in the Act and may be taken to include a person who has a right to succeed in law to the holder. MON MOHAN SINGH v. RAGHU NANDAN SINGH Pat. 23

ss. 3, 9—Word 'alienation' in s. 3, meaning of—Holder, whether prohibited from making testamentary disposition.

The word "alienation" ordinarily means alienation of all kinds but applying the principle of *ejusdem generis* as the general words in s. 3 follow specific words and again are followed by specific words, the word alienation means an alienation *inter vivos* only. In other words the prohibition against alienation in the Chota Nagpur Encum. Estates Act is a prohibition against alienation *inter vivos* and does not affect the testamentary power of the holder. MON MOHAN SINGH v. RAGHU NANDAN SINGH Pat. 23

s. 9—Object of the Act explained.

The object of Chota Nagpur Encum. Estates Act is that the manager shall have unfettered power of management and control over the property so that he may apply the rents and profits of the land to speedily relieve the holder's estates from the burdens created on it by the holder before the provisions of the Act were brought into operation for his benefit. The Act does not make the manager the holder of the estate but merely prohibits the holder in his own interest from exercising the acts of ownership so that they may not interfere with the wide powers given to the manager to manage the estate. MON MOHAN SINGH v. RAGHU NANDAN SINGH Pat. 23

Chota Nagpur Tenancy Act (VI of 1908), ss. 46, 47, 6, 4—Persons protected under ss. 46 and 47—Person holding immediately under raiyat, if protected—Under-raiyat, if raiyat—S. 60, Civil Procedure Code (Act V of 1908), applicability to case.

Section 46, 47, Chota Nag. Ten. Act, are intended to protect the rights of a *raiya*t only. The definition of "*raiya*t" in s. 6 is wide enough to include an under-*raiya*t: but cl. (2) of s. 6 makes the position clear. A person shall not be deemed to be a *raiya*t, unless he holds land either immediately under a proprietor or immediately under a tenure-holder or immediately under a Mundari *khunt-kattidar*. Where a person does not claim to hold the land under a proprietor or a tenure-holder or a Mundari *khunt-kattidar*, he cannot be held to be a *raiya*t in the sense in which the expression has been used in the Chota Nagpur Ten. Act though he may be an under-*raiya*t. There are only three classes of *raiya*ts mentioned in this section, and these are occupancy *raiya*ts, non-occupancy *raiya*ts and *raiya*ts having *khunt-katti* rights. Under-*raiya*ts, on the other hand are tenants, holding whether immediate or mediately, under-*raiya*ts.

Where the money decree-holder is not trying to sell the occupancy right in the lands but merely trying to sell the shop or house and such right, title and interest as the judgment-debtor who is not a *raiya*t has in the land in question, such interest cannot be said to be protected under s. 47. There is nothing in s. 60, Civil P. C. to prevent the sale of such judgment-debtor's interest in the

Chota Nagpur Tenancy Act—concl'd.

land in dispute. The shop or house which has been erected by him certainly belongs to him, and he has undoubtedly a disposing power over the profits of the land which he may exercise for his own benefit. The case, therefore, comes within the category of those properties which can be sold under the provisions of s. 60 of the Civil P. C. RAMPRATAP MARWARI v. LACHMAN MISTRY Pat. 441

s. 208—Sale under s. 208 entirely without jurisdiction.

Where a sale under s. 208 is entirely without jurisdiction it does not affect the interest of any of the judgment-debtors even though the sale of their interest under s. 210 (b) might be valid. NEHAL KHAN v. FELU DOME Pat. 435

ss. 208, 213, 258—Decree obtained against some tenants of holding only—Order of sale of holding in execution is void—S. 208 does not authorise such sale.

Section 208, Chota Nag. Ten. Act does not authorise the sale of a holding in execution of a decree obtained against some only of the tenants of the holding and an order directing the sale of the holding in execution of such a decree is void and without jurisdiction. NEHAL KHAN v. FELU DOME Pat. 435

ss. 213, 258, 208—S. 213, applicability of, where sale is challenged on ground of being void for want of jurisdiction in executing Court—Decree effective only against part of tenancy interest—Sale of holding in execution is nullity—Suit by tenant not impleaded in rent suit for declaration of title to land is not barred by s. 258.

Section 213, does not apply where the sale is challenged not on the ground of any irregularity or fraud in publishing or conducting it but on the ground that it is void for want of jurisdiction in the executing Court. No application is needed to set aside a null sale. When a decree is effective against only a part of the tenancy interest, a sale held in execution of it is entirely without jurisdiction and does not affect the interest of any of the judgment-debtors. Where one of the tenants of a holding is not impleaded in the suit for rent, a part of the tenancy interest is not represented in the suit and the decree obtained in the suit does not affect the interest of the tenant not impleaded and the sale held in execution of that decree is a nullity. A suit brought by such tenant for declaration of his title to the land is not, therefore, barred by s. 258. NEHAL KHAN v. FELU DOME Pat. 435

Civil Procedure Code (Act V of 1908), s. 2 (12)—Interest on mesne profits, if can be awarded as mesne profits.

Interest can rightly be awarded on mesne profits by the Court as mesne profits. The fact that by the delay in the filing of the suit for mesne profits the claim on the score of interest proved to be much larger in amount than it would otherwise have been, does not disentitle the plaintiff to the interest. VENUGOPAL PILLAI v. THIRUGNANAVALLI AMMAL Mad. 840

s. 2 (12)—Mesne profits—Costs of collection.

Mesne profits mean amount realised minus the costs of collections, and in the absence of any evidence the costs of collection should be considered to be 10 per cent. KHAN BAHADUR v. ALI MOHAMMAD Oudh 615

ss. 2 (17) (h), 80—Word "service" in s. 2 (17) (h)—Liquidator appointed by Registrar of Co-operative Societies, whether public servant.

The word "service" must necessarily mean something more than being merely subject to the orders of Govt. or to control by Govt. A liquidator who is appointed by the Registrar of Co-operative Societies to

Civil Procedure Code—contd.

liquidate a private Co-operative Society is not an officer in the service of the Govt. and therefore is not a public servant. Even if the liquidator is appointed by the Govt. it cannot be said that because the liquidator is given quasi-judicial powers, the duties which he performs must necessarily be regarded as being public duties. For can every person who is appointed by the Govt. to perform public duties is a public officer. **KUPPU GOVINDA CHETTIAR v. UTTUKOTTAI CO-OPERATIVE SOCIETY** Mad. 769

s. 10—Stay of suit filed on original side of High Court pending decision in previous suit filed in mofussil—Procedure—Application to be made on original side to Judge trying suit.

The proper and convenient procedure to stay a suit which has been instituted on the original side of the High Court until the decision of a previously instituted suit in the mofussil Court, is to apply under s. 10, Civil P. C., on the original side of the High Court to the Judge trying the suit and not on the appellate side.

The Judge on the original side can, if necessary, restrain the parties from proceeding with the suit in the mofussil Court. If the Judge declines to make an order under s. 10 an appeal would then lie to an Appellate Bench. **NAGAPPA CHANNAPPA TAMBRALI v. RAMSING JESSASING** Bom. 510

ss. 10, 151, 115—Order under s. 10 refusing stay of subsequent suit pending previous one—Order though not open to revision held could be interfered with under s. 151.

The defendant B did not object to the valuation put by plaintiff A of the suit at Rs. 300 but later on when apparently he thought that he had not raised a defence which might have been of benefit to him he approached another Court over the same subject-matter, put a valuation of Rs. 1,200 and virtually created a situation in which conflicting decisions may be given by two different Courts. The Court in which the subsequent suit was filed by B, refused to stay it under s. 10, Civil P. C., pending the previous suit on the ground that the Court in which the suit was previously instituted by A had no pecuniary jurisdiction to try it:

Held, that the order of the Court under s. 10 refusing to stay subsequent suit was an interlocutory one and it could not be subject of revision. The powers conferred by s. 151, Civil P. C., should not be exercised lightly but the case was eminently one in which they should be exercised in order to avoid "an idle multiplicity of suit" by ordering the subsequent suit to be stayed pending the decision of the previous suit. **WAQF MASJID v. SARDAR KHAN SHARIF KHAN** Pesh. 268

s. 11. See Civil Procedure Code, 1908, O. II, r. 2 586

s. 11—Court trying previous suit not competent to try subsequent suit—Previous decision, if res judicata.

The decision in the previous suit does not operate as res judicata in a subsequent suit, when the Court which decided the previous suit was not competent to try the subsequent suit. **MUNIA v. MANOHAR LAL** Oudh 161

s. 11—Creditor's suit against debtor on pro-note—Debtor's suit against creditor under s. 33, U. P. Agriculturists' Relief Act (XXVII of 1934)—Suits disposed of by one judgment—Identical sum found due to creditor from debtor—Appeal by debtor from decree in suit filed by creditor but not from decree in his own suit—Appeal held barred under s. 11.

A creditor instituted against his debtor a suit on a

Civil Procedure Code—contd.

pro-note for recovery of a certain amount. The debtor also instituted a suit against the creditor under s. 33, U. P. Agri. Relief Act. Both these suits were disposed of by a single judgment and the same sum was found due to the creditor. The debtor went in appeal from the decree in the suit filed by the creditor but not from the decree in the suit filed by himself.

Held, that the appeal was barred under s. 11, Civil P. C. **MOHAMMAD MOHTASHIM v. JOTI KRASAD** All. 801

s. 11—Previous suit by wife for divorce—No alternative plea for declaration that she is not wife—Subsequent suit for such declaration, if barred.

It cannot be said that a person petitioning the Court for a divorce as a husband or wife ought to add an alternative plea asking for a declaration that he or she is not a husband or wife at all, because the marriage has long ago ceased to exist. The matters are so dissimilar that their union not only might but must certainly lead to confession. Consequently the failure of the wife in earlier suit for divorce to raise alternative plea for declaration that her marriage has ceased to exist will not bar a subsequent suit for such declaration. **U SEIN v. MA MA LAY** Rang. 482

s. 15—Suit triable both by Village Court and District Munsif—S. 15 does not apply to such suit.

The District Munsif's Court is regulated by the provision of the Civil P. C. The Court of the Village Munsif is not. The procedure of the Village Courts is very special and decidedly of comprehensive character. However, although the provisions of the Lim. Act will apply to suits under the Village Courts Act, (s. 20) there is no provision applying the Civil P. C. to such suits. Hence where a suit is triable both by the Village Court and the District Munsif s. 15, Civil P. C., has no application in such a case and the suit can be instituted in any of those Courts. **BONDA SUBBA RAO v. KANDREGULA NARASIAH** Mad. 434

s. 24. See Civil Procedure Code, 1908, r. 2 (3) 166

s. 24—Transfer of suit—Transfer of all proceedings arising out of suit, is implied.

The transfer of a suit implies the transfer of all proceedings which arise out of the suit. Therefore, a Court which has passed an interim order which requires execution ceases to have jurisdiction in the matter of enforcing the order when the suit is transferred to another Court and consequently the power of enforcing the order lies in the Court to which the suit is transferred. **DULHIN JANAK NANDANI KUNWARI v. KEDAR NARAIN SINGH** All. 166

s. 35—Special costs—Point unnecessarily contested and time of Court and Crown Counsel wasted—Special costs may be allowed.

Where a point as to the court-fees has been quite unnecessarily and gratuitously contested and a considerable amount of the time of the Court and of Counsel for the Crown wasted on a very petty matter, special costs may be allowed under s. 35 of the Civil P. C. **SURJAN SINGH v. MASHAL SINGH** Oudh 425

s. 47.

See Civil Procedure Code, 1908, s. 73 46

See Civil Procedure Code, 1908, O. XXI, r. 58 45

s. 47—In spite of notice under s. 34, Bengal Agricultural Debtors Act (VII of 1936), property of judgment debtor sold—Judgment-debtor, if can apply under s. 47 for declaration that sale does not affect his title—High Court if can interfere with decision in revision.

Civil Procedure Code—contd.

Where in spite of the notice under s. 34, Ben. Agri. Debtors Act the executing Court has proceeded to execute the decree and property of the judgment-debtor is sold, the judgment-debtor is entitled to raise the question in an application under s. 47, Civil P. C., to ask for a declaration that the sale has not affected his title. The decision on that application would be appealable and it would not be open to High Court to interfere in revision. *Pyari Mohan Manjhe v. Hashan Ali Khan Armanali Khan* Cal. 307

— ss. 47, 115—Sale of judgment-debtor's holding in execution of rent decree—Application for setting aside sale under s. 174, Bengal Tenancy Act (VIII of 1885)—Subsequent application before Debt Settlement Board for settlement of debts—Notice under s. 34, Bengal Agricultural Debtors' Act (VII of 1936)—Executing Court refusing to stay further proceedings and proceeding with application for setting aside sale—Order held came under s. 47—No revision under s. 115 held competent.

The decree-holder obtained a rent decree against the petitioner and in execution of that decree, brought the holding to sale. The auction-purchaser thereafter deposited in Court the whole of the purchase money. The judgment-debtor then applied for setting aside the sale under s. 174, Ben. Ten. Act. Subsequently the judgment-debtor made an application before a Debt Settlement Board for the settlement of his debts in which he included the debt due under the rent decree referred to above. Upon that a notice was issued under s. 34, Ben. Agri. Debtors' Act to the Court in which the execution case was proceeding. The execution Court refused to stay further proceedings and proceeded with the application for setting aside sale.

Held, that the order complained of was an order relating to execution and that although the auction-purchaser was a party to the proceeding it was still an order which came within s. 47, of the Code the question at issue being one in which the judgment-debtor on the one hand and the decree-holder on the other were really interested. This being so, the order was open to appeal and the application under s. 115, of the Code was not, accordingly competent. *Mukimannessa Chowdhurani v. Rameswar Shukul*

Cal. 805

— s. 52—Auction by executor or administrator as such failing—Liability for costs—His Personal liability—Suit against him on liability of testator—S. 52, if protects him.

In ordinary cases, that is unless the defendant has been guilty of some misconduct including the action, an executor or administrator who sues as such and fails is personally liable for the costs of the action. It is true that if he is sued upon a liability of his testator he has the protection of s. 52, Civil P. C., but if he seeks to assert a claim, the fact that he possesses it by virtue of being sole executor and beneficiary of a deceased person puts the defendant at no disadvantage from which he would have been free if the claim had been brought otherwise than in a representative capacity. *Eusoo Karwa v. Niemeyar*

Rang. 177

— s. 52—Legal representatives—Claim against estate of deceased—Personal representative, if entitled to require strict proof of any claim against estate not within his personal knowledge.

A personal representative is fully justified in requiring strict proof of any claim against the estate not within his personal knowledge and entitled to be bound if others than he are interested in the estate—to avail himself of any technical defence, which he may

Civil Procedure Code—contd.

be advised, is open to him. *Eusoo Karwa v. Niemeyar* Rang. 177

— s. 53—Watan property—Whether property inherited by son.

Watan property is not to be regarded as property inherited by the son, so as to expose it to liability to execution under s. 53, Civil P. C. *Ramabai Shrinivas Nadgir v. Government of Bombay* Bom. 431

— s. 54. See Civil Procedure Code, 1908, s. 151 175

— ss. 55 (4), 145—No attempt by decree-holder to execute decree for three and half years—Security given by judgment-debtor held should not be forfeited.

In execution of a decree the judgment-debtor was arrested but was released on his furnishing security that he would apply within one month to be declared as insolvent. He failed to apply within one month but the decree-holder made no attempt to execute the decree for over three and half years.

Held, that the obvious inference was that the decree-holder realized that the judgment-debtor had substantially, if not technically, complied with the order of the Court, and that the purpose for which the security was given was substantially fulfilled. It would be wholly inequitable at such late stage to order that the security should be forfeited. *Jitendra Mullick v. Alla Bux* Cal. 103

— s. 60. See Chota Nagpur Tenancy Act, 1908, s. 46 441

— ss. 60, 73, as amended by Act (IX of 1937)—Attachment of salary before June 1, 1937, by judgment-creditor saved by s. 3 of Amending Act, whether available for rateable distribution to other creditor not so saved.

An attachment of salary made before June 1, 1937, under s. 60, Civil P. C., by a judgment-creditor saved by s. 3 of the Amending Act, is available by way of rateable distribution to another judgment-creditor who is not covered by s. 3. *Execution Darkhast No. 280 of 1937*, affirmed. *Maruterao Krishnaji v. Thakuradas Isardas* Sind 532

— s. 60 (1)—Word "or" in Proviso—Scope of.

The word 'or' is used in Proviso to s. 60 (1) to include decrees in which no attachment is necessary and mortgage decree is one of this class. *Mahmud Jan Mir Hamzah Khan v. Gutta Singh-Ajab Singh* Pesh. 716

— ss. 60 (1) (c), 60 (1), Proviso—Mortgage decree against house—House, if can be sold.

The house of an agriculturist cannot be sold even in execution of a mortgage decree passed against that property. *Mahmud Jan Mir Hamzah Khan v. Gutta Singh-Ajab Singh* Pesh. 716

— s. 73, as amended by Act (IX of 1937). See Civil Procedure Code, 1908, as amended by Act (IX of 1937), s. 60 582

— s. 73—Decree against grandfather must be deemed to be passed against son and grandson to the extent of their shares in family property—Decree against grandfather, son and grandson—Another decree against grandfather and son only—Grandfather and son adjudged insolvents—Both decree-holders held entitled to rateable distribution in the interest of grandson.

Where a money decree is passed against a grandfather who is joint with his son and grandson it must be taken to be a decree passed against the son and the grandson to the extent of their interests in the family property as they are liable to that extent for his lawful debts.

Civil Procedure Code—contd.

Consequently a creditor who has a decree against the grandfather, son and grandson and another creditor who has a decree against the grandfather and son only, are entitled to rateable distribution under s. 73, Civil P. C., when the grandfather and the son are adjudicated insolvents and the interest of the grandson is attached by one of the creditors before the same has been realized by the Official Assignee or the Official Receiver. *SUBRAMANIAN CHETTIAR v. ANNAMALAI CHETTIAR* Mad. 803

s. 73—Object of s. 73.

The object underlying the enactment of s. 73, Civil P. C., was to prevent multiplicity of execution proceedings while at the same time ensuring equitable distribution of assets between various decree-holders who had the right to have their decrees satisfied out of these assets. *HOTI LAL v. CHATURA PRASAD* All. 276 F B

s. 73—S. 73 enacts mere rule of procedure

—It does not clothe decree-holder with right which he does not possess.

Section 73 enacts a mere rule of procedure and not a rule of substantive law. It merely enacts a rule by which decree-holders, in specified cases, can resort to a cheap and speedy procedure for the realization of their decrees. It does not, however, clothe a decree-holder with a right which he does not possess. It does not enlarge the rights given to a decree-holder by his decree, nor does it cut down the rights to which a decree-holder may be entitled by the decree in his favour. Section 73 cannot, therefore, be invoked to entitle a decree-holder to satisfy his decree from assets which he could not touch if s. 73 was not on the statute book. Conversely the provisions of s. 73 cannot be utilized to deprive a decree-holder from satisfying his decree from assets which he would have been otherwise entitled to follow in execution. *HOTI LAL v. CHATURA PRASAD* All. 276 F B

s. 73—Word "passed" significance of.

The Legislature, added the word "passed" in the new s. 73 in order to make it clear that the words "against the same judgment-debtor" had reference to the decrees themselves, and not to the various applications for execution contemplated by the section. *HOTI LAL v. CHATURA PRASAD* All. 276 F B

s. 73—Words "passed against same judgment-debtor", construction of.—Decree by X against Y—Decree by A on Y's death against Y's son Z personally and against Y's assets in hands of his sons, on pro-note executed by Y and Z—s. 73 held appli.d.

Per *Iqbal Ahmed and Verma, J.J. Bajpai, J. dissenting*.—The expression "passed against the same judgment-debtor" in s. 73 must be liberally construed. The object of s. 73 being to provide for rateable distribution of assets upon which two or more decree-holders have equal claims, the words "passed against the same judgment-debtor" must be interpreted as referring more to the property which a judgment-debtor represents than to the person against whom execution has been sought.

Where therefore a decree for certain amount has been obtained by X against Y on a pro-note executed by Y and on the death of Y one A obtains a money decree against Y's son Z personally and against the assets of Y in the hands of Z and C the sons of Y on the basis of a promissory note executed by Y and Z, the decree obtained by X and A are against the same judgment-debtor and s. 73 applies.

Per *Bajpai, J.*—The personality, the character and the capacity of the judgment-debtor should not be ignored and undue preference should not be given to

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the property from which the assets are realized. The decree-holders must have obtained their decrees against the same persons and it may become a matter of no importance that by reason of the death of the judgment-debtor in one decree the property that can be seized in execution in both the decrees happens to be the same. If the two decrees are not against the same person s. 73 would not be applicable. *HOTI LAL v. CHATURA PRASAD* All. 276 F B

ss. 73, 47—Order under s. 73 determining question of rateable distribution between rival decree holders—Judgment-debtor not interested—Order, if falls under s. 47 and whether appealable.

An order under s. 73, Civil P. C., determining the question of rateable distribution as between rival decree-holders in which the judgment-debtor has no interest does not fall under s. 47, Civil P. C., and is not appealable. *S. B. DASS v. GHANSHAM DAS* Rang. 46

s. 80.

See Civil Procedure Code, 1908, s. 2 (17) (h) 769
See Tort 263

s. 92—Applicability of s. 92 whether depends upon whether defendants had or had not objected to form of suit.

The applicability of s. 92, Civil P. C., does not depend upon whether the defendants had or had not taken objection to the form of the suit. The form of the suit is laid down by law. The Legislature requires that if a suit of this kind is to be instituted it must be instituted in a particular way, and it is not open either to the plaintiffs or to the defendants, as it were, to contract themselves out of this section and to say in effect "we do not mind if the law in this matter is or is not observed." *MULCHAND CHANDUMAL v. HARKISHINDAS PARMANAND* Sind 461

s. 92—Consent to institute suit given to certain individuals—Suit instituted by some of them only, whether validly instituted.

Where consent has been given to two or more persons, only some of those persons, even if they are more than two, cannot institute the suit. A condition precedent to the valid institution of the suits is the fulfilment of the conditions of the consent which has been given. The section does not contemplate that some of those persons should institute a suit as plaintiffs while others who, after consent is given, have changed their minds, should be joined as defendants. *MULCHAND CHANDUMAL v. HARKISHINDAS PARMANAND* Sind 461

s. 92—Library held trust for public purpose of charitable nature.

Where a testator in his will sets apart certain portion of his building for a library to be used by general public and dedicates part of his property for the up-keep of the library and appoints a committee for its management, the library is a trust for public purpose of a charitable nature within the meaning of s. 92. *LOKE NATH MUKERJEE v. ABANI NATH MUKHERJEE* Cal. 874

s. 92—Mere assertion by trustee that trust properties are private properties, whether sufficient ground for his removal.

Mere assertion in a suit under s. 92, by a trustee that trust properties are private properties is not by itself a sufficient ground for his removal. If he committed any breach of trust before the suit, his conduct in the course of the suit is an important element to be taken into consideration in deciding whether the breach should be condoned and he should be allowed to retain the office. *LOKE NATH MUKERJEE v. ABANI NATH MUKHERJEE* Cal. 874

s. 92—Point that suit instituted under

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section was not validly instituted as it was not instituted by all those to whom consent was given which can be raised for first time in appeal.

If the facts are in dispute the point that the suit was not instituted by all those to whom consent was given to institute the suit by the Collector under s. 92 read with s. 93, Civil P. C., and therefore was not validly instituted, should not be allowed for the first time in appeal. But where there is no dispute about the facts the point can be allowed to be raised for the first time in appeal. *MULCHAND CHANDUMAL v. HARKISHINDAS PARMANAND* Sind 461

—s. 92—Question whether particular property appertains to public trust or whether trustee has been validly appointed or not, when can be determined in suit under s. 92.

Mere declarations are outside the scope of s. 92 of the Civil P. C. But where reliefs contemplated by the section are claimed and such reliefs cannot be granted without the determination of the question whether a public trust exists or whether a particular property appertains to a public trust the Court in a suit under s. 92 can determine the question whether a public trust exists or a particular property appertains to such public trust. A suit for a mere declaration that a trustee has not been validly appointed may be outside the scope of s. 92. But in a suit under s. 92 the Court has to determine whether a trustee has been validly appointed or not if determination of such a question is necessary for giving reliefs claimed in the suit which properly come under that section. *LOKE NATH MUHERJEE v. ABANI NATH MUKHERJEE* Cal. 874

—s. 92—"Two or more persons", meaning explained.

The phrase in s. 92, Civil P. C., "two or more persons" means, two or more individuals who are named or so described in the consent that they can be identified. *MULCHAND CHANDUMAL v. HARKISHINDAS PARMANAND* Sind 461

—s. 100—Finding of fact based on untenable view of law is not binding in second appeal.

The finding of fact based on a view of law which is manifestly untenable is not binding in second appeal. *HARAN CHARAN MANDAL v. HIRALAL NASKAR* Cal. 172

—s. 100—Fraud—Finding as to, is one of fact.

The finding of the lower Appellate Court on the question of fraud is a clear finding of fact which cannot be challenged in second appeal. *GOKUL PRASAD v. MAHADEI KUNWAR* Oudh 195

—s. 100—Objection that execution application is fraudulent cannot be raised in second appeal for first time—Similarly, objection that execution application was defective as not mentioning previous application, cannot be raised for first time in second appeal.

An objection raised in the High Court which was not raised in either of the Courts below to the effect that the present application is fraudulent in that the decree-holder has suppressed certain particulars was the intention of misleading the Court must be disallowed.

Similarly an objection which was not taken in the Courts below, namely that the present application for execution is defective in that it does not refer to the previous application and also does not mention the results of the previous applications to which it refers must be disallowed. *NATHMA v. BALKRISHNA*

—s. 104. See Civil Procedure Code, 1908, Sch. II, Paras. 21, 16

Civil Procedure Code—contd.

—s. 105. See Civil Procedure Code, 1908, s. 115 354

—s. 105—Suit for framing scheme—Defendant's objection that Court has no power—Objection overruled—In revision, High Court upholding objection and dismissing suit—On order being communicated lower Court passing formal decree dismissing suit—High Court's order held interlocutory—High Court's order held inappropriate—Appeal from decree held competent by virtue of s. 105.

In a suit for framing a scheme, the preliminary objection of the defendant that the Court had no power to frame a scheme was overruled. In revision, the High Court upheld the defendant's objection and dismissed the suit. On this order being communicated, the lower Court passed a formal order dismissing the suit.

Held, that the High Court's order was not final but interlocutory and was inappropriate inasmuch as the High Court dismissed the suit itself instead of directing the lower Court to dispose of it according to law. The order fell under s. 105 (1), Civil P. C., and appeal from the decree was competent by virtue of s. 105, since the order affected the decision of the lower Court when passing the decree. *T. S. PICHU AYYANGAR v. PERARULALA RAMANUJA JEE* Mad. 809

—s. 109—Contempt of Court—Refusal of High Court to punish—Jurisdiction exercised is of criminal nature—S. 109 is not applicable.

The jurisdiction which the High Court exercises in proceedings for contempt of Court is a jurisdiction of a criminal nature and not of a civil nature at all. Where, therefore, the High Court has refused to punish a party for contempt the provisions of s. 109, Civil P. C., have no application. *RADHEY LAL v. NIRANJAN NATH* All. 606

—s. 109—Refusal to High Court of stay criminal complaint—Application for leave to appeal—S. 109 does not apply.

Where the High Court has refused to stay the criminal complaint the jurisdiction it has exercised is of a criminal nature and s. 109, Civil P. C., does not apply to an application for leave to appeal to the Privy Council. *RADHEY LAL v. NIRANJAN NATH* All. 606

—s. 109 (c)—Expression "fit one..... in Council," meaning of—Refusal to stay criminal complaint—Case cannot be said to be fit for appeal.

The expression "fit one for appeal to His Majesty in Council" in s. 109 (c) means that the question should be either of great general importance to the public at large or of great private importance to the particular litigant and that the matter was not measurable in money. A refusal to stay a criminal complaint cannot be said to be a matter of great private importance to the particular accused in the case. *RADHEY LAL v. NIRANJAN NATH* All. 606

—s. 110 (2)—Suit for declaration that property could not be attached and sold in execution of certificate as same belonged to plaintiff—Suit valued at Rs. 7,699 for which certificate was issued—Suit decreed but on appeal dismissed by High Court—Appeal also valued at Rs. 7,699—Property in respect of which certificate was issued worth more than Rs. 10,000—Case held covered by s. 110 (2).

The plaintiffs brought a suit for a declaration that a certain property could not be attached and sold in execution of the certificate. They rested their claim

Civil Procedure Code—contd.

in the suit on the ground that they had purchased it in execution of a mortgage decree obtained by them against the persons who owned the property. The suit was valued at Rs. 7,699 odd, because that was the amount for which the certificate was issued. The suit was decreed by the trial Court but on appeal the High Court dismissed it. The appeal was also valued at Rs. 7,699. But the property in respect of which the certificate was issued was worth more than Rs. 10,000:

Held, that the case was fully covered by s. 110 (2) and was a fit one for appeal to His Majesty in Council from the decree of the High Court. *ISHWARI PRASAD SINGH v. SIR KAMESHWAR SINGH BAHADUR*

Pat. 654

s. 115.

See Civil Procedure Code, 1908, s. 10

268

See Civil Procedure Code, 1908, s. 47

805

See Decision

583

See U. P. Tenancy Act, 1939, s. 276

543

s. 115—Applicability to proceedings under Agra Tenancy Act.

Though s. 115, Civil P. C., is inapplicable to a proceeding under the Agra Ten. Act, s. 253, Agra Ten. Act is applicable. *RATI RAM v. NIADER MAL*

All. 640

s. 115—Execution—sale set aside on ground of insufficiency of stamp—No appeal by decree-holder but application to Court to vacate its order under s. 151—Refusal by Court—High Court held could not interfere in revision.

A sale held in execution was set aside on the ground of insufficiency of stamp. The decree-holder took no steps to challenge that decision by an appeal but he applied to the Court to vacate its order under its inherent powers under s. 151 and the Court refused to interfere. The decree-holder applied in revision to the High Court against the order:

Held, that under the circumstances the High Court could not interfere in revision. *BINRAJ MARWARI v. RAM SAHAI MAHTO*

Pat. 21

s. 115—Mere question whether Court's order is wise or unwise cannot be gone into.

A mere question whether the order of the Court is wise or not cannot be gone into in revision. *CHINAKURTI SESHAYYA v. HIRACHAND CHUNILAL*

Mad. 33

ss. 115, 105—Order setting aside dismissal of case for default—Revision, if lies.

Under s. 105 (1), Civil P. C., the propriety of the order setting aside the dismissal of a case for default of the plaintiff cannot be set fourth as a ground of objection in the memorandum of appeal from the decree ultimately passed in the suit, and hence where an order sets aside the dismissal for default and restores the case, there is a case decided within the meaning of s. 115 and an application in revision lies against the order restoring the case. *BAIJNATH v. RAM NARAIN*

Oudh 354

s. 144—Allowance ordered by Court to be paid to parties out of suit property must be deemed to have been paid on condition of their being refunded by party ultimately proving unsuccessful.

No interim order of the Court could operate to give away the revenues of the estate absolutely to one of the contesting parties. The allowances paid *pendente lite* must be deemed to have been paid on condition that they should be refunded by the party who ultimately proves unsuccessful.

Even in case of an impartible estate the widow of an undivided co-parcener is *prima facie* entitled to

Civil Procedure Code—contd.

maintenance. *ZAMINDAR OF SANNOKHEMEDI v. SUSI IAMALA PATTA MAHADEVI*

Mad. 486

s. 144—Application for mesne profits—Claim to set-off not put in trial Court cannot be raised in appeal.

Per *Stodart, J.*—When in an application for mesne profits under s. 144 the opposite party fails to put forth the claim for set-off, he cannot be allowed to raise this plea for the first time in appeal.

An order for the payment of mesne profits to the person who would have been in possession but for the decree which has been reversed is in the words of s. 144 an order which is properly consequential on such "reversal." *ZAMINDAR OF SANNOKHEMEDI v. SUSI IAMALA PATTA MAHADEVI*

Mad. 486

s. 144—Possession of Receiver is possession of party ultimately declared successful—Plaintiff succeeding in Court of first instance in suit for possession—Defendant's appeal to High Court—Appointment of Receiver—High Court allowing appeal—Defendant getting possession from Receiver—High Court's decree reversed by Privy Council—Receiver's possession—Plaintiff held entitled to restitution and mesne profits.

Per *Wadsworth and Stodart, JJ., Burn, J., contra.*—The possession of a Receiver *pendente lite* must be deemed to be the possession of the party who is ultimately declared successful.

Plaintiff's suit for possession was decreed. The defendant went in appeal to the High Court. A Receiver was appointed by the Court during the pendency of the appeal. High Court allowed the appeal and the defendant took over possession from the Receiver. In the meantime the plaintiff went in appeal to the Privy Council who reversed the decree of the High Court and restored the decree of the Court of first instance. In the application by the plaintiff under s. 144, Civil P. C.:

Held, per *Wadsworth and Stodart, JJ., Burn, J., contra.*—(1) that the Receiver's possession must be deemed to be the possession of the plaintiff who must be deemed to have been dispossessed when the defendant took over possession from him in pursuance of the erroneous decree of the High Court and hence the plaintiff was entitled to possession and mesne profits during the period he was out of possession by way of restitution under s. 144;

(2) that the fact that the plaintiff was refused a decree for mesne profits by the Court of the first instance and the High Court did not deprive him of his right to claim the same under s. 144 from his opponent after his dispossession by the latter in consequence of High Court's decree which was subsequently reversed. *ZAMINDAR OF SANNOKHEMEDI v. SUSI IAMALA PATTA MAHADEVI*

Mad. 486

s. 144—Words "place the parties in the position which they would have occupied but for such a decree," construction.

Per *Wadsworth, J.*—There are three ways possible in interpreting the words "place the parties in the position which they would have occupied but for such a decree," occurring in s. 144, Civil P. C. The words might mean that the parties are to be put in the position they would have occupied had the right decree been passed instead of the wrong decree; or secondly, they may mean that the parties are to be put in the position that they would have occupied had no decree at all been passed; or the words may mean simply that the parties are to be put in the position which they would have occupied had it not been that a wrong decree had been passed. The last interpretation is the cor-

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rect one. There is nothing in the words of s. 144 to justify the conclusion that it was the intention of the Code to give to the person claiming restitution and better position than that which he occupied at the time when the wrong decree was passed and this is what has to be inferred if he has to be put in the position which he would have occupied had the right decree been passed. The correct procedure is to take the position as it stood immediately before the wrong decree, to find out what would be the position of the ultimately successful party as on that date, having regard to the fact that the proceeding terminated and to award to the successful party restitution in the shape of any profits wrongfully received under the erroneous decree or as a direct consequence thereof. *ZAMINDAR OF SANNOKHEMEDI v. SUSI IAMALA PATTA MAHADEVI*

Mad. 486

ss. 144, 145—Order under s. 144, if can be passed against surety.

Per *Burn and Stodart, J.J.*—In proceedings under s. 144, Civil P. C., no order for restitution can be made against sureties. There is of course no objection to the sureties being made parties in such proceedings, as they are vitally interested in the amount that may be found due by way of restitution. If the principal is found liable to pay anything to the applicant by way of restitution, it will be for the applicant to enforce that order against the sureties by proceedings under s. 145, Civil P. C., and the liability of the sureties can only be determined in such proceedings. *ZAMINDAR OF SANNOKHEMEDI v. SUSI IAMALA PATTA MAHADEVI*

Mad. 486

s. 145.

See Civil Procedure Code, 1908, s. 144

486

See Civil Procedure Code, 1908, s. 55 (4)

103

s. 149—Court granting time for payment of court-fee after presentation of plaint, improperly and without sufficient cause—Effect.

Where the Court has given improperly and without sufficient cause, time for payment of court-fee after the plaint had been presented the effect of the grant of such time is that the plaint takes effect as if it had been presented along with the full court-fee on the date of its first presentation and no question of limitation arises where the plaint originally presented is within time. *VENUGOPAL PILLAI v. THIRUGNANAVALLI AMMAL*

Mad. 840

s. 151. See Civil Procedure Code, 1908, s. 10

268

s. 151—Injunction, if can be granted in personam against party restraining it from proceeding with criminal complaint in Court outside jurisdiction of High Court—Injunction was refused in peculiar circumstances of the case.

High Court has inherent jurisdiction to grant an injunction in personam against a person who has submitted to the jurisdiction to restrain him from proceeding with a criminal complaint in a Court which is not subject to the jurisdiction of that High Court. This jurisdiction, however, should be exercised with extreme caution.

[Bombay High Court refused to grant injunction in personam against a defendant who had submitted to its jurisdiction restraining him from proceeding with the complaint filed by him against the applicant in the Court of a Magistrate at Benares, charging him with an offence of criminal misappropriation as the plaintiff had not in the first instance applied to the Criminal Court for the stay of criminal proceedings, had instituted the civil suit with the object of forestalling and preventing the criminal proceedings, and there was a long delay in praying for the injunction.] *KANHAIYA-*

Civil Procedure Code—contd.

LAL HARKARANDAS v. MOHANLAL RAMVALLABH

Bom. 814

ss. 151, 54, O. XX, r. 18—Partition suit—Decree for possession of plaintiff's share—Application of plaintiff under s. 151 for proclamation in villages that plaintiff obtained certain share in them, allowed—Legality of procedure.

In a suit for partition of an estate a preliminary decree for possession of one-fifth share of the estate was passed in favour of the plaintiff. The Court allowed an application of the plaintiff under s. 151, Civil P. C., that it might be proclaimed in villages in which he had been given a share that he had obtained a decree for a fifth share in those villages:

Held, that the decree was not drawn up in proper form according to O. XX, r. 18 and the Court had no jurisdiction to pass such an order under s. 151 as the remedy was provided by the Code under s. 54 and O. XX, r. 18. *SUKHPAL DAS v. KEDAR NATH*

Oudh 175

ss. 151, 115, 47—Dismissal of execution application as time-barred—On decree-holder's application under s. 151, Court reconsidering previous order and reviving execution case—Order under s. 151 held, not illegal—Remedy of aggrieved judgment-debtor.

Where on an application of the decree-holder under s. 151, Civil P. C., the executing Court reconsiders its previous order dismissing the decree-holder's execution application as time-barred and revives the execution case the order under s. 151, cannot be said to be illegal. The remedy of the aggrieved judgment-debtor is by way of revision under s. 115 *PULIN BEHARI DAS v. KRASAT ALI*

Cal. 265

s. 151, O. XLI, rr. 23, 25, 27—Trial Court refusing to give opportunity to produce evidence—Evidence not sufficient for decision on point at issue—Remand by Appellate Court for obtaining evidence—Remand is under s. 151, and proper.

An Appellate Court's power of remand is not circumscribed within the rr. 23 and 25 of O. XLI of the Civil P. C. An order of remand under s. 151 would be a proper order, if it is made by the Appellate Court in a case in which the evidence on the record is not sufficient for a correct decision on the point at issue, to obtain further evidence before the trial Court which had refused to give an opportunity to produce that evidence. *RAM DHANI v. NAGAR MAL*

Oudh 755

O. I, r. 3—"Necessity" and "proper" party, distinction between.

The distinction between a "necessary" and a "proper" party to an action appeal or other proceedings, is well recognized. A "necessary" party is one, whose presence on the record is enjoined by law, or in whose absence no effective decision can at all be given. Without such party the action, appeal or proceeding is not properly constituted and is liable to be dismissed on this ground alone. A "proper" party, on the other hand, is one whose presence is not essential for the constitution of the suit appeal or proceeding, but whom it may nevertheless be desirable or even necessary, to have before the Court in order to properly, or completely and adequately, adjudicate on the matter involved. It is the duty of the person bringing the action appeal or proceeding to implead all "necessary" parties to it and his omission to do so is a fatal defect which if not remedied, with the permission of the Court within the period prescribed by law, results in its dismissal. No such duty, however, is cast on him in the case of a "proper" party nor does the absence of such a person

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from record entail any such serious consequences.

HARI RAM v. CENTRAL GOVERNMENT *Lah. 192*

— **O. I, r. 8.** See Transfer of Property Act, 1882, s. 53 *766*

— **O. I, r. 8—Public right of irrigation interfered with—Suit by members of public in individual capacity—Half-hearted resort to O. I, r. 8—Whether prevented from obtaining relief as members of public specially injured.**

Where a public right of irrigation has been interfered with by a person by encroaching upon *ahar* land and members of the public have brought a suit substantially in their individual capacity, the half-hearted resort to O. I, r. 8, Civil P. C., would not prevent the plaintiffs from obtaining relief as members of the public, specially injured by the defendants' interference with the "public" right of irrigation.

AKHAURI HALIWANT SAHAY v. DEO NARAIN MALI *Pat. 243*

— **O. I, r. 10—Order under O. I, r. 10, discharging defendants on ground that there was no cause of action—Appeal, if maintainable.**

Where the name of a defendant is struck out under O. I, r. 10, Civil P. C., on the ground that the plaintiff does not disclose any cause of action against him, the order operates as a decree and is appealable as such.

LALSA MOTISA v. BHAGWANT RAMJI NAIK KANAO *Nag. 37*

— **O. II, r. 2—Mortgage-deed providing that mortgagee could secure payment of principal and interest by bringing mortgaged property to sale or he could secure payment of interest and compound interest by bringing separate suit thereafter—Suit by mortgagee for interest and decree obtained—His second suit for principal and interest, if barred.**

A mortgage-deed provided as under: ".....It would be open to the mortgagee at his will to secure payment of the principal together with the balance of interest by bringing the mortgaged property to sale at any time. It would be open to the mortgagee to let the interest accumulate till the time provided by law for payment, or to obtain the payment of interest and compound interest by bringing a separate suit. In this contingency the principal mortgage amount shall remain secured on the mortgaged property". So far as the payment of interest and compound interest was concerned, no reference was made to the mortgaged property in this clause. The mortgagee instituted a suit for interest only and got a decree. Subsequently he brought another suit for principal and interest:

Held, that the subsequent suit was not barred under O. II, r. 2, Civil P. C., since the first suit was based on a cause of action distinct from the second.

Held, also as the mortgage-deed contained a separate personal covenant for the payment of interest and compound interest, such a covenant could not be ignored simply because in the previous suit the stipulation in the mortgage deed was not made the basis of the claim. NIDHAN SINGH v. PREM SINGH *Lah. 524*

— **O. II, r. 2—Plaintiff not aware of his right at date of former suit suing subsequently on such right—Second suit, if barred.**

A right which a litigant possesses without knowing or ever having known that he possesses it, can hardly be regarded as a "portion of his claim" within the meaning of O. II, r. 2 (2), Civil P. C.

Where, therefore, the plaintiff at the date of the former suit was not aware of the right on which he claimed in a subsequent suit;

Held, that O. II, r. 2 did not apply to the case and

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the plaintiff was not precluded from suing in respect of that right. BHAGWAN DASS v. TAJUNNISA BIBI *Oudh 363*

— **O. II, r. 2, s. 2 (12)—Suit for possession of property—Past mesne profits, whether must be claimed—Separate suit for such mesne profits, if lies.**

A claim for past mesne profits need not be sued for in a suit for recovery of possession of the property in respect of which mesne profits are claimed by reason of O. II, r. 2, Civil P. C. A separate suit for mesne profits is competent. VENUGOPAL PILLAI v. THIRUGNA-NAVALLI AMMAL *Mad. 840*

— **O. II, r. 2, s. 11—Applicability—Essentials—First suit for recovery of specific sums—Second suit for rendition of accounts, held not barred either by O. II, r. 2 or s. 11.**

In order to ascertain whether the suit is barred by the provisions of O. II, r. 2, Civil P. C., it is necessary to consider what facts had to be proved in the first suit and what facts have to be proved in the second suit.

The defendants who were proprietors of a firm of a military contractors gave a sub-contract to the plaintiff for the supply of goods and the arrangement between the parties was that the plaintiff should submit his bills to the defendants and the latter should realize the money from the military department and should thereafter pay it to the plaintiff after deducting a commission of 5 per cent. The plaintiff instituted a suit for recovery of a specific sum of money, which admittedly had reference to specific bills submitted by the plaintiff to the defendants. Subsequently the plaintiff filed another suit against the defendants for rendition of accounts:

Held, that the causes of action and the matters to be proved were different in the two suits and hence the provisions of O. II, r. 2 did not operate as a bar to the second suit. Nor was the suit barred by s. 11. RADHA KISHEN v. IKRAM-UD-DIN *All. 586*

— **O. II, r. 2—O. II, r. 2 does not apply to joining of different causes of action in same action.**

Order II, r. 2, Civil P. C., is not directed to the inclusion in one and the same action of different cause of action even though they arise from the same transactions. U SIN v. MA MA LAY *Rang. 482*

— **O. II, r. 4—Suit on mortgage against brothers—One of brothers admitting mortgage and dying—Plaintiffs' application to bring widow as legal representative—Other defendants alleging that they formed joint Hindu family and have succeeded by survivorship—Plaintiff not pressing application—Suit decreed—Widow, if can file suit that she not being represented, was not bound by the decree and that she was still the owner of the house.**

Plaintiff instituted a suit upon a mortgage executed in his favour by three brothers, admitted the mortgage in his written statement but subsequently died during the pendency of the suit. The plaintiff applied at first for his widow being brought on the record as his legal representative but subsequently did not press the point as the two brothers stated that they were members of a joint Hindu family and had, therefore, succeeded to the interest of their deceased brother in the house by survivorship. The suit was eventually decreed. Thereafter the widow instituted a suit for declaration that she was the owner of the house in dispute and it was not liable to be sold in execution of the decree obtained by the plaintiff on the basis of the mortgage. The suit was based on the allegation that a partition had been effected between the mem-

Civil Procedure Code—contd.

- bers of the joint family prior to the execution of the mortgage and that she was therefore the legal representative of her deceased husband and that inasmuch as the plaintiff had failed to implead her as the legal representative in the previous suit, the decree obtained in that suit was not binding on her:

Held, that the deceased brother had already admitted the mortgage and his widow as his legal representative would have been bound by the admission. Her defence, if any, would have been the same as that of the co-mortgagors, who were impleaded and fought out the case. In the circumstances, the estate was effectively represented in the previous suit and the decision in the previous suit was binding on the widow. **SHIMBU NATH v. BRAHAMWATI** *Lah. 304*

O. VI, r. 5—Pleadings obscure—Court must call for particulars,

The rules of pleadings contained in O. VI of the Civil P. C., should be complied with and the practice of introducing obscure pleadings with a view to taking the adversary by surprise is open to grave objection and is not unoften likely to lead to grave miscarriage of justice. Where the parties neglect to perform their duty it is clearly the duty of the Court to call upon them to furnish definite particulars of the plea contained in their pleadings. **FAQIR BUX v. THAKUR PRASAD** *Oudh 588*

O. VI, r. 17—Amendment of pleadings—Discretion of Court—Interference with, in appeal.

It is within the power of the Court to allow the parties to add to their pleadings, and where it is done without any objection by the other side, it is too late to question it in appeal. **KHAN BAHADUR v. ALI MOHAMMAD** *Oudh 615*

O. VI, r. 17—Cause of action—Party having complete cause of action alleging it imperfectly—Remedy—Suit premature—Remedy.

It is a party at the moment he commences a suit has but an inchoate cause of action nothing he thereafter does can entitle him to any relief in that suit. His only course is to discontinue it and, if possible, start afresh. A party who, having a complete cause of action, alleges it imperfectly may be helped by amendment; but a premature suit is incurable. **EUSOOF KARWA v. NIEMEYER** *Rang. 177*

O. VI, r. 18—Amendment for adding more defendants allowed but not embodied in plaint—Court after delivering judgment ordering its officers to carry out amendment—O. VI, r. 18 held sufficiently complied with.

An application for amendment of the plaint by adding some more defendants made by the plaintiff was allowed. The amendment was not, however, embodied in the plaint till the date of the judgment. After delivering the judgment the Court ordered its officers to carry out the amendment:

Held, that the provisions of O. VI, r. 18, Civil P. C., were sufficient complied with. **RAHMAT BI SAHENA v. R. KRISHNA DOSS LALA** *Mad. 788*

O. VIII, r. 5—Defendant admitting to have executed bond for certain amount on certain date and admitting to have agreed to pay it on certain date—Case does not fall under O. VIII, r. 5.

Where in a suit the defendant admits that he executed a bond for certain sum on a certain date on taking accounts and also admits that he agreed to pay the amount on certain date, it is not a case which falls under O. VIII, r. 5, Civil P. C., of an implied admission. This is an example of an express admission. **UDHAO v. NARAYAN** *Nag. 120*

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O. VIII, r. 6. See Companies Act, 1913, s. 229

O. IX, r. 2—Plaintiff directed to file process fees by certain date—Part of process fees paid—Court fixing certain date for disposal of suit—Full process fees not paid—Court held had no jurisdiction to dismiss suit.

A person instituted a suit for rent and was directed to file process fees amounting to Rs. 3/6 by October 7, 1939. There were five defendants in the suit of whom one was a minor. On October 7, the plaintiff filed only Rs. 3. The Court pointed out that annas six was still due and fixed November 18, for the disposal of the suit. On that date the plaintiff applied for the appointment of a guardian *ad litem* for the minor defendant and filed a fee of Rs. 2 for that purpose. The defendants were not present. The balance of six annas due from the plaintiff was not paid and the suit was dismissed for default;

Held, that the Court had no jurisdiction to dismiss the suit.

Held, further that even if the three rupees which the plaintiff deposited were sufficient at least to pay the process fees for service on the adult defendants, the suit could not proceed as against the adult defendants. **BHUNESHWARI KUER v. SAMA KUER** *Pat. 47*

O. IX, r. 2—Plaintiff not depositing sufficient fees for service on all defendants but wishing Court to issue notice to some of them—He must specify which of them he desires to serve.

It is not for the Court to decide which of the defendants are to be served. If the plaintiff does not deposit sufficient fees for service on all the defendant and wishes the Court to issue notice to some of them he must specify which of them he desires to serve otherwise it would be open to him to complain afterwards that the persons whom the Court had served were not substantial defendants while the substantial defendants had not been served and that the Court had exercised an unwise discretion in serving notice on the unsubstantial defendants and omitting to serve notice on substantial defendants. The plaintiff cannot be allowed to put the Court in such a position. **BHUNESHWARI KUER v. SAMA KUER** *Pat. 47*

O. IX, r. 6. O. XXXVII, r. 2—Even against ex parte defendant, claim must be proved.

Even when a defendant is *ex parte* the claim against him must be proved before there can be a decree. **VASURAM VALIRAM v. KARACHAND MANGHAN MAL** *Sind 81*

O. IX, r. 9, s. 151—Dismissal for default—Setting aside of—'Sufficient cause', within meaning of O. IX, r. 9—Inherent jurisdiction of Court to restore case.

The plaintiffs application for permission to sue as pauper was dismissed by the Court for plaintiff's default. An application for restoration was made by the plaintiff the same day alleging that he was present in the Court compound from 10 A. M. and explaining that he did not attend the Court when the case was put up for hearing because he did not hear the case called out. The Court held that there was not a sufficient cause for restoration because there was no sufficient cause for the non-appearance within the meaning of O. IX, r. 9 of the Civil P. C. He added however "but in the interest of justice I am

Civil Procedure Code—contd.

of opinion that the case be restored on payment of costs to the contesting opposite party":

Held, that as the plaintiff was present in the Court on the date fixed for hearing the Court was not justified in holding that there was no sufficient cause for the restoration under O. IX, r. 9. Civil P. C., and it had, therefore, power to restore the case and in the circumstances of the case was justified in restoring it. **BAIJNATH v. RAM NARAIN**

Oudh 354

O. IX, r. 13—Application to restore petition to set aside sale which has been dismissed for default is not maintainable.

An application to restore to file the petition to set aside sale which had been dismissed for default is not maintainable. **MANTHIRI GOUNDAN v. ARUNACHALAM GOUNDAN**

Mad. 795

O. X, rr. 1, 2—Court recording statement of Plead after framing issues—Statement held fell under O. X, r. 1 and not under r. 2—But even under O. X, r. 1 it could not be recorded.

In a suit against the mortgagor and the mortgagee for a declaration that the mortgagor had no interest in the mortgaged property and that the plaintiff was absolutely entitled to the same, the Court framed the issues and examined the mortgagee's Counsel and recorded his statement to the effect that he did not know how the mortgagor acquired title to the mortgaged property:

Held, that the statement of the Counsel fell not under O. X, r. 2 but under r. 1 and that the same could not be recorded even under r. 1. **VASUMAL VALIRAM v. KARAOHAND MANGHANMAL**

Sind 81

O. X, r. 2, O. XVIII—O. X, r. 2 ought not to be utilized to supersede procedure for trial prescribed by O. XVIII—Procedure followed held illegal.

The power given by O. X, r. 2, Civil P. C., to examine any party present in Court is to be used by the Judge only when he finds it necessary to obtain from such party information on any material questions relating to the suit. It ought not to be employed so as to supersede the ordinary procedure at a trial as prescribed in O. XVIII, Civil P. C.

The plaintiff sued for a declaration that he was entitled to the last male-holder's estate as the next reversioner. On the date fixed for hearing the Judge adopted extraordinary procedure in supersession of the provisions of O. XVIII, of examining the defendant (widow) and recording his admission as to the plaintiff's relation with the last male-holder with a view to obviate the recording of evidence and thus to expedite the disposal of the suit. Then both the parties closed their case without adducing any evidence and the Court decreed the suit:

Held, that the procedure amounted to a misuse of r. 2, O. X, since the examination of the defendant could not be said to be necessary in order to obtain information on any material question relating to the suit. The burden was on the plaintiff to establish by evidence that the estate of the last male-holder, their uncle, had vested in him, that he was the reversioner after the widow's death entitled to sue, and this burden could not be said to have been discharged by the statement. The fact that it was nobody's case that there existed any reversioner nearer than the plaintiff was no answer. The plaintiff was bound to go into the witness box and prove his title as the next reversioner after the death

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of the widow. **VASUMAL VALIRAM v. KARAOHAND MANGHANMAL**

Sind 18

O. XIII, r. 10—Record of another case sent for—Use of important documents in it, as evidence—Procedure to be followed.

The power to send for the record of another case and to inspect the same does not carry with it the power to treat the whole of the record or a part thereof as evidence in the case. If upon inspection of the record the trial Court came across an important document as the summons which in its opinion either threw important light on the question at issue or was of material assistance in ascertaining the truth, it is open to the Court to adopt proper proceedings to have the document brought on the record and proved according to law before such document can be used as evidence in the case. Mere summoning of the record does not, however, render the entire record *ipso facto* evidence in the case. **GOKUL PRASAD v. MAHADEI KUNWAR**

Oudh 195

O. XVII, r. 1—Defendant summoning no evidence and applying for adjournment on sham pretext—Court's discretion in refusing adjournment held properly exercised.

Where the defendant who is present in Court summons no evidence and applies for adjournment on the pretext of being ill, the Court uses its discretion properly if it refuses the adjournment on the ground that the defendant is shamming and this discretion cannot be interfered with. **VASUMAL VALIRAM v. KARAOHAND MANGHANMAL**

Sind 81

O. XX, r. 18. See Civil Procedure Code, 1908, s. 151

O. XXI, r. 2—Completed contract immediately extinguishing and replacing decree, whether adjustment—Agreement to adjust decree on fulfilment of future condition—Decree still left existing pending fulfilment of condition—Agreement, if adjustment under O. XXI, r. 2—Question of completed contract—S. 92, Evidence Act (I of 1872), whether bars setting up of contract as adjustment of decree.

A completed contract, which immediately extinguishes and takes the place of the decree is an adjustment within the meaning of O. XXI, r. 2, Civil P. C. If, there is only an agreement to adjust the decree on the fulfilment of a future condition and the decree is still left in existence pending its fulfilment then there is no adjustment. It is, of course, a question to be decided in each case by the executing Court whether there has been a completed contract or not.

Section 92, Evi. Act does not bar the setting up of a contract to operate as an adjustment of a decree. **S. UDHAM SINGH v. S. ATMA SINGH**

Lah. 1 F B

O. XXI, r. 2—Execution of rent decree—Judgment-debtors pleading adjustment—Alleged deed of adjustment appointing one of decree-holders as manager in respect of share of 11 annas judgment-debtors, to manage their property and to distribute surplus profits among decree-holders—Other decree-holders and judgment-debtors not parties to deed, held not bound by deed—Deed held not adjustment within meaning of O. XXI, r. 2—Fact that other decree-holders were paid portion of rents in accordance with terms of deed held did not make them parties to it.

Two rent decrees were obtained by the same decree-holders against the same judgment-debtors. In execution proceedings objections were raised by some of the judgment-debtors on the ground that there was

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an arrangement under a registered deed between the decree-holders and the judgment-debtors which had the effect of an adjustment of the decree within the meaning of O. XXI, r. 2, Civil P. C. By this instrument one of the decree-holders was appointed a manager of the interest of the 11 annas judgment-debtors and he was to manage the property on their behalf. This deed contained provisions as to how the property was to be managed and how after meeting the collection expenses, paying out commissions to the manager and the current rents due in respect of the tenure, the surplus that remained were to be distributed among decree-holders. To this document the other decree-holders as well as the remaining judgment-debtors were no parties :

Held, that the document was not a deed of adjustment of the decrees within the meaning of O. XXI, r. 2. The decree-holders and the judgment-debtors who were not parties to it were not bound by it and the fact that the other decree-holders were paid some portion of the rents that subsequently fell due under the terms of the deed; did not make them parties to the deed, nor could they be presumed to have expressly or impliedly authorised the manager decree-holder to enter into any such agreement with the judgment-debtors on behalf of them all.

Held, further that the 11 annas judgment-debtors were entitled to credit to the extent of the amounts paid on their behalf under the arrangement embodied in the deed. JNANENDRA NARAYAN BAGCHI v. BHOLA NATH MONDAL Cal. 764

O. XXI, r. 11 (2) (b)—Order under O. XXI, r. 2 (b), not specifying addresses of judgment-debtors, is in accordance with law.

All that O. XXI, r. 11 (2) (b), Civil P. C., requires is that the names of the parties should be specified in the application. It says nothing about the addresses. Consequently even where the application does not specify addresses of judgment-debtors, the application is in accordance with law. NATHMAL v. BALKRISHNA

Nag. 641

O. XXI, r. 11 (2) (e)—Application under O. XXI, r. (2) (e) not specifying date of payment, if in accordance with law.

All that sub-cl. (e) of r. 11, O. XXI, requires is that the payments made should be specified in the application. It says nothing about the dates of these payments. Therefore, application not specifying such dates is in accordance with law. NATHMAL v. BALKRISHNA

Nag. 641

O. XXI, r. 11 (2) (h)—Execution application showing costs slightly less than awarded, if in accordance with law.

If the decree-holder asks for more costs than are actually due to him, that might be another matter, but where, when he asks for something less, and the difference is of a trivial character, it is impossible to hold that the application is so vitiated as to be incapable of execution at all. NATHMAL v. BALKRISHNA

Nag. 641

O. XXI, r. 11 (2) (j), 12, 13—Particulars of movables to be attached not shown—Validity of application.

Order XX, r. 11 (2) (j), Civil P. C., states nothing about the specification of the property. All that the decree holder is required to set forth is the mode in which he seeks the assistance of the Court. This mode is sufficiently indicated when he states that he seeks attachment of the movables of the judgment-debtor. From the perusal of rr. 12 and 13 of O. XXI, it is clear that the Code has drawn a distinction between movables in the possession of the judgment-debtor and movables belonging to him but not in his possession and

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immovable property in his possession. When the Code itself draws such a distinction and does not ask for a list of movables when they are in the possession of the judgment-debtor, it is impossible to state that an application which does just what the Code requires is not in accordance with law. Consequently an application not specifying particulars of movable to be attached is in accordance with law. NATHMAL v. BALKRISHNA

Nag. 641

O. XXI, r. 15—Death of one of joint decree-holders—Other, if can execute decree.

On the death of one of the two joint decree-holders, the other is entitled under O. XXI, r. 15, Civil P. C., to apply for the execution of the decree to its entire extent for the benefit of himself as well as the legal representative of the deceased joint decree-holder unless the decree imposes any condition to the contrary. HAJIRA KHATOON v. MUSTAFA HUSAIN

Oudh 410

O. XXI, r. 17 (1)—Execution application—Correct number of suit and decretal amount not mentioned—Defect, if can be remedied.

Where in the form of an execution application the correct number of the suit had not been mentioned had the amount for which the decree was passed was incorrectly given the defects are not material and can easily be remedied under O. XXI, r. 17 (1), Civil P. C. PULIN BEHARI DAS v. REASAT ALI

Cal. 265

O. XXI, r. 17 (4)—Execution application duly registered—Judgment-debtor taking no steps to have order for registration set aside—Order, if legal and valid.

Where an application for execution is duly registered under O. XXI, r. 17 (4) and the judgment-debtors take no steps to have this order for registration set aside the order must be regarded as a legal and valid order. PULIN BEHARI DAS v. REASAT ALI

Cal. 265

O. XXI, rr. 22, 90—Notice issued under r. 22 but not served on recipient of notice—Sale held in execution is nullity—Proper recipient of notice can maintain suit for declaration that sale was not binding on him.

Where no notice under O. XX, r. 22, Civil P. C., has been issued a sale in execution is wholly without jurisdiction. Mere issuing a notice is not, however, sufficient. The Court must be satisfied that the notice has been served on the person whom the Court regards as the proper recipient of the notice. Hence where notice is issued but not served at all, the sale held subsequently is wholly ineffective against the person against whom the notice under O. XXI, r. 22 was issued and this is not a case of irregularity or fraud in the publication or conduct of a sale so as to attract r. 90 but rather a case where no sale at all has been held. In the eye of the law the sale in such a case is a nullity and the person on whom the notice ought to have been served is entitled to maintain a suit for a declaration that the sale of property in execution was not binding on him and for recovery of possession of the same together with mesne profits. DURG SINGH v. SUGAMBAR SINGH

Pat. 372

O. XXI, r. 58, s. 47—Transferee of transferee from judgment-debtor is not his representative—Objection by him to attachment falls under O. XXI, r. 58 and not under s. 47.

A transferee of the properties by a sale-deed and subharna deed executed in his favour by a transferee from the judgment-debtor, is not the representative of the judgment-debtor and hence his objection to the attachment falls to be determined under O. XXI, r. 58, and not under s. 47, Civil P. C. RAM BEHARI SARAI v. BINDA PRASAD

Pat. 45

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— **O. XXI, r. 63.** See Transfer of Property Act, 1882, s. 53 **766**

— **O. XXI, r. 89.**—*Sale of property in execution—Before confirmation of sale judgment-debtor adjudicated insolvent and also discharge given—Decree-holder not proving debt in insolvency—Whether ground for setting aside sale.*

Where after the property of the judgment-debtor is sold in execution of a decree but before the confirmation of sale, the judgment-debtor is adjudicated an insolvent and also obtains an order of discharge and puts in an application that the sale should not be confirmed on the ground that the debt was wiped off as the decree-holder did not prove it in insolvency proceedings the fact that the debt was wiped off on account of the discharge is no reason for setting aside the sale as at the time the sale took place, there was a valid decree. **SURAJ BALI v. GANGA PERSHAD**

Oudh 605

— **O. XXI, r. 90.** See Civil Procedure Code, 1908, O. XXI, r. 22 **372**

— **O. XXI, r. 90.**—*Application to set aside sale, if can be dismissed on ground that applicant is adjudicated insolvent.*

The words "whose interests are affected by the sale" in O. XXI, r. 90 must be construed in their ordinary sense. It is too much to say that merely because a person is adjudicated insolvent his interests are not adversely affected by the sale of property that belonged to him before adjudication. The insolvency of the judgment-debtor does not *per se* render it incompetent for him to continue proceedings initiated by him under O. XXI, r. 90. **MANTHIRI GOUNDAN v. ARUNACHALAM GOUNDAN**

Mad. 795

— **O. XXI, rr. 90 to 93.**—*Execution sale—Judgment-debtor proved to have no title to property sold—Auction-purchaser, if can sue to recover purchase price—His remedy.*

The auction purchaser in Court sale is not entitled to maintain a suit for the recovery of purchase money in the event of the judgment-debtor being proved not to have any title to the property sold. His remedy is confined within the limits of O. XXI, r. 93. **MIRZA JAN GHULAM HAIDAR v. GHULAM RAZA MIAN MOHAMMAD**

Pesh. 565

— **O. XXII, rr. 3, 4, 11, O. XLI, r. 4.**—*Lower Court's decision jointly affecting all appellants—Death of one—Legal representative not brought on record within time—Appeal, if abates.*

A suit against several defendants for a declaration that the plaintiffs were entitled to water their lands from a particular stream at a specified point and for a perpetual injunction that the defendants should remove their dam in order to enable the plaintiffs to do so, was decreed:

Held, that the decision jointly affected all the defendants and if in appeal by them one of them died and his legal representative was not brought on record within time, the appeal did not abate against all the appellants. **MASHAHUR v. SUBHAN DIN**

Pesh. 365

— **O. XXII, r. 4, O. XXI, rr. 90 to 93.**—*Execution sale set aside—Suit by auction-purchaser against decree-holder, judgment-debtor and another decree-holder who had shared sale proceeds rateably, decreed—At hearing of appeal judgment-debtor dying and his representatives substituted—Second appeal by auction-purchaser impleading original defendants as parties in spite of judgment-debtor's death—Suit held abated only against representatives of judgment-debtor.*

An auction-purchaser filed a suit for the recovery of the sale price subsequent to the setting aside of the

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execution sale, against the decree-holder X, the judgment-debtor Y and another decree-holder Z who had shared the sale proceeds rateably along with X and the suit was decreed. All the defendants appealed. At the hearing of the appeal Y died and his legal representatives were substituted in his place. The appeal having been allowed the auction-purchaser filed a second appeal against X, Y and Z although Y was already dead:

Held, that the appeal abated only against the representatives of Y but not against X and Z as the auction purchaser could sue only X and Z without adding Y as a party to the suit. **MIRZA JAN GHULAM HAIDAR v. GHULAM RAZA MIAN MOHAMMAD**

Pesh. 565

— **O. XXII, r. 5.**—*Decision, if operates as res judicata.*

A decision under O. XXII, r. 5 does not operate as res judicata. **DAULAT RAM v. MEERO**

Lah. 585

— **O. XXII, r. 5.**—*Decision under r. 5, whether confers any rights to heirship or to property.*

A decision under r. 5 of O. XXII, Civil P. C., should be limited to the purpose of carrying on the suit and cannot have the effect of conferring any right to heirship or to property. **DAULAT RAM v. MEERO**

Lah. 585

— **O. XXII, r. 5.**—*Suit for sale of mortgaged property—Plaintiff dying—Person relying on will executed by deceased claiming to be brought on record—Probate of will, if essential.*

Where a suit is merely for sale of mortgaged property and after the death of the plaintiff, a person relying on the will executed in his favour by the deceased plaintiff claims to be brought on record as his legal representative, he need not take out probate of the will. **DAULAT RAM v. MEERO**

Lah. 585

— **O. XXII, r. 10.**—*Testator making legatee owner of decrees which might be acquired subsequently—Testator dying after obtaining decree for mesne profits—Legatee is entitled to be substituted in place of testator in proceedings for determination of mesne profit.*

Where a person has obtained a decree for mesne profits he can make a will in respect of them. Where the will was made when there was no subsisting decree for mesne profits and it had made certain person owner not only of the movables and decree in existence at the time of its execution but also of those which might be acquired subsequently and the testator dies after the decree for mesne profits is passed, the heir-at-law and legatee under the will is entitled to be substituted in the place of the testator in proceedings for the determination of mesne profits. **HARI SARAN DAS v. HAR KISHAN DAS**

Oudh 16

— **O. XXIII, r. 1.**—*Leave to file fresh suit cannot be granted on its dismissal.*

A Judge cannot give leave to a plaintiff to file a fresh suit upon the dismissal of an earlier suit but only upon its withdrawal. **U SIN v. MA MA LAY RANG**

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— **O. XXVI, r. 1—O. XXVI, r. 1, applicability of, to execution proceeding.**

The provisions relating to the issue of a commission do not apply to execution proceedings. **MANTHIRI GOUNDAN v. ARUNACHALAM GOUNDAN**

Mad. 795

— **O. XXXII, r. 7.**—*Guardian agreeing to refer matter in suit to arbitration, if can question legality of reference and award in suit and in appeal.*

Obiter.—The question of legality of reference and that of an award can be raised on behalf of the minors by the same guardians who had agreed to refer the matter to arbitration both in the suit and even in the ap-

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peal. P. L. S. S. RAMANATHAN CHETTIAR v. K. N. V. V. KUMARAPPA CHETTIAR *Mad. 826*

O. XXXII, r. 7 (1)—Agreement or compromise by guardian on behalf of minor without leave of Court whether voidable against all parties at minor's option.

If a guardian in spite of the prohibition contained in r. 7(1) of O. XXXII, Civil P. C., enters into an agreement or a compromise on behalf of a minor, without obtaining leave of the Court it would be voidable against all the parties and presumably not at their option but at the option of the minor. It is, therefore, the minor alone who can be held entitled to reside from the agreement or compromise, if he may choose it fit to do so, either on attaining majority or even before through his next friend or guardian. The sub-cl. (1) only contemplates two parties one of which is the minor and the other persons who have entered into a contract with the minor through his guardian. As between these two parties the contract is stated to be voidable against them and not at their option. P. L. S. S. RAMANATHAN CHETTIAR v. K. N. V. V. KUMARAPPA CHETTIAR *Mad. 826*

O. XXXIV, r. 4 (3)—Anomalous mortgage—Mortgagee's choice of remedy between sale and foreclosure—Discretion of Court in this respect.

There is in O. XXXIV, r. 4 (3), a perfectly clear statutory provision that in the case of an anomalous mortgage the mortgagee's choice of remedy, between a sale and foreclosure, is to be subject to the discretion of the Court. This discretion, as every other discretion vested in a Court must be exercised judicially and not arbitrarily. The consideration that it is open to a mortgagee, where a sale is ordered, to bid for it and purchase it himself, a good deal enlarges the scope of a Judge's discretion. UJAGAR LAL v. BAHADUR LOKENDRA SINGH *All. 520*

O. XXXV, rr. 2, 7. See U. P. Encumbered Estates Act, 1934, s. 14 *615*

O. XXXIX, r. 1. See Civil Procedure Code, 1908, O. XXXIX, r. 2 (3) *166*

O. XXXIX, rr. 1, 2 (3)—Proceedings to enforce injunction, whether proceedings for contempt.

It is doubtless convenient to speak of the proceedings to enforce the injunction as proceedings for contempt, but the terminology is not strictly accurate. There is doubtless an element of punishment in the provisions for the enforcement of an injunction, but the main object surely is to see that the order of the Court is carried into effect. DULHIN JANAK NANDINI KUNWARI v. KEDAR NARAINS SINGH *All. 166*

O. XXXIX, rr. 2 (3) and 1, s. 24—O. XXXIX, r. 2 (3), applicability of, to injunction issued under r. 1—Injunction issued under r. 1—Proceedings for its enforcement, if transferable under s. 24.

The provisions in sub-r. (3) of r. 2 of O. XXXIX, Civil P. C., must have been intended to apply to injunctions issued under that rule. Sub-r. (3) of r. 2 does not apply to injunctions issued under r. 1. Consequently the proceedings for enforcement of an injunction under r. 1 are transferable under the provisions of s. 24, Civil P. C., and the proper Court to enforce the injunction is the Court which at the time was seized of the suit in the course of which the injunction was issued. DULHIN JANAK NANDINI KUNWARI v. KEDAR NARAIN SINGH *All. 166*

O. XL, r. 1—Partition suit—Appointment of Receiver under O. XL—Title to property does not vest in Receiver—Court sanctioning loan on

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mortgage—Receiver can validly bind shares of parties by ex cution of mortgage—Mortgagee from Receiver held not entitled to first charge.

The title to properties does not vest in the Receiver, appointed under O. XL, Civil P. C., for the management and preservation of the properties in suit. The parties therefore have power to deal with their shares without reference to Court provided that their acts do not interfere with possession of the Receiver. The Receiver can exercise the powers of the owners in the matter of execution of documents and if the Court sanctions a loan on mortgage he can validly execute the mortgage instrument so as to bind the shares of the parties.

In those cases where the order of the Court simply sanctions a loan by the Receiver on a first charge of the properties, but does not indicate the purpose for which the loan is sanctioned, the creditor who advances the money is entitled to assume that everything was in order and so he ought to get what the Court had promised to give him, namely precedence over earlier encumbrances created by the parties. In such cases the Court cannot break faith with him. He is not bound to look beyond the order.

If the purpose of the loan as set out in the order is for preservation or protection of the property committed to the care of the Receiver, or is an order in an administration suit or one in a partition suit made for working out the rights, liabilities and obligations of the co-sharers of the joint properties in the course of partition, the mortgagee from the Receiver would have first charge in accordance with the order.

The power of the Court to sanction a loan for protection or preservation of the property is incidental to and necessary for the performance of its duty to protect and preserve the subject-matter of the suit, which it has taken upon itself by appointing a Receiver, and must be measured and limited by its duty, where its exercise comes into conflict with the rights of third parties which are not before it and to whom no notice had been given, or who had not consented. In such a case the principle of breach of faith cannot, be the decisive factor. It is a question of power or jurisdiction of the Court. If the Court arrogates to itself a power which it does not possess—and such usurpation appears on the face of the order—and does an act affecting persons not parties to the suit, its acts cannot prejudice the rights of such persons. In such a case the mortgagee from the Receiver cannot protect himself on the presumption that the Court had acted within its powers, for the order on the basis of which he acted *ex facie* would indicate want of power in the Court.

In a suit for partition the Court sanctioned a loan to be raised by the Receiver on a mortgage, for payment to one of the parties. The order originally did not mention the purpose of the loan nor made it a first charge. The Receiver who was personally interested in raising the loan on the basis of the order raised an amount in excess of that sanctioned by the Court on the basis of promissory notes and on the assurance to the creditor that the loan would be a first charge on the property. The parties subsequently agreed that their property should be mortgaged for the loan and by suppressing the fact that it was already heavily encumbered misled the Court into making the mortgage by Receiver a first charge on the property. No notices were issued to the prior mortgagees. On the basis of the second order the Receiver mortgaged the aforesaid property to the creditor already mentioned on two mortgages for amounts far in excess of that sanctioned by the Court.

Held, that no priority could be claimed by the mort-

Civil Procedure Code—contd.

gages from the Receiver, over the prior mortgagees.
BHADRABATI DEVI v. JIBANMAL BABU Cal. 650

—O. XL, r. 1—Receiver—Appointment of—
Rival claimants to property of deceased owner—
None of claimants in possession of property since
death of owner—Possibility of waste and mis-
management—Receiver should be appointed.

In a case where there are rival claimants to the prop-
erty in dispute and the property has never been in
the possession of any of the parties to the suit since
the death of the deceased owner and the situation is
fraught with the possibility of waste and mismanage-
ment, it would eminently be a case for the appoint-
ment of a Receiver. SHROAMBAR BAN v. MOHAN BAN
Oudh 8

—O. XL, r. 1—Trial Court exercising dis-
cretion judicially—No interference by Appellate
Court.

Where the trial Court, with whom the discretion
under O. XL, r. 1 of the Civil P. C., primarily vests,
has not exercised such discretion in an arbitrary
fashion, illegally or improperly, the Appellate Court
should not interfere with the order passed by the trial
Court. SHROAMBAR BAN v. MOHAN BAN Oudh 8

—O. XLI, r. 4. See Civil Procedure Code,
1908, O. XXII, rr. 3, 4, 11 365

—O. XLI, rr. 23, 25, 27. See Civil Proce-
dure Code, 1908, s. 151 755

—O. XLI, r. 27, O. XIII, r. 10—Addi-
tional evidence—When can be allowed to be produced.
In order to entitle the appellant to produce additional
evidence in the appeal the essential conditions required
by r. 27 of O. XLI of the Civil P. C., must be satisfied.
Where no attempt was made to produce the documents
in lower Courts when they could have been produced
and they are not required by the Court to enable it to
pronounce judgment or for any other substantial cause,
such additional documentary evidence cannot be
admitted in appeal. GOKUL PRASAD v. MAHADEI
KUNWAR Oudh 195

—O. XLI, rr. 27, 29—Absence of recorded
objection to admission of evidence in appeal—
Provisions of rr. 27 and 29, if can be ignored in
all cases.

Although when both parties agree that further evi-
dence is necessary and admission of that evidence is
made by consent, any failure on the part of the Judge
to record in due form the reasons for the admission
of that evidence is not a matter which would justify
the reversal of the judgment or the rejection of the
additional evidence. Yet it is not a rule that in all
cases where there is no recorded objection to the
admission of evidence in appeal under O. XLI, r. 27,
Civil P. C., the provisions of r. 27 and the procedure
laid down under that rule and under r. 29 can be
treated as of no importance. PARAPPIL ASSYA UMMA
v. PALOONTEAKATH MOOSSA Mad. 816

—O. XLI, rr. 27, 29—Failure of party
to examine material witness though available, if
sufficient reason to examine him in appeal.

When an essential piece of evidence, obviously
necessary for the proof of a party's case and available
to that party, has not been adduced in the trial Court,
the Appellate Court will not ordinarily allow the produc-
tion of the missing evidence in appeal, merely because
the trial Court has commented adversely on the failure
of the party to prove his case as completely as was
obviously necessary.

The failure of a party to examine a material witness
when that witness is available and the consequent
existence of a gap in his case is not ordinarily a
sufficient reason for examining that witness in appeal,

Civil Procedure Code—contd.

though there may possibly be circumstances in which
such a procedure would be justified, as, for instance,
if the whole case was in such a muddle that the Judge
was unable to pronounce a satisfactory judgment
without further materials. PARAPPIL ASSYA UMMA v.
PALOONTEAKATH MOOSSA Mad. 816

—O. XLI, r. 27 (1) (b)—Documents sought
to be produced under r. 27 (1) (b)—Non-production
due to negligence—If can be admitted.

Where the non-production of the documents sought
to be produced under O. XLI, r. 27 (1) (b) is due to
the negligence of the appellant or his Counsel, it is
neither desirable nor proper to allow the appellant to
fill up the lacuna in the evidence produced in the
Court below and to patch up the weak points of the
case. MUNIA v. MANOHAR LAL Oudh 161

—O. XLI, r. 27 (1) (c) and (1) (b)—
Additional evidence, when admitted—"For any
substantial cause," meaning of.

It is only when the Appellate Court requires, in other
words finds it needful, that additional evidence can
be admitted. The words "for any other substantial
cause" must be read as *ejusdem generis* with the
previous portion of cl. (c), namely, "the Appellate Court
requires." MUNIA v. MANOHAR LAL Oudh 161

—O. XLI, r. 29. See Civil Procedure Code,
1908, O. XLI, r. 27 816

—O. XLI, r. 33—Leave to appeal to Letters.
Patent granted—Appellate Court, if can pass
whatever decree which should have been passed by
trial Court.

To assume that when leave is granted the appeal
and the terms of the certificate are to be regarded as
a reference only, is an error and the Appellate Court
has the right and duty to pass whatever decree should
have been passed by the Subordinate Court in all the
circumstances of the case that is in all the circum-
stances which gave rise to the litigation originally and
to all the disputes between all the relevant parties in
the matter. SEIN DASS v. LAKHAJEE Rang. 306

—O. XLI, r. 33—Person acquiescing in dec-
ree appealed from, whether entitled to benefit of
O. XLI, r. 33.

Order XLI, r. 33, Civil P. C., confers discretionary
power on the Court. That power cannot be exercised
in favour of a person who acquiesced in the lower
Court's decree passed against him by payment of the
decree amount and bound himself not to appeal from
the decree. SHRIRAM v. BANYA BAI Nag. 454

—O. XLVII, r. 1—Consent decree sought to
be vacated or amended on ground of fraud—Proper
course is by separate suit.

The proper course and indeed the only course, for a
party desiring to have a consent decree amended or
vacated upon the ground that it was fraudulently pro-
cured, is to proceed by a separate suit for the pur-
pose. It is not competent under O. XLVII to obtain
a review of a consent decree on the ground that the con-
sent decree was obtained by fraud. GIRDHARAN PRASAD
v. BHOLI RAM Pat. 551

Sch. II, para. 1—Suit for restitution
of conjugal rights, if can be referred to arbitra-
tion.

The question whether a person should be given a
decree for restitution of conjugal rights against his
wife is a matter in difference between the husband and
wife in suits for restitution of conjugal rights and there
is no legal bar in Sch. II, Civil P. C., to its being
referred to arbitration. Hence, there is nothing to
prevent a reference of the whole suit for restitution
of conjugal rights to arbitration and to a decree being

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passed in accordance with the award. *KUNTI DEVI v. BHOLA RAM* Pesh. 466

Sch. II, Paras. 21, 61, s. 104—Decree in accordance with award—Appeal, grounds of—Second appeal from order filing or refusing to file award, competency of.

Although a decree upon an award which is in accordance with the award is normally not appealable nevertheless an appeal will lie from such a decree where the submission or reference to arbitration is challenged as being invalid. From this, however, it does not follow that a second appeal will lie from an order filing or refusing to file an award when the validity of the reference to arbitration is challenged. An order filing or refusing to file an award not being a decree is appealable only to the extent allowed by s. 104, Civil P. C. which prohibits a second appeal.

TRAILOKHYA NATH BANERJEE v. SUKUMAR EOSE

Cal. 610

Paras. 21, 16, s. 104—No explicit order filing award—Decree upon award—Appeal against whole decision must be treated as one against implied order filing award—Appellate order falls under s. 104 (2).

Where there is no separate order passed filing the award, the appeal from the decision of the Court passing a decree upon the award should be treated as an appeal which is in substance an appeal from an implied order filing the award. In such a case the order passed in the appeal is governed by s. 104 (2), Civil P. C. *TRAILOKHYA NATH BANERJEE v. SUKUMAR BOSE*

Cal. 610

Companies Act (VII of 1913), s. 156—New liability under, when arises—Previous calls made and becoming time-barred—Effect of.

New liability to contribute under s. 156, Companies Act arises for the first time upon the winding up and is unaffected by the fact that previous calls have been made by the Company and have become barred by limitation. *EAST BENGAL SUGAR MILLS, Ltd., Benares*

Cal. 59

s. 171—Decree in favour of company—Appeal by judgment-debtor—Company wound up—Appeal proceeded with—Judgment-debtor, if proceeding with legal proceeding against company—Leave of Court, if necessary.

Where a decree has been passed in favour of a company and the judgment-debtor has appealed from the decree and goes on with his appeal at the date of the winding up of the company, he should be regarded as proceeding with legal proceedings against the company and this he cannot do without the leave of the Court. *RAWAT RAJ KUMAR SINGH v. BENARES BANK, LTD., Benares*

All. 57

s. 229—Liquidator's power to set-off—Distinction between set-off in his case and one under provisions of O. VIII, r. 6, Civil Procedure Code (Act V of 1908)—Liquidator can appropriate sum owing to company even if company's claim is not legally recoverable by lapse of time—Set-off.

A distinction must be drawn between the right of set-off which the Official Liquidator has under the mutual credit clause of the Insolvency Act, and the right of set-off which a defendant in a suit governed by the Civil P. C. exercises under O. VIII, r. 6 under the Civil P. C. It is required as a condition precedent to a set-off that the money should be "legally recoverable" by the defendant from the plaintiff. But the set-off which the Official Liquidator exercises is a set-off under the powers conferred on him by the Companies Act, and not under any power conferred

Companies Act—concl'd.

on him by the Civil P. C., and there is no such condition precedent. The Official Liquidator can appropriate so much of the sum that the depositor owes to the company in satisfaction of what the company owes to the depositor even if the company's claim is not legally recoverable by lapse of time. *THAKUR PRASAD CHAUDHARI v. OFFICIAL LIQUIDATOR, BENARES BANK*

All. 839

Company—Articles of association—Persons consenting to become share-holders on condition of their suggestions being included in memorandum and articles—Despite non-fulfilment of conditions, usual application for shares and for becoming share-holders signed—Proper time for objecting to become share-holder.

Where persons consented to become share-holders on condition that their suggestions were included in the memorandum and articles of association, but subsequently it was found that the memorandum and articles of association were different to the draft memorandum and articles of association which had been shown to them, and did not embody their suggestions and despite this, they signed the usual application for shares and became share-holders:

Held, that it was not open to them subsequently to object to their being share-holders on the ground of the condition as to alteration of the memorandum and articles of association, not having been fulfilled. The proper time to object was at the time of incorporation of the company. *EAST BENGAL SUGAR MILLS LTD., In re*

Cal. 59

Contempt of Courts Act (XII of 1926), s. 2—Articles in newspaper—Test to see, whether amount to contempt of Court.

In considering whether articles published in newspaper amount to contempt of Court, what the Court has to see is, whether the publications had a tendency to prejudice the public or the Court for or against any party before the cause was finally heard. If they had such a tendency, the editor is guilty of contempt of Court. *ANIS AHMAD ABBASI v. NASIR AHMAD*

Oudh. 158

Contract. See Minor

824

Building contract—Contractor contracting to build up building according to plan and of particular kind—Building owner appointing supervising engineer—Collusion between contractor and engineer—Building when nearly complete found very defective, as to necessitate its pulling down—Joint decree for damages held could be passed—Measure of damages—Passing of running bills by engineer, whether precludes owner from challenging work done.

A contractor contracted to build a building of a particular kind in a particular way and according to plans. The building owner appointed a supervising engineer. There was a collusion between the contractor and the engineer. When the building was nearly complete it proved to be so defective and out of level as to make it necessary to pull it down:

Held, (i) that the owner was entitled when there was either such gross incompetence or gross negligence or gross dishonesty to put an end to the whole contract; and this apart from any special clause in it;

(ii) that a joint decree against two persons could be passed even when the liability of one was in contract and that of the other in tort and even though the connection between the plaintiff and the one was a direct one while that between the plaintiff and the other was indirect;

(iii) that the measure of compensation was the loss

Contract—concl.

which the owner would suffer in erecting a structure of the kind for which he had contracted ;

(iv) that the passing of running bills by the supervising engineer did not preclude the plaintiff from challenging the work done. *RAJARAM v. MADHAORAO*

Nag. 257

— *Consideration—Wife forbearing to sue for maintenance on her husband's agreeing to pay her monthly allowance—Contract, if supported by consideration.*

Where a wife has foreborne to sue her husband for maintenance allowance on his agreeing to pay her monthly allowance by way of maintenance, the contract is supported by consideration, as wife's forbearance to sue amounts to consideration for husband's agreement for payment of a monthly maintenance allowance to her. *DEBI RADHA RANI v. RAM DASS*

Pat. 645

— *Finding of goods—Suit against purchaser from finder for return of goods—Onus to prove ownership.*

In a suit for the return of the goods, against the purchaser from the finder of the goods, it is for the plaintiff to prove that the goods are his and not for the defendant to show that they were his. *TAN SOON LI v. BURMA OIL CO. LTD.*

Rang. 387

— *Specific performance—Suit for—Contract by vendors to sell land—One of them minor—Vendee going into possession and retaining it for long time without repudiating contract—Purchase price not paid—Suit by vendors for specific performance—Minor becoming major then—Suit held maintainable—Right to repudiate held waived.*

A, B and C who were brothers and members of joint Hindu family agreed to sell a piece of land to vendee. C was minor. A and B signed the contract and A also signed as manager of the family and guardian of C. Vendee went into possession and remained in possession for a long time enjoying the rents and profits of the land without paying the purchase price. Vendors sued for specific performance of the contract. C had by then, reached majority :

Held, that the vendee having remained in possession of the land without repudiating the contract must be deemed to have waived the right to repudiate it on the ground that one of the vendors was a minor when the contract was executed. The vendors were entitled to maintain the suit. *KONA ADINARAYANA v. DRONAVALLI VENKATASUBBAYYA*

Mad. 446

Contract Act (IX of 1872), s. 23—U. P. Stayed Arrears of Rent (Remission) Act (XVIII of 1939)—U. P. Stay of Proceedings (Revenue Courts) Act (IV of 1937)—Judgment-debtor executing bond in favour of decree-holder in consideration of latter refraining from executing his decree for arrears of rent, before passing of U. P. Acts of 1937 and 1939—Consideration is lawful—Subsequent passing of those acts does not make it unlawful.

Where a judgment-debtor has executed a bond in favour of the decree holder before the passing of the U. P. Stay of Proceedings (Revenue Courts) Act (IV of 1937) and U. P. Stayed Arrears of Rent (Remission) Act (XVIII of 1939), in consideration for the decree-holder refraining from execution of his decree for arrears of rent which he could otherwise have lawfully taken out. There is nothing unlawful within the meaning of s. 23, Contract Act, in the consideration or object of that agreement and it cannot be affected by subsequent legislation barring a suit in the Revenue Court for recovery of arrears of rent. *RAM PIARI v. DAYA SHANKER*

All. 427

Contract Act—contd.

— *s. 25 (3)—Implied promise to pay contained in acknowledgment—S. 25 (3), if attracted.*

Unless a promise to pay is in writing it cannot fall within the purview of s. 25 (3), of the Contract Act. The implied promise to pay which is contained in all acknowledgments does not attract the provisions of s. 25 (3), of the Act, because the promise to pay is not in writing. Where the words used in an acknowledgment are 'Juna Hasib Raju Karna Baki Dena Raha Rs. 3,200' which may be translated: "after taking old accounts into consideration there remains to be paid a balance of Rs. 3,200," the acknowledgment does not attract the provisions of s. 25 (3), for there is no consideration for the implied promise contained therein. This is not an "account stated" of the kind which includes items on both sides which the parties have agreed to set off so that only the balance should be paid. *SHIVJIRAM v. GULABCHAND*

Nag. 806

— *ss. 25 (3), 63—Novation—Suit based on acknowledgment—Party seeking to base suit on novation—Facts to constitute novation must be alleged and proved.*

In a case when the plaintiff has based his case on an acknowledgment, in order to make out a case of novation he should plead the necessary facts to found novation and state what was the original contract and in what way it had been replaced by a new contract. *SHIVJIRAM v. GULABCHAND*

Nag. 806

— *s. 62—Suit by mortgagee on subsequent mortgage executed in lieu of prior one—Prior mortgage, if can be set up—Pro note in lieu of mortgage, whether extinguishes mortgage—Pro note value of.*

Although a mortgagee in a suit on a subsequent mortgage executed in lieu of prior mortgage cannot set up the prior mortgage, yet a fresh promissory note only provides evidence of the original loan and does not extinguish the mortgage. *EUSOOF KARWA v. NIEMEYER*

Rang. 177

— *s. 65—Applicability.*

Section 65, Contract Act does not apply to contracts into which persons deliberately enter, knowing that the contract cannot have any validity and is in express contravention of the rules and restrictions imposed on them. *BAVA C. GOPALASWAMI MUDALIAR v. ANNADANA KATTALAI*

Mad. 105

— *s. 65—Trust—Trustee of temple prohibited by scheme from borrowing money—He commits breach of trust—Creditor advancing money with knowledge of prohibition, if can recover money.*

Where a trustee of a temple who is prohibited under the scheme of the temple for borrowing money, borrows money in spite of such prohibition, he commits a breach of trust and the creditor advancing money with the knowledge of such breach of trust cannot be heard to say that he was enabling the trustee to perform his duty to the trust and is not therefore entitled to be compensated for what he has supplied. *BAVA C. GOPALASWAMI MUDALIAR v. ANNADANA KATTALAI*

Mad. 105

— *s. 72—Payment made under mistake of fact, if voluntary—Voluntary payment of money under mistake of fact, whether can be recovered under s. 72—Person paying tax to Panchayat Board under mistaken notion that property for which tax was paid lay within jurisdiction of Board—Payment is under mistake of fact and can be recovered under s. 72 as money had and received for payer's use.*

If money is paid under a mistake of fact, it cannot be said to have been voluntarily paid. If money is paid voluntarily under a mistake of fact, viz., in regard to the territorial limits of the Panchayat Board's jurisdic-

Contract Act—conold.

tion it is recoverable under s. 72, Contract Act. The payment need not arise out of contractual relation between the parties. The payer's ignorance and even forgetfulness would not by themselves disentitle him from claiming a refund unless he can be held to have been estopped or guilty of laches. Nor is it necessary that the mistaken payment must be of such a nature that if such payment were not rectified, the liability would be created against the persons paying.

Where a person has paid taxes to the Panchayat Board under the mistaken notion that the properties in regard to which those were made were situated within the local jurisdiction of the Board and not beyond it. There can be no doubt that they are made under a mistake of fact and the payer is entitled to recover them as money had and received by the Board for the payer's use. *PENTAKOTA AUDINARAYANA NAIDU v. PANCHAYAT BOARD OF MANGAPAKA* Mad. 657

Co-operative Societies Act (II of 1912), s. 42 (2) (b) and (6)—Contribution payable by past member—Determination of, by liquidator—If can be questioned in Civil Court.

Where the liquidator passes an order determining the amount of contribution payable by a past member to the Co-operative Society, the order can be questioned in a Civil Court. *KUPPU GOVINDA CHETTIAR v. URTTU-KOTTAI CO-OPERATIVE SOCIETY* Mad. 769

s. 43—Rules under r. 22—Award under—Date of award—Execution application within three years from date of communication of award to party, is within time.

In the case of an award made under r. 22 of the rules framed under the Co-operative Societies Act. The date of the award should be regarded as the date on which such award is officially communicated to the person or persons affected thereby and not the date of the decision of the arbitrator. An execution application filed within three years of the date on which award is communicated to the party will be within time. *LAKSHMI NARAYAN v. I ALIT MOHAN* Cal. 35

Costs—Commissioner—Appointment of Commissioner in partition suit—Whether can apply to Court for payment of costs—Bill of Commissioner of partition, if can be taxed.

A stranger may apply in proper circumstances, for costs and a Commissioner of partition is justified in applying to the Court which appointed him for payment of costs if he is unable to receive payment of costs to which he is entitled.

The bill of a Commissioner of partition can be taxed by taxing officer. *SARBASUNDARI DASSI v. NANDARANI DASSI* Cal. 13

Partition suit—Court, if can order, in suit for partition, Receiver to pay costs of attorney of deceased party.

In a partition case the Court can order against the Receiver for payment of costs incurred by an attorney of a deceased party. *SARBASUNDARI DASSI v. NANDARANI DASSI* Cal. 13

Court-fees—Mortgage suit—Subsequent mortgagee added wanting determination of his rights—Valuation of suit for purposes of jurisdiction—Amount claimed on prior and subsequent mortgages exceeding pecuniary jurisdiction of Court—Court's jurisdiction, if lost—Court-fees, if payable on claim on subsequent mortgage.

When in a mortgage suit a subsequent mortgagee is added who wants his rights to be investigated and decided the suit is to be valued for purposes of jurisdiction, *ad valorem* on the amount due on the plaintiff's prior mortgage and jurisdiction is not lost if the

Court-fees—conold.

amounts claimed on the prior and subsequent mortgages taken together exceed the pecuniary jurisdiction of the Court.

The claim under the subsequent mortgage is neither a set-off nor a counter-claim on which court-fees should be paid. Where the puisne mortgagees ask for this relief in their written statement it does not require to be stamped at all. It is no doubt advantageous to puisne mortgagees to obtain a decree on their mortgages without paying any court-fees and it would be especially so where the later mortgages happens to be for very large sums. The Legislature no doubt could have provided for payment of court fees by the puisne mortgagees when they claimed a determination, or recourse perhaps might have been had to s. 9, of the Suits Valuation Act. But in the absence of any such provision or rule no court-fees are payable on the claim under the subsequent mortgages. *GANPATEAO v. SHAMRAO* Nag. 390

Court Fees Act (VII of 1870), s. 4. See Court Fees Act, 1870, Sch. I, Art. 1

s. 7 (iv) (b), Sch. II, Art. 17 (vi)—Suit by Muhammadan co-sharer in actual possession of portion of property for partition alleging his joint possession of entire property by reason of possession of another co-sharer—Court-fees payable.

Section 7 (iv) (b) applies to cases relating to joint family property, where the plaintiff has been ousted from its enjoyment and seeks to be restored to joint enjoyment. It does not apply where he is in enjoyment of the right but merely seeks to change the mode of such enjoyment. It does not apply to a suit for partition of joint property by a person alleging himself to be in joint possession whether he owns property in coparcenary or as a tenant-in-common with the defendants. Hence a Muhammadan co-sharer, who alleges that he is in joint possession of the entire property by reason of the possession of another co-sharer and who is also in partial actual possession of certain portion of the property as indicative of his right to co-ownership in the whole property, can bring a suit for partition on a stamp of Rs. 10 only and the case falls under Art. 17 (iv) and not under s. 7 (iv) (b), Court Fees Act. *MOHAMMAD SOHAIL v. GHULAM RASUL* Lah. 125 F B

s. 7 (iv) (c), Sch. II, Art. 17 (iii)—Suit by G's grandson against G's widow for declaration that he was an adopted son of G under his will—A, a collateral of G not made party—Decree passed—A's suit for declaration that decree in suit by grandson was not binding on him and that suit was collusive and that will set up was not genuine—Suit held fell under Sch. II, Art. 17 (iii).

G's grandson instituted a suit against G's widow for a declaration to the effect that he was the adopted son of G under the will. A who was G's collateral was not made a party to that suit. The suit was decreed. Thereupon A instituted a suit for a declaration to the effect that the aforesaid decree in the suit instituted by G's grandson against G's widow had been obtained by fraud on wrong facts and against law, without joining the plaintiff (A) as a party, and that it was not binding on him, in other words, that G's grandson was not the adopted son of G and that the will set by him, on which the decree was obtained, was not genuine.

Held, that the plaintiff (A) not being a party to the decree obtained by G's grandson against widow was in no way bound by it. It could not be said that he was constructively represented in that suit by the widow whose interests were really adverse to his.

Held, also that A's suit was clearly one for a dec-

Court Fees Act—contd.

laration without any consequential relief and fell within Art. 17, cl. (iii) of Sch. II, Court Fees Act. **ALAM KHAN v. BHAG BHARI** Lah. 613

s. 7 (xi) (cc)—*Tenant refusing to vacate after notice to quit—Ejectment suit falls under s. 7 (xi) (cc).*

Even though a notice of ejectment is served on a tenant he does not cease to be a tenant "holding over" for the purposes of s. 7 (xi) (cc), Court Fees Act. Consequently a suit to eject him falls under s. 7 (xi) (cc) and cannot be treated as a suit against a trespasser. **CHHABBA RAM v. NATHU RAM** Lah. 262

Sch. I, Art. 1, s. 4—*Schedules, if confer right to impose court fee.*

The schedules to the Court Fees Act only determine the method of assessment and do not confer right to impose and collect court-fee. **MORESHWAR PARASHRAM DAMLE v. COMMISSIONER, CHHATISGARH DIVISION, RAIPUR** Nag. 731

Art. 1, s. 7 (ix)—*U. P. Agriculturists' Relief Act (XXVII of 1934), ss. 12, 23—Application for redemption—Decree on payment of amount due under mortgage and other deeds of further charge executed by mortgagor—Appeal contesting liability under deeds of charge—Valuation of subject-matter of appeal—Court-fee payable.*

Where on an application under s. 12, U. P. Agri. Relief Act, for the redemption of a mortgage the Court passes a decree for redemption on payment of the amount due under the mortgage set up in the application and also under certain deeds of further charge executed by the mortgagor and an appeal has been preferred by the applicant against the decree contesting his liability for the payment of dues under the deeds of further charge, the value of the subject-matter of the appeal is the difference between the amount decreed by the trial Court and the amount for which the appellant admits his liability, and the appellant is liable to pay *ad valorem* court-fee on the amount of difference under Art. 1, Sch. I, Court Fees Act. **SURJAN SINGH v. MASHAL SINGH** Oudh 425

Art. 1—Sch. I, Art. 1, applicability of. Schedule I, Art. 1, is the residuary article and applies only when there is no other provision in the Act, governing the case under consideration. **DIWAN CHAND v. DHANI RAM** Lah. 230 FB

Art. 14—*Suit under s. 9, Specific Relief Act (I of 1877)—Revision—Court-fee payable is same as paid on plaint.*

Article 14, Sch. I, Court Fees Act, really means that on an application for revision the same amount of court-fee is payable as has been paid on the plaint in a case where the subject-matter in dispute is the same both in the suit and in revision. Consequently on an application for revision arising out of a suit under s. 9, Specific Relief Act, the court-fee payable is the same as has been paid on the plaint. **U KYAW ZAN v. U TUN HLA U** Rang. 70

Sch. II, Art. 17, Sch. I, Art. 1—*Suit falling under Art. 17—Court-fees payable on plaint and memo of appeal arising out of such suit—Joint property—Partition suit—Plaintiff claiming to be in actual or constructive possession—Appeal arising from such suit—Plaintiff found not to be in possession—Court-fee payable.*

The wording of Art. 17, Court Fees Act, which are plain and explicit should be given their ordinary meaning. They show clearly and indubitably that when a suit falls under any one of the clauses of Art. 17, Sch. II, the plaint as well as the memorandum of

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appeal arising from such a suit, is chargeable with a fixed court-fee of ten rupees only, irrespective of whether the subject-matter in appeal is or is not capable of being estimated in money value. Therefore in appeal arising from a suit for partition of alleged joint properties, of which the plaintiff claimed to be in actual or constructive possession a court-fee of Rs. 10 is payable on the memorandum of appeal, even though the trial Court had found the plaintiff not to be in possession of some or all such properties. **DIWAN CHAND v. DHANI RAM** Lah. 230 FB

Sch. II, Art. 17 (iii). See Court Fees Act, 1870, s. (iv) (c) 613

Art. 17 (iii)—*Suit for declaration that order of Revenue Officer fixing reduced rent under s. 112, Bihar Tenancy Act (VIII of 1885), was illegal and of no effect and for enhancement of rent to original one—Suit does not fall under s. 104-H, Bihar Tenancy Act (VIII of 1885), but is for declaration pure and simple—Court-fee payable under Sch. II, Art. 17 (iii).*

A suit was brought for the following reliefs. (1) A declaration that an order of the Revenue Officer fixing a reduced rent roll under s. 112 of the Bihar Ten. Act, was wrong, illegal, without jurisdiction, unenforceable, and not binding on the plaintiffs. (2) For enhancement of the reduced rent to the rent formerly paid :

Held, that the suit was not one under s. 104-H, Bihar Ten. Act. The declaration sought was necessary in view of s. 15 of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act. The only relief however, which the plaintiff could ask the Court to grant, was a declaration that the proceedings were illegal and without effect. The Court could not be asked, to cancel the proceedings of the Revenue Officer. Once that declaration was given, there could be no need for any additional relief in the shape of restoration of the old rates of rent, or an enhancement of the rent to the old rates. Once it was declared that the alteration in the rates was illegal and of no effect, the old rates of rent would be restored automatically. Therefore, the second prayer for restoration of the original rate of rent by enhancement, was in fact quite unnecessary, and should be disregarded as surplusage. The Court must in such cases go by the substance rather than the wording of the plaint and substantially the suit was for a declaration, pure and simple and there was clearly a court-fee payable for the declaration under Sch. II, Art. 17 (iii), Court Fees Act.

Held, further that the Civil Court was not sitting in appeal or revision from the orders of the Revenue Officer, and if those were voidable orders, it was not for the Civil Court to cancel them. **RAI BAGESHWARI PRASAD v. TULSI GARAIN** Pat. 378

Art. 17 (vi). See Court Fees Act, 1870, s. 7 (iv) (b) 125 FB

Art. 17 (vi)—*It makes no difference for purpose of Art. 17 (vi) that in one case joint property is held by parties as joint tenants and in other they own it as "tenants-in-common."*

Clause (vi) of Art. 17, Sch. II, Court Fees Act, applies to a suit by a co-parcener for partition and equally to a similar suit by a co-owner. It makes no difference for this purpose, that in one case the joint property is held by the parties as 'joint tenants', while in the other they own it as 'tenants-in-common.' And in the latter class of cases, it is again, immaterial that the parties are governed by Muhammadan Law,

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or that they do or do not belong to the same family.
MOHAMMAD SOHAIL v. GHULAM RASUL *Lah. 125-F B*

Criminal Procedure Code (Act V of 1898), s. 17 (1)—Burma Courts Manual, Para. 102—Discretion of District Magistrate under, exercise of.

The instruction in the Burma Courts Manual (Para. 102) which is based on the provisions of s. 17 (1), Criminal P. C., no doubt applies to pending as well as to completed proceedings; but the discretion which has to be exercised is the discretion of the District Magistrate, unfettered by influences and pressure which may weigh with the Deputy Commissioner, and it can very rarely be a proper exercise of such discretion to remove a pending proceeding from the Court of a Magistrate and forward it to an executive officer, and even in the rare cases when such a course might be justifiable it would be essential for the District Magistrate to take adequate steps to see that the record must be returned within a reasonable time so that the trial could proceed. **THE KING v. MAUNG PO THAING** *Rang. 370*

s. 103—Panchnama—Identification parade—Police relying on panchnama must call panch to prove it—Object of calling panch witness—Independent evidence that identification parade was properly and fairly held.

If the Police relied on a *panchnama*, they must call a *panch* to prove it, the practice of allowing a *panchnama* to be put in by a Police witness is wrong. The object of having *panch* witnesses is to provide evidence which is independent of the Police. In searches under Chap. VII, Criminal P. C., or the City of Bombay Police Act, it is necessary to call *panchas*, but s. 103 (2) of the Code provides that they need not be called as witnesses unless they are specially summoned. That does not mean that the *panchnama* can be used if no *panch* is called apart from searches, it is, of course, not a rule of law or practice that Police evidence must be corroborated; but in case of an identification parade, and where it is of vital consequence to show that the accused was duly identified, it is obviously desirable, to have some independent evidence that the parade was properly and fairly held. **MOHANLAL BABABHAI v. EMPEROR** *Bom. 326*

s. 103—Panchnama—Panchnama can be used only to refresh panch's memory—Police Officer cannot bring panchnama on record in his evidence-in-chief—Police holding panchnama but not offering to call panch—Adverse inference against them can be drawn.

The *panchnama* is merely a record of what a *panch* sees, and the only use to which it can properly be put is that when the *panch* goes into the witness-box and swears as to what he saw, the *panchnama* can be used as a contemporary record to refresh his memory. But a Police Officer is not entitled to give evidence of what the *panch* told him, that he saw, and that is what it comes to if a Police Officer is allowed to put in the *panchnama*. A Police witness may state that he held a *panchnama* and offer to produce the record if the accused asks for it, but he cannot bring it on record in his evidence-in-chief. If the Police hold a *panchnama*, and do not offer to call the *panch*, an inference may be drawn against them from the fact that the *panch* is not submitted for cross-examination. The putting in of a *panchnama* without calling the *panch* is not only an infringement of the rules of evidence against the admission of hearsay evidence, but it is unfair to the accused, because it enables the Police to get the advantage of evidence in corroboration without

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putting that evidence to the test of cross-examination.
MOHANLAL BABABHAI v. EMPEROR *Bom. 326*

s. 109 (a)—Applicability—Accused coming within local limits of jurisdiction of certain Magistrate and taking precaution to conceal himself—S. 109 (a) applies.

Section 109 (a) of the Criminal P. C. is applicable to a person who, being or coming within the local limits of the jurisdiction of a certain Magistrate, takes precautions to conceal his presence with a view to committing an offence. It is not limited to the more restricted case of a person who, with a similar object, takes precautions to conceal the fact of his presence within the local limits of the jurisdiction of a certain Magistrate. If a man is taking precautions anywhere in order to conceal his presence, and that concealing is to be effected within the jurisdiction of a Magistrate who receives information such Magistrate has power to demand security, even though the residence of the person informed against within the jurisdiction is well-known. **CHHUTAI (CHITAI) v. KING EMPEROR** *Oudh 740*

s. 109 (a) (b)—S. 109 (a) applicability of—Held on facts that s. 109 (a) did not apply.

The cl. (a) of s. 109, Criminal P. C., should be applied with proper discretion: It cannot be applied to a person who was merely found talking at night, time with bad characters in a place open to the public or to one who merely shows a disinclination for the society of the Police and endeavours to avoid them by running away on their approach. There must be some definite attempt at concealment by taking precautions with that object in view, whether it be by disguise or otherwise, indicating a desire to hide the fact that the person is present within the local limits of the Magistrate jurisdiction.

Held, having regard to the entire circumstances that it was a matter of common experience that a person in the position of a petitioner would ordinarily try to run away when challenged at night from the Police or the *choukidars*, and that there was no sufficient evidence which would justify the inference that the petitioner had been found to be taking precautions to hide his presence far less that he was taking such precautions in order to commit an offence. **LAKHMAN KURMI v. EMPEROR** *Pat. 295*

s. 147—Costs—No order as to costs made in decision under s. 147—Subsequent order for costs cannot be made.

Where no order as to costs was made in the decision under s. 147, Criminal P. C. The award of costs by a subsequent order cannot be made. **THOONGA VEDAN v. PERUMAL GOUNDAN** *Mad. 32*

s. 147—Dispute relating to right exercisable only at particular seasons—Magistrate starting proceeding under s. 147 cannot drop it when season is over and cannot pass order which could not be properly passed after hearing all evidence.

When the dispute relates to a right exercisable only at particular seasons, it cannot be the law that it is open to the Magistrate to start a proceeding under s. 147 not only to drop it when the season is over but in addition to pass an order against one of the parties which could only be properly passed after hearing all the evidence that the parties may desire to produce in the case. Where a Magistrate is satisfied that a dispute requiring to be dealt with under the ss. 144, 145 and 147 does exist, it is clearly necessary that he should proceed with the matter in accordance with the law, and the High Court cannot permit him to abuse the procedure by dropping the proceedings on an untenable ground and indirectly passing an order

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which he could not directly have passed without hearing all the evidence. *DWARKA SINGH v. JAMUNA SINGH* Pat. 793.

— **ss. 155, 173**—*Charge-sheet, when can be called—Final report of Police that case was non-cognizable accepted by Sub-Divisional Officer—Subsequently Court Sub-Inspector moving Magistrate on Inspector's report and copy of Government letter addressed to Deputy Inspector-General of Police that cases should be tried and decided in Court—Magistrate calling for charge-sheet—There was held no proper material to put accused on trial—Magistrate held did not act judicially and order must be quashed in revision.*

A complaint was made to the Magistrate about a cognizable offence. The investigating officer submitted a final report that the case was non-cognizable which was accepted by the Sub-Divisional Magistrate. The Magistrate was subsequently moved by the Court Sub-Inspector on a letter or report of the Inspector of Police. And a copy of a letter from the Chief Secretary to Govt. in which it was stated that Govt. were of opinion that the counter cases should be tried and the issue decided in the Court. This letter was addressed to the Deputy Inspector-General of Police, C. I. D., and was sent to the Inspector in the usual course for information and compliance. The Inspector wrote that in face of the Govt. orders charge-sheets will have to be submitted in both the cases and he enquired if it would be regular for the Police to submit the charge-sheets *suo motu* or whether in order "to regularize judicial proceedings" the Sub-Divisional Officer should call for charge-sheets. Upon this the Magistrate's order was "Inspector's report and copy of Govt. orders seen. Call for a charge-sheet." On the subsequent date the Magistrate noted that the charge-sheet had been received, and transferred the case to another Magistrate for disposal, adding, "you will please have the original record called for"; the accused and the witnesses were thereafter summoned in accordance with the charge-sheet;

Held, (i) that the Magistrate was competent under the law to reconsider the order accepting the final report of the Police but he could only do so on proper materials;

(ii) that the application in revision against the order of the Magistrate calling for the charge-sheet was one to revise the judicial order of the Magistrate and not the orders of the Govt.;

(iii) that neither the Inspector's report nor the copy of the Govt. orders on which materials the order passed by the Sub-Divisional Magistrate calling for a charge-sheet was founded, contained any relevant materials which could form the basis of that order whether by way of judicial action or as an obvious preliminary to judicial action. The Magistrate did not consider whether there were any proper materials for his putting the accused on their trial. It was clearly his duty as a judicial officer to form his own views on proper materials instead of merely carrying out the views of Govt. in his judicial work as a Magistrate. The Magistrate did not apply his judicial mind before putting the accused on his trial. As he took the judicial action upon what he took to be Govt. orders and not upon proper materials, the proceedings must be quashed. *N. L. CARRICK v. EMPEROR* Pat. 94.

— **ss. 155, 173, 435, 439**—*Cases disposed of by Sub-Divisional Officer as non-cognizable—No further investigation without order of competent Magistrate and no charge-sheet—Magistrate taking cognizance of case and transferring it to another*

Criminal Procedure Code—contd.

Magistrate for trial—His act, whether judicial—If open to revision.

Where the cases are disposed of by the Sub-Divisional Magistrate as non-cognizable there can be no further investigation under Chap. XIV of the Criminal P. C., without the order of a competent Magistrate according to s. 155 (2)—and no charge-sheet under s. 173.

Section 192 (1), Criminal P. C., empowers a Sub-Divisional Magistrate to transfer any case of which he has taken cognizance, for enquiry or trial, to any Magistrate subordinate to him. The order of transfer to another Magistrate, therefore, necessarily imports his taking cognizance of the case, and it constitutes a judicial act. Hence, the Magistrate's action in taking cognizance and transferring the case to another Magistrate for trial is a judicial matter open to scrutiny by Courts of Revision under ss. 435 and 439, Criminal P. C. *N. L. CARRICK v. EMPEROR* Pat. 94.

— **s. 162**. See Evidence Act, 1872, s. 27

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— **s. 162**—*Report made to Police by accused after first information report—Accused not questioned by Police—Admissibility of.*

Where after the first information report of a murder has been made and recorded, the accused makes a report to the Police by voluntarily going to the Police Station, by way of defence and possibly by way of reply to the report already made and no question is put to him by the Police and his report is not recorded as a report but only noted in the general diary, such a report is not a statement made in the course of investigation within the meaning of s. 162, Criminal P. C., and is not inadmissible. Such report is admissible under s. 8, Evi. Act. *KING-EMPEROR v. BHAGI*

Oudh 236

— **ss. 192, 530**—*Magistrate to whom case is transferred under s. 192, must be empowered to try it.*

The Magistrate to whom a case is transferred under s. 192, Criminal P. C., must be empowered to try it, otherwise the trial would be void under the provisions of s. 530 of the Code. *HAFIZAR RAHMAN v. AMINAL HAQUE* Cal. 38

— **s. 192 (1)**—*Case transferred under s. 192 (1)—Magistrate to whom it is transferred, powers of—Duty and power of transferee Magistrate—Transferring Magistrate, powers of, issuing order connected with case, under s. 528 or Chap. XXXII.*

When a case has been transferred to a Magistrate under s. 192 (1), Criminal P. C., that Magistrate has the same authority to deal with the case which has been transferred to him, as regards the issuing of processes and other matters connected with the inquiry or trial, as is vested in the superior Magistrate from whom he received the case on transfer. When once a case has been validly transferred to a subordinate Magistrate under s. 192 (1) of the Code, such Magistrate has no authority to return the case to the transferring Magistrate in order that the latter might issue process under s. 201 and his duty is to complete the trial according to law. The superior Magistrate has no jurisdiction to issue any orders connected with the case except such as are contemplated under the provisions of s. 528 or Chap. XXXII of the Code. *HAFIZAR RAHMAN v. AMINAL HAQUE* Cal. 38

— **s. 192 (1)**—*Piecemeal transfer of case under s. 192 legality.*

The legality of the piecemeal transfer of a case under s. 192 (1), Criminal P. C., is doubtful. Even

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if such piecemeal transfer is in certain circumstances valid that portion of the case which has not been transferred must be clearly indicated in the order of transfer recorded by the transferring Magistrate who acts under s. 192, (Criminal P. O.). In the absence of a clear indication as to which part of the case is retained on the file of the transferring Magistrate or some further indication to the effect that such Magistrate intended to dismiss the complaint against those accused persons in respect of whom he did not issue process, it must be taken that the whole case had been transferred to the subordinate Magistrate not only as against the accused persons actually summoned but against all other persons whom the subordinate Magistrate might consider to be implicated in the offence. **HAFIZAR RAHMAN v. AMINAL HAQUE** Cal. 38

s. 192 (1)—*S. 192 (1) is wider than s. 190 (1) — Scope of s. 192 (1)—Matter in respect of which trial or enquiry may be held under Code—Magistrate, if can take cognizance—Magistrate when competent to transfer under s. 192 (1).*

Section 192 (1) refers not merely to take cognizance of offences but to cases of which cognizance has been taken and the language used is wider in its character than that which has been employed in s. 190 (1). Therefore, cognizance can be taken by a Magistrate of any matter in respect of which an enquiry or trial may be held under the provisions of the Criminal P. O., and in taking cognizance of an offence or other cases, for example, cases under ss. 107, 110 or 145 of the Code, a Magistrate merely takes seisin of the matter for the purpose of exercising the specific powers with which he has been vested under the Code in connection with the case in question. As soon as a Magistrate duly empowered has taken cognizance of a matter, there is a case before him which he is competent to transfer to a subordinate Magistrate under the provisions of s. 192 (1) of the Code. Although s. 192 appears in Part VI of the Code relating to proceedings in prosecutions, nevertheless it is sufficiently wide to cover cases under the Code other than criminal cases.

Consequently the Magistrates mentioned in s. 192 (1) have power to transfer cases to subordinate Magistrates either for the purpose of holding a trial for example under Chaps. XX or XXI of the Code or for enquiry, for example under Chaps. VIII, XII or XVII of the Code. **HAFIZAR RAHMAN v. AMINAL HAQUE** Cal. 38

ss. 192 (1), 202—*Inquiry under s. 192 (1), nature of—Inquiry under s. 202, nature and scope of—Magistrate ordering enquiry under s. 202, whether transfers case.*

The term "inquiry" in s. 192 (1) is used with special reference to such inquiries as are held in connection with proceedings under Chaps. VIII, XII and XVIII of the Code. The inquiry which is contemplated by s. 202, on the other hand, is merely for the limited purpose of ascertaining the truth or falsehood of a complaint in order to enable the Magistrate to decide whether an accused person should be summoned or the complaint against him should be dismissed under s. 203. The plain meaning of s. 192 (1) of the Code is that a case which is transferred to a subordinate Magistrate under that section is transferred to him in order that he may complete the inquiry or trial to be held in connection with the case and take all requisite steps to that end. The holding of an inquiry under s. 202 in a suitable case is merely one of such requisite steps to be taken by a Magistrate who has taken cognizance of a case or to whom a case may have been transferred for trial under s. 192 (1). It is clear that, a Magistrate who orders an inquiry under s. 202 of the Code does not transfer the case at all. Ordinarily he merely

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retains the case on his own file and directs some suitable person to hold an inquiry and send the report to him. It follows, therefore, that an order for an inquiry under s. 202 of the Code cannot operate as a transfer under s. 192 (1). **HAFIZAR RAHMAN v. AMINAL HAQUE** Cal. 38

ss. 192 (1), 202, 204—*Transfer under s. 192 (1), as soon as accused appears or at any time thereafter when case is ready for inquiry or trial.*

If ss. 192 (1), 202 and 204 are read together, it is clearly competent for the Sub-Divisional Magistrate to transfer the case as soon as the accused has appeared or at any time thereafter when the case becomes ready for the inquiry or the trial. It would be equally competent for the Sub-Divisional Magistrate to transfer the case to a subordinate Magistrate immediately after the complainant had been examined. **HAFIZAR RAHMAN v. AMINAL HAQUE** Cal. 38

ss. 192 (1), 204—*Magistrate summoning only one accused—Transfer of case under s. 192 (1)—Death of aforesaid accused subsequently—Proceedings in case against others, if terminated.*

Where a Magistrate summons only one of the accused persons mentioned in the complaint and transfers the case under s. 192 (1), the death of the aforesaid accused subsequent to the transfer does not terminate the proceedings in the case against the other accused persons unless the Magistrate to whom the case is transferred thinks fit to conclude the proceedings against him. **HAFIZAR RAHMAN v. AMINAL HAQUE** Cal. 38

ss. 204, 202—*Opinion of Magistrate that there is sufficient ground for issuing process under s. 204, whether should be based on evidence—Record of reason.*

It is not necessary that the opinion that there is sufficient ground for issuing process against certain accused persons under s. 204 should be based on evidence in the case nor that the reasons for such an opinion should be recorded. When the sworn statements, the reports of the enquiring officers under s. 202 of the Code and the petitions of complaint are before the Magistrate it must be presumed that he had perused these documents and the other papers on the record and that, after having done so, he was of opinion that there was sufficient ground for proceeding against some of the accused persons other than those in respect of whom process had originally been issued. **HAFIZAR RAHMAN v. AMINAL HAQUE** Cal. 38

s. 209—*Duty of committing Magistrate—His power to weigh evidence and exercise judicial discretion—Weighing evidence and balancing it, difference—Trial of number of accused—Prosecution evidence identical against all—Evidence not believed against some—Either all must be discharged or all committed—Held that all accused ought to have been committed.*

The law clearly empowers the committing Magistrate to weigh the evidence, and to exercise his judicial discretion, and it plainly contemplates that he should do so. Nevertheless, it is one thing to weigh the evidence with a view to determining whether there are or are not sufficient grounds for commitment within the meaning of s. 203, (Criminal P. O.), and another to balance the evidence, as it is the duty of the Sessions Court to do, in order to decide upon the guilt of the accused after considering the case as a whole. It is not for the Magistrate to usurp the functions of the Sessions Court. It is not for him to decide whether upon the whole this witness or that witness should or should not be believed. In short, though the Magistrate should weigh the evidence and exercise his judicial discretion, the criterion to be applied by him

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is not quite the same criterion as will be finally applied by the Sessions Court at the trial. If the Magistrate, after weighing the evidence, is satisfied that it is evidence upon which no reasonable Court could convict, it is his duty to discharge; but if it is a case of balancing probabilities, estimating pros and cons; if it is a case where a different Court might possibly, in his opinion, come to a conclusion different from his own, then it is his duty to commit where the evidence is sufficient for conviction, if believed, and that even though, he may himself not think the evidence sufficient for a conviction. In such circumstances he should leave it to the Sessions Court to estimate the result of the evidence as a whole after cross-examination and a full trial. These considerations are all the more applicable in a case where there are a number of accused persons, and the evidence led by the prosecution is practically identical against them all. Undoubtedly it is open to any of the accused to satisfy the Magistrate that that evidence is not at all fit to be believed; but if they do, the result should be the discharge of all the accused, and not commitment of some and discharge of others.

A number of accused were produced before the committing Magistrate. The prosecution evidence was the same in case of all the accused. Two of the accused examined defence witnesses to establish an *alibi*. The Magistrate discharged these two accused and committed the rest. He did not in his order state definitely that he disbelieved the evidence of the prosecution witnesses, but held that in the case of these two accused persons the *alibi* had been established:

Held, that, in the circumstances the real alternatives were either to commit or to discharge all. Even without an express finding on the Magistrate's part that the prosecution witnesses were speaking falsely the course he adopted must, be liable to prejudice the trial of the persons he actually committed. It would have been better in such circumstances to leave the evidence as a whole with all its pros and cons to be weighed by the Court of Session. The case was one where all the accused should have been committed to stand their trial. **MOINUDDIN v. SHEGOBIND SAHU Pat. 399**

s. 234—Criminal cases, when can be consolidated and tried together on same evidence.

Criminal cases cannot like civil suits be consolidated and tried together on the same evidence except within the limits as to the joinder of charges laid down in the Criminal P. C. Hence, where there are a series of complaints of an offence alleged to have been committed on different occasions it is not permissible to the Magistrate to hear the evidence and write a judgment in one of the cases and then proceed to pass merely consequential orders in other cases.

Under s. 159, Bom. Municipal Boroughs Act, it has got to be proved, firstly, that the accused is a person who has the building or land under his control, secondly, that he allowed the water to run upon any street, land or space, and, thirdly, that the water was or was likely to become offensive. Waste water of the bleaching and dyeing departments of a mill would not necessarily be offensive or likely to become offensive in the absence of any proof. **EMPEROR v. CHAMPAKAL CHUNILAL BANKER Bom. 345**

ss. 258, 367—Order of acquittal should be incorporated in judgment.

It is imperative that if in any case in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal. The provisions of s. 258 (1), Criminal P. C., are mandatory. Mere mention of the fact of acquittal in an order-sheet

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is not enough. The order-sheet is no substitute for the judgment. **DIWAN v. RAJA RAM Oudh 372**

s. 289—Trial by jury—Function of jury—Duty of Judge in leaving case to jury—Prosecution case closed—Conclusion of Judge that jury will not be justified in convicting even, if they believed all prosecution evidence—Judge is bound to say so and direct jury that in law they must give verdict of not guilty—He must not in such case leave matter to jury.

In a trial by jury if the Judge comes to the conclusion that there is no evidence to go to the jury, it is the duty of the Judge to direct the jury that in law they must acquit. It is the function of the jury, to determine whether the evidence is true, and if the Judge thinks that the prosecution evidence, if true, will lead to a conviction, then he is bound to leave the case to the jury. But if he thinks that though weak the evidence if true will justify a conviction, he must leave the case to the jury, cautioning them, of course, about the weak points in the evidence. But if the Judge, after the prosecution case is closed, comes to the conclusion that, assuming that the jury believe every word of the prosecution evidence, nevertheless they will not be justified in convicting, then he is bound in law to say so and to direct the jury that in law they must bring in a verdict of not guilty, and he ought not in such a case to leave the matter to the jury. **EMPEROR v. THOKARSI NARSI Bom. 5 F B**

s. 386 (1) (b) and (3)—S. 386, whether controls s. 70, Penal Code—Effect of s. 386 (3).

Section 70, I. P. C., is substantive law as to the payment of fine while s. 386, Criminal P. C., relates to the procedure of its recovery. Section 70, I. P. C., is not therefore controlled by the provisions of s. 386, sub-ss. (1) (b) and (3), Criminal P. C. The warrant issued under s. 336 (1) (b), Criminal P. C., is to be deemed to be a decree for certain purposes only and not for all purposes. For the purpose of limitation therefore the substantive law contained in s. 70 is not affected. The only effect of s. 386 (3), Criminal P. C., is that the warrant which is to be deemed to be a decree is to be executed according to the mode laid down in the civil procedure code. Section 48, Civil P. C., does not prescribe any period of limitation for taking out execution. Section 48, Civil P. C., does not therefore apply to the warrant under s. 336 (3), Criminal P. C. **COLLECTOR OF BROACH & PANOCH MAHALS v. OCHHAVAL BHIKALAL Bom. 217**

s. 435. See Criminal Procedure Code, 1898, s. 155

ss. 435, 439—Order calling for proceedings signed and issued by Head quarters Assistant for District Magistrate, legality of.

Under s. 435, Criminal P. C., the District Magistrate undoubtedly has power to call for the records of proceedings before any Magistrate of the District, even when those proceedings are pending; but it is the District Magistrate who has that power, and an order signed by another person "for" the District Magistrate, calling for a proceedings, is an order without authority. Therefore, the order issued by the Head-quarters Assistant and signed by him for District Magistrate is void. **THE KING v. MAUNG PO THAING Rang. 370**

s. 437—Scope and object—Essential point to be considered before acting under s. 437—Case before Magistrate in middle of hearing—Order directing commitment is not justified.

Section 437, Criminal P. C., contemplates a case in which there has already been a completed inquiry under the provisions of Chap. XVIII followed by an

Criminal Procedure Code—contd.

order of discharge in a case triable exclusively by the Court of Session. The object of s. 437 is to enable the Sessions Judge in such a case to order commitment for trial without the necessity of a fresh and unnecessary inquiry. Such a procedure as is contemplated by s. 437 may be either in a proceeding under Chap. XVIII or in a case in which the accused has been tried out and convicted or acquitted on other charges by a warrant case. Such discharge may be either express or by implication. The essential point either for a Magistrate acting under s. 347 or for a Sessions Judge acting under s. 437 is to make certain that the rights of the accused are in no way prejudiced.

In a case where the Magistrate has only framed charges in respect of certain offences and fixed a date for further cross-examination of the prosecution witnesses and thus the case is still in the middle of its hearing an order under s. 437, Criminal P. C., directing commitment is not justified and must be set aside. *NASIMULLAH v. EMPEROR* *Oudh* 214

—s. 439. See Criminal Procedure Code, 1898, s. 155 *94*

—s. 439—Power of District Magistrate to stay proceedings in Criminal Court subordinate to him.

There is no provision of the Criminal P. C., authorising the District Magistrate to stay proceedings in a Criminal Court subordinate to him, and it is only the High Court which has power to do so, that power being conferred by s. 439 of the Code and s. 85 (1), Govt. of Burma Act. When a case is once made over for disposal to a Subordinate Magistrate, the District Magistrate is not competent to pass any order relating to it other than an order such as might be made by him under Chap. XXXII, Criminal P. C., i. e., ss. 435, 436 and 437. *THE KING v. MAUNG PO THANG Rang.* 370

—s. 439—Revision against conviction on ground of insufficient evidence—Interference, propriety of.

Appreciation of the evidence is a matter for the Courts which deal with the facts of the case. The conviction cannot be set aside on revision merely because of inadequate evidence. *HAFIZAR RAHMAN v. AMINAL HAQUE* *Cal.* 38

—ss. 439, 561-A—Government of India Act, 1935, (25 & 26 Geo. V, Ch. 42), s. 224 (1)—No appeal from order of acquittal—High Court, if has jurisdiction to expunge remarks made against witness in trial Magistrate's judgment, on application of such witness.

The superintendence given to the High Court under sub-s. (1) of s. 224 of the Govt. of India Act, 1935, is not to be construed as giving to a High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision.

Section 439 of the Criminal P. C., will not enable the High Court to expunge passages from a judgment which is not under appeal. So also, all that s. 561-A, Criminal P. C., does is to preserve the inherent powers of the High Court without conferring any additional power and no Court can claim inherent power to alter the judgment of another Court. *BHUTNATH KHAWAS v. DASRATH DAS* *Pat.* 248

—s. 439 (2)—Revision against acquittal—Acquittal of persons whose names do not appear in application cannot be touched.

Where the names of certain persons who have been acquitted do not appear in the revision application against acquittal, their acquittal cannot be touched in revision. *RAMLAKHAN DHORI v. KACHHEYA KALWAR* *Pat.* 660

Criminal Procedure Code—contd.

—s. 476—Decision of lower Courts under ss. 476 and 476-B, if can be interfered with by High Court under Civil Procedure Code (Act V of 1908), s. 115.

The sum and substance of s. 476 is that before a prosecution can be launched either the first or the Appellate Court must be of opinion both that an offence appears to have been committed and that it is expedient to prosecute. If in their opinion either of these elements is absent, then no prosecution can be launched. It is consequently not necessary for these two Courts to deal with both questions when in their opinion the answer to either is in the negative; also they can consider the questions in any order they please, but the opinion has to be their opinion and not the opinion of the High Court in revision. Also, if they take up those questions or either of them and deal with them judicially and reach a conclusion then the High Court has no jurisdiction whatever to interfere in revision under s. 115 of the Civil P. C., however, wrong or erroneous the High Court may consider that conclusion to be. *RAMBILAS HARSUKHDAS v. JAI KISAN Nag.* 583

—s. 476—Magistrate trying case issuing warrants for arrest—Constable entrusted for their execution giving false information of certain offence for explaining his failure to execute them—Offence committed by constable—Complaint under s. 476, if necessary.

Magistrate who was actually trying a certain case issued warrants for arrest, which were made over to a constable for execution. As an explanation of his failure to make any arrest the constable gave false information in the *thana* that certain persons had committed an offence under s. 228 B, I. P. C.:

Held, that the constable committed an offence under s. 211, I. P. C., in a transaction which arose out of the execution of those warrants. The offence was committed in relation of those proceedings and consequently complaint was necessary under s. 476, Criminal P. C. *GANGA PROSAD SINGH v. EMPEROR Cal.* 829

—s. 476—S. 476, scope and interpretation—Section assumes that offence appears to have been committed.

It is not correct to say that only after the Courts have come to a conclusion that an offence of the kind contemplated by s. 476, Criminal P. C., appears to have been committed they can direct their minds to the next question, namely, whether it is expedient in the interests of justice that a prosecution should be launched. The section assumes that an offence appears to have been committed. *RAMBILAS HARSUKHDAS v. JAI KISAN Nag.* 583

—s. 530. See Criminal Procedure Code, 1898, s. 192 *38*

—s. 561-A. See Criminal Procedure Code, 1898, s. 439 *248*

—s. 562—Discretion to be used in applying s. 562—Cattle-lifting by young accused acting like practised thief—Facts that he is young, is prepared to give sureties and has no previous conviction, are not sufficient for application of s. 562.

Section 562, Criminal P. C., must be applied with discretion for otherwise rather than preventing the manufacture of criminals, it may assist in their manufacture, for it may become known that first offences even of cattle-lifting can be committed with impunity.

Where in a case of cattle-lifting the evidence clearly shows the guilt of the accused and also shows the hand of a practised thief rather than the apprentice hand of a first offender, the fact that he was prepared to give sureties combined with his young age and the fact that

Criminal Procedure Code—concl'd.

he had no previous conviction are not sufficient to justify the application of s. 562, Criminal P. C. *EMPEROR v. AHMED HAJI SIDIK Sind 833*

Criminal trial—Accused charged under ss. 325 149 Penal Code (Act XLV of 1860)—Accused not convicted under these sections—Acquittal may be implied.

The fact that the accused have not been convicted under ss. 325-149 of the I. P. C., although charged may well be regarded as their implied acquittal of that offence although there is no express order to that effect. *DIWAN v. RAJA RAM Oudh 872*

Evidence—Admissibility—Evidence of Sub-Inspector not on personal knowledge, but based on inquiries made in course of duty—Admissibility.

Evidence of a Police Sub-Inspector not on his personal knowledge but as a result of some enquiries which he has made in the course of his official duties is wholly inadmissible. Similarly the evidence that the petitioner was on the active picketing list of the *thana* and that "this list is maintained for the criminals who are suspected to be most active" is wholly inadmissible. The Courts have to decide matters judicially and not upon a suspicion which led the Police authorities, however correctly, to place a person upon the suspicion list. *LAKHMAN KURMI v. EMPEROR Pat. 295*

Evidence—Appreciation—Practice of awarding reward to Police witnesses before case is finally decided deprecated—Its effect stated.

Action of the Police authorities of rewarding Police witnesses before the case is finally determined is calculated to prejudicially affect the fair trial of the case against the accused. Such action may lead to a large body of otherwise good evidence being eliminated altogether from consideration.

[Their Lordships treated the evidence of such witnesses as suspicious and tainted]. *KING-EMPEROR v. GAYA PRASAD Oudh 557*

Evidence—Appreciation of evidence—Prosecution evidence should be considered on merits and not rejected on consideration of defence evidence.

While dealing with the evidence of each prosecution witness the Judge should not unnecessarily introduce the defence evidence and reject the prosecution evidence largely because in his opinion the defence evidence established the innocence of the accused. The Judge should examine the prosecution evidence witness by witness on its own merits and reject it, if upon a careful analysis and scrutiny of the evidence he finds that it was not true or reliable to support the prosecution case. He should not test trustworthiness of the prosecution witnesses in the light of the defence evidence. *KING-EMPEROR v. GAYA PRASAD Oudh 557*

Evidence—Medical witness giving evidence—relying on text-books—Value of.

Where a medical witness gives evidence relying largely on statements in text-books as to the time of the death from the appearance of blisters on the dead body, the theoretical evidence of this description is not of value unless it is exhaustive with regard to all possible circumstances. *KATTAMEEDI CHENNA REDDI, In re Mad. 527*

Evidence—Murder—Deliberate opinion of doctor conducting autopsy that nature and number of wounds indicated that either there was deep motive for murder or murderer must have been insane—Admissibility.

Per *Patanjali Sastri, J.*—The deliberate opinion of a doctor who conducted the autopsy, that from the nature and number of the injuries on the body of the deceased which he had examined, there must have been

Criminal trial—contd.

either some deep seated motive for the murder or the offender must have been insane, is admissible in evidence. *SANKAPPA SHETTY, In re Mad. 332*

Evidence—Prosecution witness not cross-examined by accused before committing Court—Statement by him of incident indicating accused's insanity in Sessions Court—His omission to state in committing Court does not affect his veracity.

Where a prosecution witness who has not been cross-examined by the accused in the committing Magistrate's Court states an incident indicating the accused's insanity in the Sessions Court for the first time, no adverse inference against the veracity of the witness can be drawn from his omission to refer to the incident in committing Magistrate's Court though he might have voluntarily placed the information before the Magistrate. *SANKAPPA SHETTY, In re Mad. 352*

First information report—Person not named in—Action against, if can be taken.

An action need not be confined to persons named in the first information or charged with taking a direct part in an occurrence. *N. L. CARRICK v. EMPEROR Pat. 94*

First information report—Report of Police Sub-Inspector to his superior that certain persons were going to commit dacoity—Source of information not disclosed—Whether can be treated as first information.

The report made by the Police Sub-Inspector to his superiors that certain suspected persons were going to commit dacoity cannot be used as a sort of first information, if the Sub-Inspector has not in his report disclosed the source of his information, and the mere fact that he says that somebody told him that certain persons were going to commit a dacoity is no evidence at all against those persons. If the Sub-Inspector of Police wanted to prove as against the accused the information which he had received, he would be bound to give evidence as to the source of his information, and to call his informant. *BIRAM SINGH SARDAR v. EMPEROR Bom. 122*

Identification—Value of.

It is not illogical to say that the evidence of identification by itself might be unreliable but that, when substantial evidence is added to it, the identification evidence assumes a totally different aspect. When therefore a man is identified as being one of three persons engaged in a murder and when that person states that a jewel produced by him from a hiding place came to his share, it is reasonable to hold that he was concerned in the murder in the absence of any explanation. *KATTAMEEDI CHENNA REDDI, In re Mad. 527*

Jurisdiction—Magistrate cannot try Sessions case by leaving out more serious charges and confining charges to minor ones—Magistrate held could not try case by framing charge under ss. 147, and 325 read with s. 149, Penal Code (Act XLV of 1860).

Where a number of accused persons participate in rioting in the course of which grievous hurt and death are caused to some persons, it is not open to the Magistrate to bring the case within his jurisdiction by charging the accused with offences under ss. 147 and 325 read with s. 149, I. P. C. The fact that the accused charged with causing death is absconding is no ground for not framing charges against the accused under s. 302, I. P. C., or at least s. 304 read with s. 149. A case exclusively triable by a Court of Session cannot be brought within the jurisdiction of a Magistrate by leaving out the more serious charges and

Criminal trial—concl.

confining the trial to minor charges. **RAMLAKHAN DHOBI v. RAOHIRYA KALWAR** Pat. 660

Revision—Error of law resulting in sentence of six months—Interference.

Where there has been a clear error in law resulting in a sentence of six months' rigorous imprisonment upon the applicant, the High Court should interfere in revision. **BHAIRO MURID JAGIRANI v. EMPEROR** Sind 759

Sentence—Murder—Youth by itself, if reason for not passing death sentence.

Youth by itself is not a reason why the Court should evade its duty of sentencing the accused to death especially in the case of a cruel murderer. **KATTAMEEDI CHENNA REDDI, In re** Mad. 527

Sentence—Revision—Altering finding but maintaining sentence—Powers of Court.

A Court of Revision has the power of the Court of Appeal to "alter the finding maintaining the sentences or with or without altering the finding, reduce the sentence", and, therefore, to pass sentences under ss. 143 and 144 in a case, while setting aside the convictions under ss. 295 and 379, provided the sentences do not exceed those passed by the lower Appellate Court. **BECHAN JHA v. EMPEROR** Pat. 476

Trial by jury—Charge—Evidence against each accused should be summarized.

The Judge should conclude his charge with a summary of the evidence against each accused, so that the jury should be quite clear in their minds what evidence there was against each of them, though there is no fixed rule that a Judge should summarise separately the evidence against each accused:

Held, however, on facts that such a slight misdirection, did not prejudice the accused, specially when he himself had confessed about having committed the theft and the stolen goods were in consequence recovered from him. **SUBBARAYA AYYAR v. EMPEROR** Mad. 857

Trial by jury—Unanimous opinion of Judge and assessors as to credibility of witness—High Court is reluctant to differ.

The High Court always differs with reluctance from the unanimous opinion of the trial Judge and the assessors as to the credibility of witnesses. **BIRAM SARDAR v. EMPEROR** Bom. 122

Crown Grants Act (XV of 1895), s. 3—

Enfranchisement of inam—Burden of proof.

Whether or not a particular inam estate has been enfranchised is a question of fact in each case, the burden of proving which rests on the party who asserts it. **SHRIRAM v. BANYA BAI** Nag. 454

Custom—Proof of—Wajib-ul-arz—Wajib-ul-araiz furnishing clear and definite evidence of certain custom—Discrepancies on other points of custom—If can be rejected.

Where a *wajib-ul-araiz* furnish clear and definite evidence of a particular custom, they cannot be rejected as unreliable because they are discrepant on other points of custom as the differences in the record of these customs must be attributed to the idiosyncracies of the recording officials. **HARUN RASHID v. KANIZ FATIMA** Oudh 394

Custom (Punjab)—Non-ancestral property—Gift by widow with consent of next reversioner—Remoter collaterals, if can challenge it—Question of justification.

When the alienation of non-ancestral property by a widow is by way of gift with the consent of the next reversioner only, and is not made for charitable or religious purposes, no question of justification arises, so that the consent cannot be treated as intended for

Custom (Punjab)—concl.

evidence of justification. The consent of the next reversioner given in such circumstances should be regarded as intended to operate as a transfer by the reversioner following on a surrender by the widow. Consequently, the remoter collaterals of the widow's husband cannot contest the gift. **SUNDAR v. TABO** Lah. 310

Custom (U. P.)—Haq-i-chaharum—Custom to recover haq-i-chaharum, extends also to cases of auction sales of houses.

The custom entitling a *zamindar* to recover one-fourth of the sale price as *haq-i-chaharum* in the case of sales of houses is not limited to a private sale alone but extends to a case of auction sale also. **RADHEY SHIAM v. NAZIR HUSAIN** All. 705

Haq-i-chaharum—Right can be enforced against vendee.

The right to *haq-i-chaharum* can be enforced against the vendee. **RADHEY SHIAM v. NAZIR HUSAIN** All. 705

Deed—Construction—Rule of Part, when to be rejected—Intention—Duty of Court.

Per *Krishnaswamy Ayyangar, J.*—In construction of a deed the question is obviously one of intention to be deduced or inferred from a consideration of the entire deed, bringing into action every part of it and rejecting none, unless the expressions are contradictory and incapable of being reconciled, or there is a repugnancy which calls for the rejection of one part in order to more effectually to carry into effect the real intention of the parties gatherable from the part retained. Rejection should be the last resort, after every means to reconcile are exhausted. The Court should rather lean towards a construction which would give a meaning and effect to every one of the clauses in a deed than towards one which would result in a nullification of anyone or more of them in the end. **CHELIKANI KONDATTA RAO v. UPPALAPATI NAGANNA** Mad. 470 F B

Construction—Value of case law.

In a matter turning on the construction of a document cases are not very helpful except to clear one's mind as to the essence of the transaction which the agreement is said to effect. **DAU BHAIROPRASAD v. JUGALPRASAD** Nag. 761

Construction—Zarepeshgi lease and usufructuary mortgage—Distinction—Transaction held lease and hypothecation clause did not change its character.

Both in the case of a *zarepeshgi* lease and in the case of a usufructuary mortgage the person in whose favour the document is executed is entitled to possession. Similarly, in both cases there is an advance of money to the executants of the deed. But in the case of a usufructuary mortgage, there is a statutory liability for accounting cast upon the mortgagee by s. 76 (g), T. P. Act. In the case of a *zarepeshgi* lease however normally there is no such liability on the lessee. Further, in the case of a *zarepeshgi* lease pure and simple the lessee is not given any security for the amount advanced by him. Whereas in the case of a usufructuary mortgage there is a transfer of interest in the property mortgaged in favour of the mortgagee. It is clear from the provisions of s. 105, T. P. Act, that in the case of a lease there is a mere transfer of a right to enjoy the property leased, and no interest in the same is transferred in favour of the lessee. Again, in the case of a lease there is no right of redemption vested in the lessor, whereas such a right exists in the case of a mortgage:

Held, on construction that the transaction was a lease and the hypothecation clause did not alter the

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character of the transaction. *B. RAMMAN LAL v. RAGHUNATH SHANKER* All. 347

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 10-A—Privilege of agriculturist is personal—Mere initiation into ways of husbandry is not enough.

The privilege of an agriculturist is not hereditary but personal. Nor can that privilege be acquired by birth.

In order to claim the status of an agriculturist a person must prove that he is ordinarily engaged personally in agricultural labour, that is, he is regularly and habitually cultivating his fields. Mere initiation into the ways of husbandry is not enough. *GANGADHAR KASHINATH SAKHARE v. DATTATRAYA VISHAVANATH SULAKHE* Bom. 602

s. 10-A—Suit for redemption—Plaintiff must show that he is agriculturist and not merely that his predecessor was agriculturist at time of transaction.

In a suit for redemption, in order to rely on s. 10-A, Dekkhan Agri. Relief Act, the plaintiff must show that he was an agriculturist and not merely that his predecessor was an agriculturist at the date of the transaction.

The proper time when the jurisdiction to inquire into the real nature of the transaction can be assumed by the Court for the purpose of s. 10-A is when the Court is requested to exercise that jurisdiction. That request is contained in the plaint when disclosing the essential cause of action, upon the averment that the plaintiff is an agriculturist and a party to the suit. Therefore, if the plaintiff invokes the Court's jurisdiction under s. 10-A, he must be an agriculturist within the meaning of s. 2, Dekkhan Agri. Relief Act, at the date when the plaint is instituted. *GANGADHAR KASHINATH SAKHARE v. DATTATRAYA VISHAVANATH SULAKHE* Bom. 602

Dissolution of Muslim Marriages Act (VIII of 1939), s. 2 (ii)—Failure to maintain wife, whether should be wilful—Cause of failure is immaterial for divorce.

There is nothing in the wording of cl. (ii) of s. 2, Dissolution of Muslim Marriages Act to suggest that the failure to maintain wife must be wilful. It is absolutely, immaterial whether the failure to maintain is due to poverty, failing health, loss of work or to any other cause whatsoever. Divorce can be granted on grounds which do not necessarily involve any deliberate default on the part of the husband. *MANAO KHAN v. MULKHAN BANO* Lah. 567

s. 2 (ii)—S. 2 (ii), if can be applied retrospectively.

Section 2 (ii) must be taken as intended to apply with retrospective effect. When an Act is intended to provide a remedy for what is considered to be an existing unsatisfactory state of affairs, the intention is clearly that the remedy should be applied even though this may involve giving retrospective effect to some of its provisions. *MANAK KHAN v. MULKHAN BANO* Lah. 567

Dower. See Muhammadan Law 588

Dying declaration. See Evidence Act, 1872, s. 32 (1) 186

Easement—Interference of—Right of way—Principles applicable.

The considerations which may apply when the interference complained of has reference to the access of light and air or to support from adjoining land may not apply when the interference has reference to the use of a way over another's land. *CHINATALAPATI VENKATANARASIMHARAJU v. SURISETTI RAMASWAMI* Mad. 130 F B

Easement—conold.

Punjab—Licensee acting on license building works of permanent character—License, if can be revoked at option of licensor even on payment of compensation.

If the licensee acting upon the permission granted, has executed a work of a permanent character, and has incurred expenses, in its execution it is not open to the licensor to revoke the license at his option and resume the land even on offer of compensation. This rule being in consonance with equity, justice and good conscience should be given effect to in provinces like the Punjab, where the Easements Act is not in force. *JAGAT SINGH v. DISTRICT BOARD, AMRITSAR* Lah. 518

Right of way—Use of, by person for less than prescriptive period—If can sue to prevent stranger from obstructing his way.

A person who has been using a particular way over land adjoining his, but for less than the prescriptive period, cannot maintain an action to prevent a stranger from obstructing him using the way. An action can only be maintained if the obstruction to user will have the effect of substantially depriving a person of the enjoyment of his property. *CHINATALAPATI VENKATANARASIMHARAJU v. SURISETTI RAMASWAMI* Mad. 130 F B

Electricity Act (IX of 1910), ss. 2 (n), 37—

Definition of 'works' in s. 2 (n) not exhaustive—"Works," meaning of explained.

The definition of 'works' in s. 2 (n), Electricity Act, is not exhaustive. Nevertheless, a reference to other provisions in the Act indicates that when the expression "works" is used it usually means works connected with the supply of energy, and not lighting installations. *EMPEROR v. RAGHUNATH RAMACHANDRA KARLEKAR* Bom. 554

s. 37—Rules under—Electricity Rules 1937—Offence between March 27, 1937 and March 22, 1938—Neither r. 40-A of Rules of 1922, nor its corresponding r. 48 of the Rules of 1937, held applied—S. 24, General Clauses Act (X of 1897), held not applicable to Rules.

The Electricity Rules, 1937, were made applicable in supersession of the Electricity Rules 1922, on March 27, 1937. The Electricity Rules of 1937, came into force on March 22, 1938. The accused was charged under r. 40-A of the Electricity Rules, 1922, for an offence committed between March 27, 1937 and March 22, 1938.

Held, that neither r. 40-A of the Rules of 1922 nor its corresponding provision r. 48 of the Rules of 1937, applied to the offence.

Held, further that s. 24, General Clauses Act, could not be invoked to apply r. 40-A of Rules of 1922, to the offence as that section did not apply to rules framed under the Act. *EMPEROR v. RAGHUNATH RAMACHANDRA KARLEKAR* Bom. 554

s. 37—S. 37, rules under—Electricity Rules, 1922, r. 40-A (1) Proviso—Notification (No. 640-27-II) issued by Bombay Government on November 15, 1934, under—Words "works" and "their own works," meaning of—Installation works carried out by exempted electric company on other's premises at its own expense remaining its own property—Whether fall within notification—Accused being exempt from operation of r. 40-A cannot be convicted under r. 46, Electricity Rules, 1932.

The word "works" in the Bom. Govt. Notification (No. 640-27-II) issued on November 15, 1934, refers to installation works and not to works connected merely with the supply of energy and the words "their own works" in the same notification mean works carried out by the exempted bodies themselves or perhaps

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works belonging to them and not merely the works carried out by them on their own premises. Hence the installation works which are carried out by exempted electric supply company on other's premises but at its own expense and which remain its own property fall within the notification and are, therefore, exempt. The accused thus being exempt from the operation of r. 40-A by reason of the notification cannot be convicted under r. 46, Electricity Rules, 1932. **EMPEROR v. RAGHUNATH RAMCHANDRA KARLEKAR** Bom. 554

r. 40-A (1) Proviso. See Electricity Act, 1910, s. 37 554

Estoppel.

See Evidence Act, 1872, ss. 21, 116 161

See Income-tax 464

See Landlord and tenant 428

Consent decree creates estoppel.

In the case of a consent decree the parties themselves decide the issues in dispute between them in the litigation in which that decree is made and they are estopped from subsequently challenging the decision at which they arrived. **JAGDISH CHANDRA DEO DHABAL DEB v. BISSEWAR LAL AGARWALLA** Pat. 428

Estoppel by record—Essentials.

It is not any and every expression of opinion in a judgment which gives rise to the estoppel, nor can the actual decision be carried further than the circumstances warrant. In England the decision must be a final one: the matter must have been, distinctly put in issue; and then only the precise point which was so put in issue and solemnly found against a party is deemed to have been finally decided for the purposes of this rule; and this is so in India as well under s. 11, Civil P. C. **GHASI RAM v. KUNDANBAI Nag.** 861

Evidence. See Criminal trial 122, 332, 527

Evidence (Act I of 1872), s. 8. See Criminal Procedure Code, 1898, s. 162 236

ss. 8, 25—Self-exculpatory report made by accused to Police—Admissibility.

A report made to the Police by the accused which is of a self exculpatory nature should not be excluded under s. 25, Evi. Act, as being of a nature of confession made to the Police Officer. **KING-EMPEROR v. BHAGI** Oudh 236

s. 21—Admission by party in pleading in one suit—Whether binding on him in other suit.

A party is not bound by an admission in his pleading except for the purposes of the suit in which the pleading is delivered. It frequently happens that a party is prepared in a particular suit to deal with the case on a particular ground and to make an admission, but that admission is not binding in any other suit, and certainly not for all time. **RAMABAI SHRINIWAS NADGIR v. GOVERNMENT OF BOMBAY** Bom. 431

s. 21—Estoppel—Wrong admission made in ignorance of legal rights—Binding effect.

Wrong admissions made in ignorance of legal rights have no binding effect. **MUNIA v. MANOHAR LAL** Oudh 161

s. 25. See Evidence Act, 1872, s. 8 236

s. 27—Confession leading to discovery is admissible.

Confession before Police leading to discovery of articles which are the subject of theft is clearly admissible under s. 27 of the Evi. Act. **SUBBARAYA AYYAR v. EMPEROR** Mad. 857

s. 27—Duty of Police in recording statement of accused—Statement leading to discovery.

The duty of the Police, if they desire to record a statement of the accused is to record it as given and to leave it to the Court to decide what evidence is admissible.

Evidence Act—cont'd.

It is the first statement of the accused to whomsoever made, that leads to the discovery of the fact, if a fact is discovered. **KATTANEEDI CHENNA REDDI, In re.** Mad. 527

s. 27—S. 27, if affected by s. 162, Criminal Procedure Code (Act V of 1898).

Section 27, Evi. Act, is not affected by s. 162, Criminal P. C. being saved by s. 1 (2), Criminal P. C. **BIRAM SARDAR v. EMPEROR** Bom. 122

s. 32 (1)—Dying declaration—Assailant not recognized—Possibility of naming suspected person as assailant should not be ignored by Court—Dying declaration, when can be acted upon, for convicting accused without corroboration—Duty of Court in this respect.

Although it is improbable that a man who has been stabbed and has been able to recognize his assailant would omit to name the actual assailant and instead give the name of some other person in his dying declaration yet in cases where the assailant has not been recognized the Court must not ignore the possible temptation that there may be if one has grounds for suspecting any person, to name that person as having been actually and positively identified. The danger of this kind of wrong identification has to be borne in mind in dealing with what are called dying declarations. There is no absolute rule that a dying declaration should not be acted on for the purpose of convicting an accused person even if uncorroborated, provided, that the Court is fully satisfied that it is true. But before so acting on it the Court will apply to it every test of its genuineness and good faith which it is possible in the circumstances of the case to apply. **MOHAMMAD ARIF v. EMPEROR** Pat. 186

s. 32 (1)—Prosecution attempting to improve and develop evidence at successive stages—Special caution is necessary in dealing with dying declaration.

Where the prosecution evidence shows that there are signs of attempt to improve and develop it at successive stages special caution is needed also in dealing with a dying declaration. **MOHAMMAD ARIF v. EMPEROR** Pat. 186

s. 32 (1)—Serious room for doubt as to whether dying declaration includes matter suggested to deceased by outsiders—Value to be attached to it.

When there is serious room for doubt as to whether the contents of the dying statement include matter suggested to the deceased by the outsiders, this is a circumstance which cannot be ignored in estimating the value to be attached to it. **MOHAMMAD ARIF v. EMPEROR** Pat. 186

s. 32 (5)—Entry by father in his pocket book regarding birth of his son proved to be in his handwriting—Fact that they saw his handwriting long ago whether shakes value of their evidence.

Where entry by father in his pocket book regarding the births of his various sons which is relevant under the provisions of s. 32 (5) is proved to be in his handwriting by witnesses acquainted with his handwriting in their official capacity, the fact that it is very long time since any of them saw his handwriting would not shake the value of the evidence which they have given. **B. KALA RAM S. BHAG SINGH v. FAZAL BARI KHAN** Pesh. 824

s. 35—Entry in school register regarding age, admissibility of.

There is a presumption that when the boy is admitted into the school he was accompanied by some close relative of his who must have been aware of his age. The entry regarding the age of the boy in the school

Evidence Act—contd.

register is, therefore, admissible. *B. KALA RAM S. BHAG SINGH v. FAZAL BARI KHAN* Pesh. 824

s. 65—Debtor's application to Debt Conciliation Board, whether admission of liability within s. 65 (b).

The statement contained in the debtor's application to the Debt Conciliation Board cannot be regarded as an admission within the meaning of s. 65, Evi. Act. It is a statement. Under s. 6 of the Debt Conciliation Act the statement is not to be deemed a statement of the amount admittedly due but of the amount claimed. The debtor is in no sense promising to pay this amount or the contrary he is applying to a Debt Conciliation Board with a view to having his liability cut down, and it cannot be inferred that there is any promise to pay anything or any admission of liability for anything. *UDHAO v. NARAYAN* Nag. 120

s. 90—Original document lost—Copy admitted as secondary evidence under s. 65—Presumption under s. 90 as to genuineness of original document, if can be drawn.

Where the original document having been lost its copy is admitted under s. 65 of the Evi. Act as secondary evidence of the original, the only presumption that can be drawn under s. 90 is that it is a correct copy of the original document, but whether the original document was a genuine document is a question which is capable of proof and it is not permissible to invoke the assistance of s. 90 of the Evi. Act, to prove the genuineness of the original by the production of the certified copy. *AMJAD HUSAIN v. RAISUNESA* Oudh 855

s. 92. See Civil Procedure Code, 1908, O. XXI, r. 2 1 FB

s. 92—Expression "between the parties to any such instrument," whether applies to questions raised between parties on the one side only of deed regarding their relations to each other under contract.

The words "between the parties to any such instrument" as used in s. 92, Evi. Act refer to the parties who on the one side and the other came together to make the contract or disposition of property, and would not apply to questions raised between the parties on the one side only of a deed regarding their relations to each other under the contract. *LAKSHMANA SAHU v. M. SIMACHALA PATRA* Pat. 739

s. 92—Property purchased jointly in name of two persons—Evidence by one showing that he paid the whole consideration and that other's name was entered to enable him to present the deed for registration, admissibility of.

Where a certain property is purchased in the joint names of two persons, evidence by one of them showing that he paid the whole consideration of the purchase and the other's name was mentioned in the deed as a joint purchaser merely in order that he should be able to present the document for registration is clearly inadmissible under s. 92, Evi. Act. *MA AYE TIN v. DAW THANT* Rang. 313

s. 101. See Oudh Rent Act, (XXII of 1886), s. 151 437

ss. 101, 114—All evidence on record—Onus is immaterial.

It is academic to argue the question of burden of proof at a stage when all the evidence is on record. *CHAN WAN HONG TANG v. A. K. A. C. T. V. CHETTIAR* Rang. 270

s. 106. See Oudh Rent Act, 1886, s. 151 737

Evidence Act—concl.

s. 114—Party in possession of important documentary evidence, withholding it—Presumption.

Even if the burden to prove something does not lie on a party, the Court can draw an adverse inference if such party having important documentary evidence in his possession throwing light on the fact withholds it from Court. *CHAN WAN HONG TANG v. A. K. A. C. T. V. CHETTIAR* Rang. 270

s. 114 (d)—Presumption—Court of fact cannot be compelled to raise presumption in favour of any party.

The presumption mentioned in s. 114 (d), Evi. Act is a permissive presumption. A Court of fact cannot be compelled to raise the presumption mentioned in that section in favour of either party. *JAGDISH CHANDRA DEO DHABAL DEB v. BISWAR LAL AGARWALLA* Pat. 428

s. 116—S. 116, scope and application—Term of tenancy expiring—Section does not apply.

Section 116 of the Evi. Act confines the operation of the doctrine of estoppel against a tenant during the continuance of the tenancy. This section has no application where the term of the tenancy has already expired. *MUNIA v. MANOHAR LAL* Oudh 161

Execution—Ghatwali tenure—Judgment-debtor ghatwali of ghatwali governed by Bengal Regulation XXIX of 1814—Surplus profits are available for satisfaction of decree—What would be surplus profits is to be determined by Court executing decree—Consideration in determining surplus profits—Allowance to be paid to judgment-debtor for his maintenance and other expenses—Tenure under attachment of government for their dues—Receiver appointed—Commissioner fixing allowances to be paid to ghatwali—Government dues satisfied—Surplus profits under attachment by Civil Court—Allowances fixed by Commissioner are not binding on Civil Court.

Where the judgment-debtor is a ghatwali in the Santal Parganas whose ghatwali tenure is governed by Ben. Regulation XXIX of 1814 and is inalienable the surplus profits of such ghatwali tenure which may be left "after the payment of Govt. revenue, the wages of the chowkidars employed by the ghatwali and other like charges" are available for the satisfaction of decrees obtained against the ghatwali.

The question of what would be the surplus profits available to the decree-holders of the ghatwali must be determined by the Court executing the decree. Whatever is left to the ghatwali out of the income of his tenure "after the payment of Govt. revenue, the wages of the chowkidars employed by the ghatwali and other like charges" is his personal property and as such liable to be seized and appropriated by the decree-holder. The ghatwali's maintenance allowance and other personal expenses do not come within the expression "other like charges". The Court, however, executing the decree must make provision for the maintenance and other necessary expenses of the ghatwali judgment-debtor. His maintenance allowance cannot be regarded as salary to be fixed by the executive authorities. Where the surplus profits are under attachment by the Civil Court, it is that Court which has to determine the amount of surplus profits available to the decree-holder and for that purpose to fix the allowance to be paid to the judgment-debtor for his maintenance and other expenses. The Receiver in possession of the judgment-debtor's estate is under the control and supervision of the executing Court and must, therefore, prepare the budget with the sanction of that Court.

Execution—concl.

Where the profits of the *ghatwali* tenure were attached by the Govt. for the recovery of their dues and a Receiver was appointed for the satisfaction of those dues and after the satisfaction of the Govt. dues the surplus profits are under attachment by the Civil Court, the allowance to be paid to the *ghatwali* fixed by the Commissioner of the Division at that time are not subsequently binding on the Civil Court, which can reduce the allowance according to the circumstances. **HARISHORE PRASAD SINHA v. LOKNATH PRASAD DHANDHANIA** Pat. 234

Execution sale—Nullity—Declaration as to, sought by party—Onus is upon him—Nature of proof required.

When a party seeks a declaration that an execution sale is a nullity it is necessary for him to prove the circumstances which would nullify the sale. It is not sufficient for him to show only that the sale was not held on the first day of the month of sales or on the actual date fixed in the sale proclamation but also to show that the monthly sales had come to an end before the sale was actually held. **SASHINATH CHOUDHURY v. UGRANARAIN CHAUDHURY** Pat. 219

Federal Court—Leave by, to appeal to Privy Council when granted. See Government of India Act, 1935, s. 208 (b) F C 225, 246

First Information report. See Criminal trial 94

Foreign Judgment—Effect—Creditor's option to bring action in domestic tribunal on foreign judgment—Notification under s. 44, Civil Procedure Code (Act V of 1908), whether alters character of foreign judgment.

It is a well-established principle of Private International Law that a foreign judgment only creates a new obligation to pay but does not extinguish the original cause of action for the debt. A foreign judgment involves no merger of the original cause of action especially when it has been declared to be a nullity by a competent British Indian Court. The creditor thereunder has the option of bringing an action in a domestic tribunal on the foreign judgment which he has recovered or of bringing in a domestic tribunal a suit upon the original cause of action. It does not matter whether the procedure for enforcing a foreign judgment is by a suit or by an application in the form of execution. The mere fact that by reason of the notification issued by the Governor-General in Council under s. 44, Civil P. C., the plaintiff had the right to enforce the foreign judgment by an application for execution would not alter the legal character of the foreign judgment. In law it would still be regarded as only creating an independent obligation on the judgment-debtor to pay the sum adjudged without involving a merger of the original cause of action. **NILRATAN MUKHOPADHYA v. COOCH BEHAR LOAN OFFICE LTD.** Cal. 746

Foreign judgment obtained against some joint promissors or contractors—Suit on original cause of action, if can be maintained against rest in domestic tribunal.

Where the first judgment pronounced against some of several joint promissors or contractors is a judgment not of a domestic Court but of a foreign Court, the original cause of action still subsists and a second suit based on it can still be filed in a domestic tribunal. The promisee who has the right to sue on the original cause of action both in the foreign Court and in the domestic Court may in such a case sue those promissors who are residents or subjects of the foreign State in the foreign Court and so get against them an effective judgment in that Court and may also sue

Foreign Judgment—concl.

the others who are residents or subjects of British India in a British Indian Court on the original cause of action and so get an effective judgment against them. **NILRATAN MUKHOPADHYA v. COOCH BEHAR LOAN OFFICE LTD.** Cal. 746

General Clauses Act (X of 1897), s. 24.

See Electricity Act, 1910, s. 37

Ghatwali tenure. See Execution 234

Gift. See Muhammadan Law 77, 87

Government of India Act, 1935, (25 & 26

Geo. V, Ch. 42), s. 65—Government Trading Taxation Act (III of 1926), is intra vires the Government of India.

A tax on income accruing or arising or received in British India by a person resident outside British India is legislation relating to something, i. e., certain income, in British India, and therefore, it falls within the very wide and general words of s. 65, Govt. of India Act. Therefore the Govt. Trading Taxation Act of 1926 is *intra vires* the Govt. of India. **In re PATIATA STATE BANK** Bom. 712

s. 107. See Government of India Act, 1935 (25 & 26 Geo. V, Ch. 42), s. 219 413 F B

s. 107—Under s. 107, Statute is to be presumed legal.

Under s. 107, Govt. of India Act there is a presumption in favour of the legality of a statute and the Courts should not declare an Act inconsistent or *ultra vires* unless the repugnancy to the constitution is clear and beyond doubt. **MIRGH RAJ v. ALLAH RAKHIA** Lah. 413 F B

s. 108 (2). See Bihar Agricultural Income Tax Act, 1938 663 S B

s. 208 (b)—Leave to appeal to Privy Council—Grounds—General importance of cases—Decision dealing with decrees whose number is limited—No leave can be granted.

The Federal Court will not be disposed to grant leave to appeal to the Privy Council save in cases of real importance, cases which are likely to affect a large number of interest thereafter or cases in which difficult questions of law are involved. Where a decision deals with appeals whose number is limited and cannot be added to, no leave can be granted to appeal against it. **A. L. S. P. P. L. SUBRAHMANYAM CHETTIAR v. MURTUSWAMI GOUNDAN** F C 225

s. 208 (b)—Leave to appeal to Privy Council—Grounds—Question must be of importance and really a substantial one—Question of interpretation of s. 292, Government of India Act as to whether it deprives Legislatures of power to legislate retrospectively, is not a substantial question.

When dealing with an application for leave to appeal to Privy Council the Federal Court must be satisfied that the matter is one of importance and that there is really a substantial question to be determined. On the question whether s. 292 of the Constitution Act can be interpreted as depriving Legislatures in India of the power to legislate with retrospective effect, there is no room for such serious doubt on the point as to justify Federal Court in holding that that is a substantial question on which leave to appeal to His Majesty in Council is to be granted.

Where it cannot be said that any decision so be obtained from their Lordships of the Privy Council, if the appeal should be permitted to go to them, is likely to have a material bearing upon future litigation there is no question of general public importance justifying the leave. **ATIQA BEGAM v. UNITED PROVINCES** F C 246

ss. 219, 107, Sch. VII, Provincial List item No. 21—Act found intra vires of

Government of India Act—concl'd.

Provincial Legislature—Court, if can consider extent to which provision barring Civil Court's jurisdiction would derogate from powers of High Court.

If the Act is *intra vires* of the Provincial Legislature it is not for the Courts to consider the extent to which the provision barring the jurisdiction of the Civil Courts would derogate from the powers of the High Court. This is a matter which is within the special competence of His Excellency the Governor under s. 17 (b), Instrument of Instructions. *MEGH RAJ v. ALLAH RAKHIA* Lah. 413 F B

—s. 224 (1). See Criminal Procedure Code, 1898, s. 439 248

—s. 299. See Bihar Agricultural Income Tax Act, 1938 663 S B

—Para. XVIII of Instrument of Instruction. See Bihar Agricultural Income Tax Act, 1938 663 S B

—No. 7 of List III, concurrent list. See Hindu Women's Right to Property Act, 1937 357 F C

—Sch. VII, Pro. List Item No. 21—

Word "land" in item No. 21, includes trees standing thereon.

The expression "land" in item No. 21 of the Provincial Legislative List must be deemed to include trees standing on the land. *MEGH RAJ v. ALLAH RAKHIA* Lah. 413 F B

Government Trading Taxation Act (III of 1926). See Government of India Act, 1935, (25 & 26 Geo. V Ch. 42), s. 65 712

—s. 2—Act, whether confined to business carried on in British India.

The Govt. Trading Taxation Act is not confined to business carried on in British India. The title, the Preamble and the operative part of s. 2 of the Act make it perfectly clear that it applies to every case in which the Dominion Govt. is carrying on a business, and when that happens, the Dominion Govt. is liable to Indian income-tax as though it were a company. *PATIALA STATE BANK, In re* Bom. 712

—s. 2—Investment by Patiala State Bank in Government of India securities—Income from it, if taxable.

The income from the investment by the Patiala State Bank of a part of its surplus funds in the Govt. of India securities are profits from the business of the bank received in British India and as such taxable. *PATIALA STATE BANK, In re* Bom. 712

—s. 2—Patiala State, if falls within "His Majesty's dominions."

The Patiala State is a State under His Majesty's protection and therefore comes within the expression "His Majesty's Dominions" in the Govt. Trading Taxation Act. That Act is therefore applicable to Patiala State Bank rendering it liable to taxation under the Income Tax Act. *PATIALA STATE BANK, In re* Bom. 712

—s. 2—Property in British India taken over by Patiala State Bank from its debtor, a subject of State in part satisfaction of loan—Income arising from it, if assessable—Act legislates only in respect of Dominion Government's trading operations.

The property situated in British India taken over by the Patiala State Bank from its debtor, a subject of the Patiala State in part satisfaction of a loan advanced to him is not property occupied in British India for the purposes of its trade or business in British India within the meaning of s. 2, Govt. Trading Taxation Act, but all income arising from such property is liable to assessment by virtue of the provisions of the said Act.

Government Trading Taxation Act—concl'd.

By enacting Govt. Trading Taxation Act, 1926, an attempt was made not to legislate generally in respect of the public property of a Dominion Govt. but in respect of its trading operations only. *PATIALA STATE BANK, In re* Bom. 712

Guardians and Wards Act (VIII of 1890), ss. 17, 25—Child of tender years—Custody of—Considerations in the matter—Mother preferable to father.

The paramount consideration in the matter of a custody of a minor of tender years is the interest of the child rather than the rights of the parents. Human nature is much the same all the world over, and if the mother is a suitable person to take charge of the child it is quite impossible to find an adequate substitute for her for the custody of a child of tender years. Hence in such a case the mother is preferable to the father. *SARSAWATIBAI SHRIPAD VED v. SHRIPAD VASANJI VED* Bom. 48

—s. 25—Person interested in minor can apply to Court at any time for change of custody.

Orders as to the custody of a child are always of a temporary nature. Those interested in the minor are at liberty to apply to the Court at any time for the change of the minor's custody. *SARSAWATIBAI SHRIPAD VED v. SHRIPAD VASANJI VED* Bom. 48

Hiba—Dil-Ewaz. See Muhammadan Law 87

Hindu Law—Adoption—Adoption of daughter not allowed.

Hindu Law does not permit adoption of a daughter. *GURAN DITTA MAL v. RAM RAKHI* Lah. 742

—Widow—Consent of sapinda—Burden is upon widow to prove that consent was refused with improper motive.

The Judge cannot assume that the sapinda had refused his consent to the adoption of the widow on the ground that his rights as a reversioner would come to an end if the widow adopted a son to her husband, which is an improper motive. The burden is on the widow to prove improper motive. *VAJJULA v. HANUMANTHAVAJJULA GOPAL KRISHNAMMA* Mad. 845

—Widow—Madras School—Nearest sapindas improperly refusing consent—Consent of next nearest sapindas is necessary—All sapindas dead—There is no residuary power in widow to adopt.

Under the Mitakshara Law as interpreted in the Madras Presidency the widow cannot adopt a son to her husband unless she has received authority from him or has received the consent of her husband's sapindas. The consent of the sapinda is necessary in the absence of direct authority from the husband. If the nearest sapindas improperly refuse their consent to an adoption the widow is, however, entitled to seek the consent of the next nearest sapindas. There is no residuary power in a widow to adopt when her husband's sapindas are all dead. *VJJJULA v. HANUMANTHAVAJJULA GOPAL KRISHNAMMA* Mad. 845

—Alienation—Alienation not binding on family as whole—Mother is no more bound than sons.

The mother is no more bound by an alienation which does not bind the family as a whole than are the sons. *KASHINATH VISHWANATH JOR v. BAPURAO* Nag. 189

—Alienation of family property—Only co-parceners alive at date of alienation can challenge it—After born co-parcener has no such right.

Obiter.—The right to challenge alienations of family property is confined to the co-parceners alive at the date of the alienation. Such a right is denied to a co-parcener who though born subsequent to the alienation

Hindu Law—contd.

acquires an interest in the co-parcenary property before the death of the objecting or non-alienating co-parceners. **VASIREDDI BALACHANDRASEKHARA VARAPRASAD BAHADUR v. MALLELA LAKSHMINARASIMHAM**

Mad. 707

—Alienation—Co-parcener—Father entitled to half share on date of mortgage by him—Mortgagee's right to execute decree against father's share—After born son, if acquires right in property alienated by father.

Where at the date of the mortgage executed by the father, the father is entitled to a half share in the joint family property that interest which is vested in him would pass to the mortgagee. The property which is effectively carried away from the family is only a half and the other half would still be the joint family property and it is only in that half and in the equity of redemption in the other half, the afterborn son would be entitled to participate with the other son. This is in strict consonance with the principles of Hindu Law that in a Mitakshara family a member acquires right by birth only in the property which was then in existence and not in the property which has been effectively carried away from the family. **VASIREDDI BALACHANDRASEKHARA VARAPRASAD BAHADUR v. MALLELA LAKSHMINARASIMHAM**

Mad. 707

—Member, if can own part of family property as his separate property.

An individual member of a joint Hindu family can own separate property. The family can by agreement break off a piece of its property (whether tangible or a share) and hand it over to one of its members for him to have and to hold as his separate estate. They can do this just as effectually and completely as they could to a complete outsider, and yet remain joint. In any one of these ways it is possible for an individual member to acquire for himself as his own separate property a part of the family estate. **KASHINATH VISHWANATH JOT v. BAPURAO**

Nag. 189

—Nature of alienation in joint family.

The real alienor according to orthodox Hindu ideas is the family and not the individual who puts his signature to the deed. **KASHINATH VISHWANATH JOT v. BAPURAO**

Nag. 189

—Ancestral property—Property inherited from maternal grandmother, if ancestral.

Property inherited by two Hindu brothers from their maternal grandmother is not ancestral property and the brothers get it as tenants-in-common and not as joint tenants. **MOHAN LAL v. RAM DAYAL**

Oudh 61

—Co-sharers—Adverse possession—Manager denying rights of co-owner—Possession of junior member, whether enures for benefit of co-owner in repelling plea of adverse possession—Possession of one co-sharer, when adverse.

Where after the partition a co-owner has chosen to mix his separate movable property with property held in co-ownership the burden lies heavily upon him to prove that the immovable properties acquired after the partition were acquired from his own separate funds and not out of the income of the property held by him in co-ownership.

Possession by one of the junior members of the joint family is the possession of the manager of the family and can give manager's co-owner no advantage when the manager or karta of the family denied, or in any case is not proved to have admitted that co-owner's rights.

Possession of a co-owner in law is the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in his

Hindu Law—contd.

mind. Nothing short of ouster or something equivalent to ouster can bring about the result. It is not necessary to show that adverse possession was brought to the knowledge of the person against whom it was claimed. It is sufficient that the possession was adverse and without any attempt at concealment so that the person against whom time was running ought, if he exercised due vigilance, to have been aware of what was happening. Non-participation by one of two co-owners in the possession and enjoyment of the property belonging to them as co-owners for an extended period, coupled with the absence of any claim or demand for participation, may amount to ouster of such co-owner; whether it does or not, depends upon the facts and circumstances of each individual case. If in the circumstances of any particular case such non-participation and absence of demand cannot be interpreted by themselves as exclusion or ouster, it is necessary for the party claiming title by adverse possession to prove some further specific act or specific acts of ouster. Such ouster must in its nature be an open assertion of a hostile title, such that actual or constructive knowledge thereof is clearly attributable to the party intended and sought to be excluded. Adverse possession will then start from the date of such act or acts. **KHEMOHAND DAYARAM v. DAYARAM JESSOMAL**

Sind 137

—Debts—Father—Son's liability—Gift by father to son—Son, if absolved from liability to pay father's debts.

Under Hindu Law a son is under a pious obligation to pay his father's debts unless they are tainted by illegality or immorality. A transfer of property to the son by means of a gift would not absolve the son from his liability to pay such debts. **AYADH RAJ SINGH v. MANGREY**

Oudh 600

—Manager—Necessity—Purchase of new lands and litigation are not prima facie family necessities.

Prima facie, the purchase of new lands for the family is not a family necessity, and certainly every litigation cannot be regarded as *prima facie* a necessity of the family, assuming in both cases that borrowing alone could meet the alleged necessity, and the money required could not be found from the surplus of the family income. **NALLAPAREDDI ANNAPOORNAMMA v. PELLATI VEERARAGHAVA REDDI**

Mad. 569

—Joint family—Brothers having separate earnings building house for family—House, whether joint family property.

Where two brothers of a joint Hindu family who were in service and had separate earnings built a house for the family, both thinking it to be a family house without regard to the amount contributed by each, the house is joint family property and the brothers are not sharers in it according to their contribution. **MOHAN LAL v. RAM DAYAL**

Oudh 61

—Brothers in service living separately—Effect.

Where two brothers are in service and hence they have to be at the places where they are posted, their living separately affords very little evidence of separation. **MOHAN LAL v. RAM DAYAL**

Oudh 61

—Brothers succeeding to stridhan property—They are tenants-in-common.

Where brothers succeed to the *stridhan* property of a woman, they take it as tenants-in-common and not as joint tenants. **MUNIA v. MANOHAR LAL**

Oudh 161

—Business—Junior co-parcener participating in conduct of business—His personal liability—Whether extends to antecedent transaction.

The whole question whether a co-parcener who takes

Hindu Law—contd.

part in the conduct of the family business is personally liable, and, if so, on what legal basis, is essentially one of fact depending for its decision upon the nature and extent of participation as disclosed by the evidence in the particular case. If what the junior member is shown to have done in relation to the business is nothing more than what can reasonably be attributed to his interest in the business as a member of the family, there will be no legitimate inference that he intended to undertake a greater liability as a partner in the business and consequently no question of personal liability can arise. On the other hand, if the part taken by such member in the management of the business goes beyond what can be sufficiently explained by the interest in it as an asset of the family, as for instance, when he joins in borrowing for the purpose of the business, it may afford ground for the conclusion that he has become a partner so as to be personally answerable for all the debts incurred in the course of the business including those which he did not join in borrowing. Without such definite and unequivocal consensual acts, no partnership relation between members of a joint family can be implied from participation, however, active, in the conduct of the family business, a position which has received additional emphasis from the provisions of s. 5, Partnership Act. But such liability does not extend, in either case, to antecedent transactions. *L. M. L. V. ALAGAMAI ACHI v. M. PALANIAPPA CHETTIAR* Mad. 514

Joint family—Business—Junior members, liability of—Principle of ratification, applicability of.

In holding a junior member of a family personally liable for a contract purporting to have been entered into by the manager on the ground of ratification, it is important to bear in mind that the doctrine presupposes ability to adopt or repudiate the transaction in question and cannot properly be applied for this reason to dealings or transactions which under the Hindu Law the co-parceners are powerless to disown, so long as they continue to remain in the joint family, unless it can be shown that the manager pledged the individual credit of the junior co-parceners at the time when he received the deposits in question and that the junior co-parceners having come to know of the transaction accepted or acquiesced in it. *L. M. L. V. ALAGAMAI ACHI v. M. PALANIAPPA CHETTIAR* Mad. 514

Business—Junior members liability of—Rule of estoppel, if can give rise to partnership quod general public—Personal liability of junior co-parcener, if can be based on that ground.

The rule of estoppel can only preclude proof of facts against individuals actually misled. It cannot give rise to a partnership quod the general public in the case of a joint Hindu family and hence the junior members participating in the conduct of the family business cannot be personally liable merely on that ground. *L. M. L. V. ALAGAMAI ACHI v. M. PALANIAPPA CHETTIAR* Mad. 514

Insolvency—Father joint with son becoming insolvent Judgment-creditor of father attaching son's interest in family property before Official Assignee realizing same—Power of Official Assignee to sell son's share is lost.

Where a father who is joint with his son becomes insolvent, the right of realizing the son's share in the family estate under the pious obligation rule devolves upon the Official Assignee or the Official Receiver as the case may be. But, if before the Official Assignee or the Official Receiver takes steps to enforce that right, a judgment-creditor of the father attaches the son's interest in the estate, the power of the

Hindu Law—contd.

Official Assignee or Official Receiver to sell the son's share is lost. *A. L. S. P. P. L. SUBRAMANIAM CHETTIAR v. ANNAMALAI CHETTIAR* Mad. 803

Joint family—Presumption as to—Burden of proof—There can be joint family without joint family property.

There can be a joint family without any joint family property and there is a presumption of joint family though there may not be a presumption of joint family property without a nucleus. The burden of proof is on those who allege that the joint family terminated, to establish it. *MOHAN LAL v. RAM DAYAL* Oudh 61

Separation—Proof of—Two brothers keeping their earnings separately, if proof of separation.

The members of a joint family can have separate property and the fact that two brothers used to keep their earnings separately is not enough to show that they had separated. *MOHAN LAL v. RAM DAYAL* Oudh 61

Property—Presumption, that any particular property in hands of one co-parcener is joint family property.

There is no presumption that any particular property in the hands of one of the co-parceners is joint family property and the burden therefore is upon the person who alleges that these properties are joint family properties liable to partition to prove it. *KHEMCHAND DAYARAM v. DAYARAM JESSOMAL* Sind 137

Maintenance—Claim for future maintenance and residence—Question of limitation.

A claim by widows for future and present maintenance and residence arises from day to day and there can be no question of Limitation. *KHEMCHAND DAYARAM v. DAYARAM JESSOMAL* Sind 137

Co-parcener—Minor co-parcener, if can sue for maintenance without asking for partition.

Since a major co-parcener is entitled to sue for maintenance the right cannot be denied to a minor co-parcener and if he does happen to sue for maintenance he need not couple with the prayer for that relief a prayer for partition. *CHERUTTY v. NAGAMPARAMBIL RAYU* Mad. 834

Daughter—Daughter, if can sue manager for maintenance.

Under the Hindu Law a daughter is entitled to maintain a suit for maintenance and consequently can sue the manager. Her right is not restricted by proceeding against her own father. The personal liability of the father furnishes an additional ground of claim over and above the liability of the family property. The former alone can be said to be enforceable against the father and his separate property. The latter gives rise to a right enforceable against the joint family as a whole. *CHERUTTY v. NAGAMPARAMBIL RAYU* Mad. 834

Partition—Descendants mentioned in partition deed as "one party"—Whether shows that they continued to be joint.

The mere fact that the descendants of a person were described in the partition deed as 'one party' cannot be held to be sufficient to establish that the descendants must have continued to form a joint family. *SHIMBHU NATH v. BRAHAMWATI* Lah. 304

Every person interested in property is plaintiff in partition suit.

In a partition suit every person interested in the property to be partitioned whether ranged as plaintiff or defendant is a plaintiff. *KHEMCHAND DAYARAM v. DAYARAM JESSOMAL* Sind 137

Manager, if can be called upon

Hindu Law—contd.

- to render general account of his dealings—His duty.

In a suit for partition the manager of a joint family as such cannot be called upon to render a general account of his dealings with the joint family property. He is, however, bound to satisfy the Court what property is available for partition, and on this point his *ipse dixit* is not to be accepted, especially when it is alleged that he has secreted and done away with much property. **KHEMOHAND DAYARAM v. DAYARAM JESSOMAL**

Sind 137

Partition—Mother's share.

On partition, the mother is entitled to share equal to that of the son. **KHEMOHAND DAYARAM v. DAYARAM JESSOMAL**

Sind 137

Mother's share, when arises.

Under Hindu Law the mother's share does not accrue until the family partition. **KASHINATH VISHWANATH JOT v. BASSURAY**

Nag. 189

Partition suit—Defendant, if can claim his share without paying ad valorem court-fee on his share.

A defendant in a partition suit need not pay ad valorem court-fees on the share he claims in such a suit. **KHEMOHAND DAYARAM v. DAYARAM JESSOMAL**

Sind 137

Plaint claiming partition, withdrawn—Plaint, if evidence of intention to separate.

The institution of a suit for partition by a member of a joint family is an unequivocal intimation of his intention to separate and there consequently is a severance of his joint status from the date when it was instituted. A decree may be necessary for working out the results of the severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate whether he obtains a consequential judgment or not. A plaintiff claiming a partition even if withdrawn would unless explained afford evidence that an intention to separate had been entertained. **KHEMOHAND DAYARAM v. DAYARAM JESSOMAL**

Sind 137

Specification of shares without actual division by metes and bounds, if severs joint status.

Specification of shares even without actual partition by metes and bounds is sufficient to establish severance of joint family. **SHIMBHUNATH v. BRAHAMWATI**

Lah. 304

Suit for partition of joint family property—Claim by member for certain property belonging to him and said to have been entrusted by him to plaintiff personally cannot be made in such suit.

In a suit for partition of joint family property a claim by a member for certain property belonging to him and said to have been entrusted by him to the plaintiff personally is a separate and distinct matter, and it can find no room in a suit for partition. **KHEMOHAND DAYARAM v. DAYARAM JESSOMAL**

Sind 137

Wife, when can sue for her share—Wife held did not acquiesce in partition but merely stood by and hence entitled to her share—Wife taking ornaments because she wanted them—On re-opening partition on her suit for share, those ornaments must be taken into account—Wife's share should be so adjusted as to interfere with past transaction as little as possible.

A wife can sue for her share where there has been a partition and she has not been assigned any share and has not assented or waived her rights or acquiesced.

Hindu Law—contd.

Nobody in the family was aware that the wife was entitled to a share. No provision was made for her in the partition. She was never asked to waive her right to her share. She was allowed to retain and in fact she retained certain ornaments. Though the wife used to remain present off and on at the time of the discussion between the parties during the partition she merely stood by and did nothing except claim certain ornaments not as share-holder but because she wanted them:

Held, that the wife did not acquiesce in the partition and consequently was entitled to a share. The fact that she suggested a division of the ornaments and actually got them weighed for the purpose did not involve any agreement or consent with regard to partition.

Held, also that in settling the wife's share the value of the ornaments taken by her must be taken into account.

Held, further that on re-opening the partition the proper course in allocating the wife's share was to so re-arrange the property as to interfere with past transactions as little as possible. **RADHABAI v. PANDHARI-NATH BAPU**

Nag. 724

Religious endowment—Temple.

Public or private—Private temple becoming public—Dedication should be proved.

While it is possible that a private temple should be so dealt with that in the course of years it becomes dedicated to the public as a public temple dedication requires to be proved. **KHEMOHAND DAYARAM v. DAYARAM JESSOMAL**

Sind 137

Widow—Maintenance—Decree for maintenance against undivided members made charge on family property—Subsequent partition does not affect decree—Subsequent partition with consent of widow—Suit by member for declaration that he is not liable under decree due to partition does not lie—Question falls under s. 47, Civil Procedure Code (Act V of 1908).

When a member of an undivided family dies leaving him surviving his widow and his sons and brothers, the widow's right to maintenance is against the entire joint family composed of the sons and brothers of the husband. It may be that if she waits until a partition takes place she may have a lesser right, i. e., instead of a right over the entire family, a right over those persons who take her husband's share. But if before a partition is effected, she gets her right declared, defined and reduced to a certainty by a decree of Court, her rights cannot be taken away by any subsequent partition effected among the members of the family. When, therefore, the widow has secured her right fixing her claim against the whole joint family and getting a charge on a reasonable portion of the property the right or charge cannot be taken away from her by any subsequent partition between the members of the family.

Where subsequent to the passing of a maintenance decree creating a charge on certain joint family property, the members of the joint family effect a partition to which the widow is a consenting party a subsequent suit by one of the members for a declaration that he was not liable for the maintenance of the widow as the result of the partition with widow's consent is not maintainable as the question is one under s. 47 Civil P. C. **AKKI DODDA BASAPPA v. AKKI NALLAMMA**

Mad. 750

Maintenance—Nature of widow's right to maintenance—Her separate property, if can be taken into account.

There is, it is true a distinction made in some of the text-books, between the productive and unproductive

Hindu Law—concl'd.

character of a widow's *stridhanam* property, but this does not seem to be based on any principle, if it is borne in mind that it is a right of the widow to be maintained out of her husband's estate or what was once her husband's estate, and it is the duty of those on whom her husband's estate has devolved to maintain the widow out of that property in the same degree of comfort to which she was used during husband's lifetime. It is immaterial if she had any private means of her own or could have them by selling some of the jewellery which would not be required by her, after her husband's death. Had the husband remained alive it would have been his duty to maintain his wife out of his own estate irrespective of her *stridhanam* or private means and there appears to be no reason why the latter should be regarded to be any factor in fixing the maintenance after his death. The right of maintenance was conferred on the widow under the Hindu Law in lieu of her husband's share in the joint family property and cannot be taken away by the fact that she has some property of her own either productive or non-productive of income. **NALLAPAREDDI ANNAPOORNAMMA v. PELLETI VEERARAGHAVA REDDI** Mad. 569

Widow—Maintenance—Suit for, against manager—Manager's duty to prove binding nature of debts sought to be taken into account for, reducing family income—Costs in such suit.

In a suit by a Hindu widow for maintenance against the manager of the joint family, the manager is under obligation to prove that the debts which according to him have to be taken into account in ascertaining family income are binding on the family in other words, the manager's *ipse dixit* is not sufficient to show for this purpose that the debts are binding on the family. It may be that the standard of proof so to say required for establishing the binding nature of the debts need not be so high as in a suit in which the dispute arises either as between the co-parceners in a suit for partition or as between the creditors and the other members of the family. But nevertheless there must be some *prima facie* reliable evidence to show that the debts are binding on the family when the manager of the family wants to have those debts to be taken into account for the purpose of reducing the family income available for calculating the rate of maintenance.

So long as the claim to maintenance is genuine and true and the amount claimed is not out of all proportion to the amount that is found to be due, the widow claiming maintenance ought not to be mulcted in costs, when she has established her right to maintenance, a right to which she is entitled and which was refused unreasonably and unlawfully by the defendants. **NALLAPAREDDI ANNAPOORNAMMA v. PELLETI VEERARAGHAVA REDDI** Mad. 569

Hindu Women's Right to Property Act (XVIII of 1937)—Hindu Women's Rights to Property (Amendment) Act (XI of 1938)—Acts, whether operate to regulate succession to agricultural land in Governors' Provinces—Subject-matter of devolution by survivorship of non-agricultural property is included in entry No. 7 of List III, the Concurrent List of Government of India Act, 1935, (25 & 26 Geo. V, Ch. 42).

The Hindu Women's Rights to Property Act XVIII of 1937, and the Hindu Women's Rights to Property (Amendment) Act XI of 1938 (a) do not operate to regulate succession to agricultural land in the Governors' Provinces; and (b) do operate to regulate devolution by survivorship of property other than agricultural land.

The subject of devolution by survivorship of property other than agricultural land is included in entry

Hindu Women's Right to Property Act—concl'd.

No. 7 of List III, the Concurrent List, Govt. of India Act, 1935. **THE HINDU WOMEN'S RIGHTS TO PROPERTY ACT, In re** FC 357

See Hindu Women's Right to Property Act, 1937 357

Identification See Criminal Procedure Code, 1898, s. 103 326

Income-tax—Agricultural income—Sum collected by Receiver held not agricultural income—Amount held, constituted profit of mortgage transaction and, therefore, no deduction could be allowed in respect thereof.

In the year 1913, the assessee's father advanced Rs. 2,15,000 under a simple mortgage on the security of the *zamindari*. The loan was not repaid and in 1925, the assessee was compelled to file a suit in the Court to enforce payment of the amount then due. A compromise was eventually agreed upon and a decree was passed by embodying the terms of settlement. Under this decree the debtor was to pay to the assessee a sum of Rs. 3,75,000, in full settlement of all claims on or before July 31, 1931. In the meantime this sum was not to carry interest. In the event of the amount not being paid by the due date the *zamindari* was to become the absolute property of the assessee's family. By this decree a Receiver was appointed and it was a term of the compromise that any moneys which the assessee received from the Receiver should be set off against the Rs. 3,75,000, and that the debtor should only be responsible for the balance. It was, however, stipulated that in the event of the balance not being paid the whole of the *zamindari* would still become the property of the assessee's family. From July 28, 1928, the date of the compromise decree, to July 31, 1931, Rs. 42,000 was paid into Court by the Receiver as the net rent collections for that period. This amount was later on paid to the assessee. The sum due to be paid to the assessee under the terms of the compromise decree on July 31, 1931, was not paid and in consequence his family became the absolute owners of the *zamindari*. The estate was not, however, handed over to the assessee until February 2, 1933. But in that year the assessee's title to the *zamindari* was challenged. The litigation did not end until September 2, 1936, when the title of the assessee's family to the property was finally decided. The assessee, however, had induced the income-tax authorities to agree to the assessment being made when the mortgage transaction was closed. In assessing the assessee as the manager of the family for the year 1937-38, the income tax authorities included the profit which they calculated had been made out of this mortgage transaction. The assessee contended that as the amounts paid to him in cash were received by him more than three years before the year of account they were not assessable:

Held, (1) that Rs. 42,000 representing rents which the Receiver collected from the tenants of the agricultural lands of the *zamindari* could not be regarded as agricultural income inasmuch as the assessee was neither the owner of the *zamindari* when monies were collected nor in the position of a usufructuary mortgagee;

(2) that the assessee was not entitled in law to escape assessment on the profit which was made out of this mortgage transaction. On his own showing this transaction did not close until the High Court had given its decision in 1936 and, therefore, it was not until that year profits could properly be calculated. In these circumstances the income tax authorities were fully entitled to assess on that basis;

Income-tax—contd.

(3) that under the terms of the compromise decree the assessee got the whole of the *zamindari* plus the Rs. 42,000. The Rs. 42,000 was part of the profit which was made out of the transaction, and, therefore, no deduction could be allowed in respect of that amount. *AL. VR. S. VEERAPPA CHETTIAR v. COMMISSIONER OF INCOME-TAX, MADRAS* Mad. 637 S B

Assessable income—Animals purchased in British India and sold at profit in foreign country—Profits arise at place of sale—Profits not brought into British India are not assessable to income-tax.

An assessee did business of exporting goats and sheep from India to Colombo and of selling them there at a profit:

Held, that the profit made by the assessee could only be calculated on what the goats and sheep actually cost him and the amounts at which they were actually sold in Colombo. The figures in the invoices, whether inflated or deflated would not matter.

Held, also that the profit arose in the place of sale and that the profits derived from the sale in a foreign country of animals purchased in British India were not assessable to income-tax when the profits had not been received or brought into British India. *S. V. P. SUDALAIMANI NADAR v. COMMISSIONER OF INCOME-TAX, MADRAS* Mad. 76 S B

Estoppel—Income-tax Authorities coming to conclusion in previous year that certain debts had not become bad—If can come to conclusion in next accounting year that those debts had become bad long before.

Where income tax officials have, after enquiry, proceeded to assess the assessee on a certain basis though they may be entitled to reopen the enquiry, they cannot arbitrarily change the assessment simply on the ground that the succeeding officer does not agree with the preceding officer's finding. But if he wants to do so, there should be facts which would entitle him to do it. If fresh facts come to light which on an investigation would entitle the Income-tax Officer to come to a different conclusion from that of his predecessor he is entitled to re-open the question. The Commissioner of Income-tax is justified under the law to disallow the claim of the assessee in respect of the alleged bad debts on the ground that these debts had become bad long before the accounting year, though previous to the accounting year the claim was disallowed on the ground that it was premature and that the debts had not become bad till then provided fresh materials and facts come to the knowledge of the Income-tax Authorities on the second occasion. *KANIRAM GANPAT RAI v. COMMISSIONER OF INCOME-TAX BIHAR AND ORISSA* Pat. 464

Income Tax Act (XI of 1922), ss. 3, 9—

Association of individuals resembling Hindu undivided family falls under s. 3—Whether assesses form association within meaning of s. 3 depends upon facts—Assesses held formed association within meaning of s. 3 and were owners of property under s. 9 and consequently could be assessed under s. 9 (1).

The words 'association of individuals' appearing in s. 3, Income Tax Act, if construed on the *ejusdem generis* principle are to be construed with reference not merely to the word 'firm' immediately preceding them, but with reference to the other associations of individuals namely, a Hindu undivided family and company which appear in the section. An association of individuals resembling a Hindu undivided family is an association of individuals contemplated by s. 3. The question whether the assesses formed an association

Income Tax Act—contd.

of individuals within the meaning of s. 3 is a question which must depend upon the particular facts and circumstances of each case:

Held, on facts that the seven assesses formed an association within the meaning of s. 3 and that the association of individuals, formed by the seven assesses were the owners of the property within the meaning of s. 9 and that there could be no doubt that as owners they could be assessed under s. 9, part 1. *COMMISSIONER OF INCOME-TAX v. CHHOTALAL MOHANLAL Sind* 309

s. 4—Railway Company in accordance with contract paying into Bank of England certain amount as its share capital and Secretary of State undertaking to pay in London out of revenue of India interest on this amount—Guaranteed interest received by Company in London held liable to assessment.

In accordance with a contract entered into with the Secretary of State for India in 1882, the Madras and Southern Mahratta Railway Co., paid into Bank of England certain amount as its share of capital and the Secretary of State had undertook to pay in London out of the revenues of India a guaranteed interest on this amount;

Held, that all the profits of the Company accrued or arose in British India and the guaranteed interest, therefore, received by the Company was liable to assessment. *COMMISSIONER OF INCOME-TAX, MADRAS v. MADRAS AND SOUTHERN MAHRATTA RAILWAY CO. LTD.* Mad. 544 S B

s. 4 (2)—Assessee, if should receive profits in India in exact form in which they were made—Available profits more than sufficient to cover remittance—Remittance, if presumed to be out of profits.

A person who has income accruing to him in a foreign country is at perfect liberty to keep it there, or to spend or utilize it in that or any other country in any way he thinks fit. His liability to tax arises not because he makes the profits but because he brings or receives them into British India. It is not necessary that he should receive those profits in the exact form in which they were made, but he must receive them into British India substantially as profits. If the remittance is traceable, and is traced to the assessee's foreign profits there would be ground for holding that the Act is attracted.

If there are available profits more than sufficient to cover the remittance, the presumption to start with is that the remittances came out of the profits, though ultimately the question to a large extent is one of fact. *COMMISSIONER OF INCOME-TAX, MADRAS v. V. NADIMUTHU PILLAI* Mad. 733 S B

s. 4 (2)—Resident in British India owning immovable property in Indo-China—Account in Bank in Indo-China—Right to overdraw to certain limit—Payment of net income in account with Bank and reduction of amount of overdraft—In the year of account, withdrawal of certain sum less than net income and remittance to British India—Remittance, if remittance of profit within the meaning of s. 4 (2).

A resident of Tanjore District owned some immovable property in Saigon in Indo-China, from which he derived income in the shape of rent. He had kept an account in a Bank in Saigon and had a right to overdraw it to a certain limit. In the year of account he paid out of his net income into his account and reduced his overdraft to certain extent. While the overdraft was still at that figure he withdrew certain

Income Tax Act—contd.

sum which was less than the net income and remitted it to British India.

Held, that the remittance could not be treated merely as remittance of the proceeds of a loan. The remittance could be properly assessed to income-tax under s. 4 (2) as a receipt of foreign income in British India. **COMMISSIONER OF INCOME-TAX, MADRAS v. V. NADIMUTHU PILLAI** *Mad. 733 S B*

— **s. 6 (vi), (iv)**—*Assessee carrying on extensive business in Ayurvedic medicines and also maintaining a dramatic troupe—Troupe giving performances at assessee's business premises at different places—Prices for admission charged—Profits arising from troupe performances held income from "other sources", within meaning of s. 6 (vi).*

The assessee carried on an extensive business in the manufacture and sale of Ayurvedic medicines at Kottakkal, Palghat and Calicut, where he owned premises in which he sold medicines. One of his other activities was the maintaining of a dramatic troupe which gave public performances in the Malabar District, Cochin and Travancore at certain seasons of the year. At each place, adjoining the premises used by him for the sale of his medicines was a hall in which the assessee's dramatic troupe also gave performances. At all the performances prices for admission were charged;

Held, that the assessee maintained the troupe on a commercial basis, and whether he did so for the purpose of advertising his Ayurvedic medicines was not material. The maintenance of the troupe was not a hobby but a possible source of income and the profits arising therefrom were income from "other sources" within the meaning of s. 6 (vi), Income Tax Act, even if it could not be classified as income from a business under s. 6 (iv). **VAIDYARATNAM P. S. VARIER KOTAKKAL, SOUTH MALABAR v. COMMISSIONER OF INCOME-TAX, MADRAS** *Mad. 443 S B*

— **s. 9.** See Income Tax Act, 1922, s. 3

— **s. 10**—*Benefit received by company held represented profits—Fact that gain was not in money but shares, held immaterial.*

The assessee company entered into a ginning contract with the mills. It undertook to mill cotton for the mills for a period of ten years at a reduced rate and as a consideration the mill exchanged their 20,000 shares for the 1,000 shares of the company. The assessee company contended that the exchange shares and the benefit of the ginning contract must be regarded as one transaction and entirely of a capital nature and since the mills had been allowed to treat it as being a transaction of a capital nature, the company must be allowed to treat it in the same way.

Held, that the arrangement by which a proportion of the shares of the mills was issued to the company in respect of the ginning contract was not a transaction of a capital nature and the benefit received by the company represented profits received in the year of payment. The difference between the values of the exchanged shares must be allocated to the ginning contract and as such was profit in the hands of the company assessable to the tax. The fact that the gain was not in money but in money's worth, viz., shares, was immaterial.

Held, also that the income-tax authorities were right in adopting the market-value in respect of the 20,000 shares of the mills allotted to the company. **COMMISSIONER OF INCOME-TAX, MADRAS v. HARVEYS LTD., TUTICORIN** *Mad. 778 S B*

— **s. 10**—*Original cost of asset is question*

Income Tax Act—concl'd.

of fact—Price mentioned therein, whether conclusive proof of original cost—Price seeming fictitious—Income-tax authorities, if can go behind contract and ascertain true value.

The original cost of any particular asset is entirely a question of fact and like any other question of fact depends upon the evidence produced to prove it. The mere production of documentary evidence showing that a contract has been made for purchasing assets at a certain price does not conclusively establish the correctness of a claim made by an assessee that, for the purpose of s. 10 (2) (vi) the original cost is the amount shown in the document. Where the circumstances show that an assessee has arranged to put an entirely fictitious price on his assets it is open to the Income-tax Authorities to refuse to accept that price and to ascertain what the true value is. **COMMISSIONER OF INCOME-TAX MADRAS v. HARVEYS LTD. TUTICORIN** *Mad. 778 S B*

— **ss. 26 (2), 44**—*Partner continuing business of partnership after its dissolution—Whether succeeds to business within s. 26 (2)—S. 44, if applies.*

A firm for the purposes of assessment to income-tax is an entity quite distinct from the partners who compose it. Consequently where a partner carries on the business of the partnership after dissolution of the partnership, he succeeds to the business within the meaning of s. 26 (2) and s. 44 does not apply to such a case. **COMMISSIONER OF INCOME-TAX, MADRAS v. S. M. S. KARUPPIAH PILLAI, MADURA** *Mad. 118 S B*

— **s. 44.** See Income Tax Act, 1922, s. 26 (2)

— **s. 66 (3)**—*Finding of fact—Question whether debt is bad is a question of fact.*

Whether the debt had become bad long before is a question of fact, and the High Court cannot in reference disturb the finding where there was evidence in support of the finding. **KANIRAM GANPAT RAI v. COMMISSIONER OF INCOME-TAX BIHAR AND ORISSA** *Pat. 464*

Injunction. See Civil Procedure Code, 1908, s. 151

— *Prayer for perpetual injunction restraining mortgagor from dealing with mortgaged property—Interim injunction issued to mortgagor—Order allowing relief for injunction to be dropped at hearing held not justified.*

In a suit against the mortgagor and the mortgagee, on the basis of the prayer for a perpetual injunction in the plaint restraining the mortgagor from dealing with the mortgaged property, an interim injunction had been issued and the relief for injunction was allowed to be dropped at the hearing.

Held, that the order permitting relief for injunction to be dropped at the hearing was not justified. **VASUMAL VALIRAM v. KARAMOHAND MANGHANMAL** *Sind 68*

Insanity—Plea of. See Penal Code, 1860, s. 84

Interpretation of Statutes—*Adjective law cannot control substantive law in absence of express provision.*

It is a general rule relating to the construction of statutes that in absence of an express provision, an adjective law cannot control the provisions of substantive law. **COLLECTOR OF BROACH AND PANCH MAHALS v. OCHHAVALAL BHIKALAL** *Bom. 217*

— *Enactment altering procedure but not affecting substantive rights—New procedure, if retrospective.*

Where an enactment merely alters the procedure,

Interpretation of Statutes—concl'd.

- without altering the substantive rights of the parties, the new procedure would be retrospective in its operation, and would extend to rights which had accrued before the changes were made. *Dhirendra Nath Roy v. Ijjetali Miah* Cal. 511

Fiscal statutes.

A fiscal statute should be construed strictly and where there is a doubt, the doubt should be resolved in favour of the subject. *U Kyaw Zan v. U Tun Hln U* Rang. 70

Incidence of Act, does not affect its validity.

The incidence of the legislation, cannot affect its validity. *Megh Raj v. Alluh Rakhia* Lah. 413 F B

Phraseology capable of two interpretations—One consistent with object of enactment to be preferred.

When the phraseology of an enactment is clear and unambiguous and capable of one and only one interpretation, it is not open to the Courts to give a go-by to that interpretation simply with a view to carry out what is supposed to be the intention of the Legislature. But if the phraseology used is capable of two interpretations, that interpretation which is consistent with the object of the enactment is to be preferred to the interpretation that would nullify that object. *Hori Lal v. Chatura Prasad* All. 276 F B

Restricted meaning, when to be given to words.

The words appearing in a statute must be given their natural meaning whenever possible, but a restricted meaning must be given in cases where it is clear that such restricted meaning was intended. *Mon Mohan Singh v. Raghu Nandan Singh* Pat. 23

Retrospective effect, when to be given.

No statute is retrospective unless the statute itself expressly states that it is to be so. *Shwe Hla U v. The King* Rang. 720

Same rule apply to all statutes—Taxing statute cannot be differently construed.

If a statute purports to impose a tax, the intention so to do must be shown by clear and unambiguous language, but the same rules of construction apply to all statutes and a taxing statute cannot be differently construed. *Corporation of Madras v. Secretary of State* Mad. 821

Jurisdiction. See Criminal trial 660

Jury trial. See Criminal trial 857

Land Acquisition Act (I of 1894), ss. 23,

4 (1)—Market value—Sale prices after notification under s. 4 (1) for acquisition—Fact of land being used for building purposes and proposal for converting sub-division in which it was situate into district, if can be taken into account.

In determining the market value of the land to be acquired the sale prices of similar types of land in similar position in the past as well as after the notification under s. 4 (1) of the Land Acquisition Act, the fact that the land was at the time of determining its value being used for building purposes; a proposal to convert the sub-division in which the land was situate into a district resulting in acceleration of high price for the land, can all be taken into account even though the aforesaid factors have come into being after the notification under s. 4 (1). *Secretary of State v. Mohd. Saifur Khan Naqibullah Khan* Pesh. 212

Landlord and tenant—Adverse possession—If must be to the knowledge of landlord.

Even assuming the tenant can acquire an adverse

Landlord and tenant—concl'd.

title against his landlord by an assertion of title by not paying rent he can only do so, if his assertion was brought to the notice of his landlord. *Chinti Kaharin v. Kripashankar Warrah* Pat. 300

Adverse possession—Notice by landlord to quit disobeyed by tenant—Landlord not taking further steps to evict but accepting rent for more than 12 years—Subsequent suit by landlord for ejectment—Tenant cannot plead that he has acquired right of possession of property by adverse possession.

If a landlord serves a notice to quit on a tenant and, instead of taking further steps to evict him when the notice is disobeyed, accepts rent from him for a period of more than twelve years, the tenant cannot, if the landlord subsequently institutes an ejectment suit, take the plea that he has acquired a right to remain in occupation of the property by adverse possession. *Chagganlal Marwari v. Indra Keot* Pat. 459

"Belagan", whether means rent-free holding.

Without deciding what "belagan" means generally in the District of Jharia all that the Court (in Letters Patent Appeal) held was that it could not take a different view from the Courts below having regard to the materials on the record, i. e., the word "belagan" as used in this district did not necessarily mean rent-free but that it meant a holding which is not paying rent, and such may be a rent-free holding, or it may be a holding for which rent may later be assessed. *Chinti Kaharin v. Kripashankar Warrah* Pat. 300

Monthly tenancy—Rent, if can be mentioned as so much per year.

A tenancy may well be a monthly tenancy though the rent may be mentioned as so much per year. *Chinti Kaharin v. Kripashankar Warrah* Pat. 300

Permanent tenancy—Death of original tenant—Landlord subsequently passing receipts for rent not in names of his heirs but in name of original tenant—Whether shows that landlord wanted to prevent heirs from acquiring permanent rights in land.

Where the landlord of a holding is a lawyer, his conduct in taking care to see that receipts for rent were granted to the original tenant's sons and grandsons, not in their own names, but in the name of the original tenant is, of greater significance and suggests that, while reluctant to evict the original tenant's sons he did not admit that they had and was anxious to prevent their acquiring permanent rights in the land. *Chagganlal Marwari v. Indra Keot* Pat. 459

Permanent tenancy—Failure to demand enhanced rent—Inference as to permanent tenancy.

From the mere failure on the part of the landlord to demand enhanced rent no inference can be drawn that the tenancy was a permanent one. *Chagganlal Marwari v. Indra Keot* Pat. 459

Permanent tenancy—Inference of permanent tenancy, if can be drawn from mere non-eviction of heirs of tenant.

Landlord may refrain for one reason or another from evicting the heirs of their tenants and no inference as to the permanency of a particular tenancy can be drawn from such conduct on their part. *Chagganlal Marwari v. Indra Keot* Pat. 459

Permanent tenancy—Mere fact that small portion of land was settled for building house and that house was erected, whether shows that tenancy was intended to be permanent.

Landlord and tenant—contd.

The mere fact that the land settled with the original tenant was a very small parcel of land, and, very probably, it was intended from the beginning that he should build a house for himself on it and that a house was constructed would not of itself create any strong likelihood that the tenancy was intended to be permanent one. *CHAGGANLAL MARWARI v. INDRA KEOT*

Pat. 459

Permanent tenancy—Proof of—Recital in mortgage-deed by tenant that tenancy was permanent—Admissibility—Value of, against landlord.

A recital in a mortgage-deed executed by the tenant that the rent payable for the land was fixed permanently is inadmissible in evidence in a suit by the landlord for ejectment of the tenant and even if it is admissible it cannot have any weight as against the landlord. *CHAGGANLAL MARWARI v. INDRA KEOT*

Pat. 459

Permanent tenancy—Tenant mortgaging land—He must show that landlord was aware of and acquiesced in the transaction, in order to create inference of permanent tenancy.

In order, to create an inference that the landlord had made a permanent settlement of the land, it is incumbent on the tenants to show, not merely that the successors of the original tenant and persons who were ready to lend money to them had proceeded on the assumption that the original tenant had permanent rights in the land, but that the landlord, had been aware of and acquiesced in these transactions. The mere fact that the successors of the original tenant had mortgaged the land and the mortgage-deed recited that the land was permanently settled and the mortgage had purchased the land in execution of the mortgage-deed is not sufficient to prove the permanent tenancy when there is no evidence to show that the landlord had recognised the mortgagee as his tenant after the mortgagee had purchased an interest in the property in execution of his mortgage decree. *CHAGGANLAL MARWARI v. INDRA KEOT*

Pat. 459

Rent suit—Purchaser of share of mahal pending suit, whether personally liable for rent—Patni and darpatni already sold at superior landlord's instance—Personal liability of purchaser.

A purchase of a share of a mahal pending the hearing of the rent suits is not personally liable for any amount of the rent; and if the patni and the darpatni have already been sold at the instance of the superior landlord he cannot be made personally liable. *JNANENDRA NARAYAN BAGCHI v. BHOLA NATH MONDAL*

Cal. 764

Rent, suit for—Held on facts that the lease was not valid—Compromise decree in previous ejectment suit did not operate as res judicata—Defendants were not estopped by reason of previous rent suit from alleging that plaintiff was not their landlord—Estoppel—Res judicata.

In 1914, a Padhan of certain estate granted a lease of certain land to one G. In the following year G settled plot No. 1618 with the father of the defendants by means of a registered patta and in 1925 the defendants' father executed a *kabuliyat* in respect of plot No. 1618 in favour of the Receiver who was then in possession of the estate. In 1929, the plaintiff who was the proprietor of the estate sued the defendants for possession of this plot alleging that neither the Padhan nor the Receiver had any right to settle the land. The suit was compromised on August 23, 1930. It was agreed that the defendants should retain possession not only of plot No. 1618 but also of the other two plots

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on the terms mentioned in a *kabuliyat* executed by the defendants in favour of the plaintiff on August 19, 1930. This *kabuliyat* evidenced the grant of the land for a term of 20 years but was not registered. In 1931, the plaintiff sued G to eject him from the land leased to him in 1914 including plot No. 1618. The suit was eventually dismissed by the High Court on the ground of limitation. In the meanwhile, however, in 1934 and 1935, the plaintiff had obtained rent decrees against the defendants on the basis of the *kabuliyat* of 1930. As a result of the dismissal of the plaintiff's suit, G served a notice on the defendants calling upon them to take a fresh settlement of plot No. 1618 from him or to quit this plot. In 1936, the defendants were recorded as tenants under G in the Record of Rights. In 1937 the plaintiff sued the defendants for rent of plot No. 1618 and other two plots;

Held (i) that the *kabuliyat* of 1930 was not by itself sufficient to create a valid lease as there was no corresponding patta executed by the plaintiff;

(ii) that the compromise of 1930 did not constitute a valid lease but even if it constituted a lease it was rendered inadmissible in evidence by s. 49, Regis. Act for the purpose of proving the lease for creating any interest under it as it was not registered;

(iii) that as the defendants compromised the suit of 1929 by accepting a fresh settlement from the plaintiff it may be safely assumed that they accepted the position that the settlements of 1915 and 1925 did not confer upon them any right to retain the land as against the plaintiff; but the question whether the compromise in which that suit ended constituted a valid lease in favour of the defendants was not and could not be the subject-matter of decision in the litigation of 1929 either by the Court or by the parties themselves, and did not operate as *res judicata* on the question which arose in this present litigation, namely, whether the relationship of landlord and tenant existed between the plaintiff and the defendants;

(iv) that the rent decrees of 1931 and 1935 did not preclude the defendants from alleging that the relationship of landlord and tenants did not exist between the plaintiff themselves. *JAGDISH CHANDRA DEO DHABAL DEB v. BISESWAR LAL AGARWALA*

Pat. 428

Suit one for arrears of rent—Enquiry to ascertain what the rent was necessary—Plaintiff asking Court to settle rent and give decree—Form of suit held not bad.

Where the suit is really one for arrears of rent and an inquiry has to be conducted to ascertain what that rent is, it is maintainable, as a suit asking the Court to settle the rate of rent and for a decree for arrears of rent on such basis. *CHINTI KAHARIN v. KRIPA SHANKAR WARRAH*

Pat. 300

Lease—Terms of deed should be looked to, to ascertain character of document—Executant's description is not infallible guide—Document styled as "wasiga qaimmuqami" held was lease.

In order to ascertain the real character of the document one has to look to the terms of the deed, and the description of the document given by the executant cannot be an infallible guide:

Held, that the document styled as "wasiga qaimmuqami" (instrument of representation) fulfilled all the characteristics of a lease. *B. RAMMAN LAL v. RAGHUNATH SHANKER*

All. 347

Legal practitioner—Professional misconduct—Addressing of letter to Magistrate's clerk asking him to deal with application filed, urgently, is professional misconduct.

It is improper for an Advocate to address a letter to a clerk in a Magistrate's office asking that an ap-

Legal practitioner—concl'd.

Application filed by him should be dealt with urgently and amounts to professional misconduct. The proper course for him if there is any delay, is to bring the matter to the notice of the Magistrate himself. *SIR R. KALYANSUNDARAM AYYAR, In the matter of*

Mad. 587 S B
Letters Patent (Rangoon), cl. 13—"Judgment" meaning of. See Presidency Towns (Rangoon) Insolvency Act, 1909, s. 8 2 (h) *250*

Libel—Action for—Publication to third party is essential.

It is an essential part of a cause of action for libel, to allege publication which means to a third party, or such circumstances as will lead the Court to presume publication to a third party. Publication to the plaintiff, according to the law is not publication. *SOHONLAL DAGA v. SREECHAND DAGA Cal. 119*

Limitation. See Practice *243*

Expiry of—Effect.

All that happens after the lapse of three years after the creation of a debt on a pro-note is that the debt cannot be enforced in a Court of law. The debt does not cease to exist nor does the relationship of creditor and debtor. *NITHOOR THIMMANNA BHAT v. AITHAPPA ADYANTHAYA Mad. 401*

Limitation Act (IX of 1908), s. 3—Debt remains but remedy is barred.

The effect of s. 3, Lim. Act, is to bring about the automatic dismissal of suits, appeals and applications founded upon debts or causes of action which, according to their various periods of limitation, are time-barred. What the Lim. Act does not do is to extinguish the debt. The debt remains, but the remedy is destroyed. *THAKUR PRASAD CHAUDHARI v. OFFICIAL LIQUIDATOR BENARES BANK LTD. All. 839*

s. 4—Applicability—Promissory note—On last day for suit on pro-note Courts closed—On re-opening day payee assigning pro-note and assignee filing suit on very day—Suit held maintainable.

The wording of s. 3, Lim. Act indicates that s. 4 does not lengthen the period of Limitation prescribed. So that suits to which s. 4 can be applied are, therefore, clearly not suits instituted during the period of limitation prescribed. Section 4 deals with one of the exceptions to the general rule that a suit filed after the period of limitation prescribed shall be dismissed.

On last day of limitation for filing a suit on a pro-note the Courts were closed for the summer recess. On the re-opening day the payee under the promissory note assigned his rights in the promissory note to other person and on the very same day the assignee filed the suit:

Held, that on the date of the assignment there was an interest that could be assigned. Section 4 applied to the case and the suit was maintainable. *NITHOOR THIMMANNA BHAT v. AITHAPPA ADYANTHAYA Mad. 401*

s. 4—Suit triable both by Village Munsif and District Munsif—Limitation expiring during vacation of latter Court and suit filed on first opening day—Former Court open during latter's vacation—Suit, if within time—Madras Village Courts Act (I of 1889), ss. 13, 20.

The Court ought not to imply that a litigant should be deprived of his right to go to a normal Court subject to normal procedure because a Court of a very special nature, the village Court, happened to be open to him. To take away the right given by the Lim. Act requires, some more substantial basis than implication.

Where, therefore, a suit which is triable by both the Village Munsif and the District Munsif and the limitation for which has expired during long vacation

Limitation Act—cont'd.

of District Munsif's Court, is instituted in that Court on the opening day of that Court, the suit is within limitation under s. 4, Lim. Act. It is not barred by limitation merely because the Village Munsif's Court was open during vacation of the District Munsif's Court and the suit could have been instituted there, because, *prima facie* the plaintiff is entitled to sue in the District Munsif's Court and there is no compulsion to go to the Village Munsif's Court. *BONDA SUBBA RAO v. KANDREGULA NARASIAH Mad. 434*

ss. 4, 19—Acknowledgment expiring on date when the Courts are closed for vacation—Fresh acknowledgment, if can be executed on date when the Court re-opens, in order to save limitation.

Section 4 of the Lim. Act has nothing to do with computing the period prescribed under s. 19, Lim. Act. Where on the date when the previous acknowledgment was due to expire the Courts were closed for the summer vacation, the limitation would not be saved even if the fresh acknowledgment was executed on the day when the Courts re-opened. The argument that because a suit could have been instituted on the old acknowledgment when the Courts re-opened the party could accept the fresh acknowledgment while still he had right to sue, is not good. *SHIVJI RAM v. GULAB CHAND Nag. 806*

s. 5. See Limitation Act, 1908, s. 29 as amended in 1922 *404*

s. 6. See Second Appeal *806*

s. 14—Onus to prove good faith lies on person claiming benefit of s. 14.

A person who claims to come within s. 14, Lim. Act, has to show that in pursuing his remedy in other proceedings he acted in good faith; the burden of showing lack of good faith is not on his opponent. This is made clear by O. VII, r. 6, Civil P. C., and s. 103, Evi. Act. *SRI KASIKANANDA GNANACHARYA SWAMIGAL v. SARAVANAPERUMAL PILLAI Mad. 328 F B*

s. 14—Plaint returned for presentation to proper Court for want of pecuniary jurisdiction—Plaintiff striking off part of claim to bring it within jurisdiction and representing amended plaint on date when suit was time-barred—Suit held must be deemed to have been instituted on date of representation and was barred—Plaintiff held could not claim benefit of s. 14.

A Court which has no jurisdiction cannot pass orders in the suit beyond directing the plaint to be presented to the proper Court and giving a direction with regard to the costs incurred upto the time of the return of the plaint.

A plaint was presented within limitation to the Court which had no pecuniary jurisdiction to try it and was, therefore, returned by the Court for presentation to the proper Court. The plaintiff amended the plaint by striking out a part of his claim in order to bring his claim within jurisdiction and represented it to the same Court. On the date of such representation the claim had become time-barred. The amendment was allowed by the Court and the plaint was treated as a continuation of the original plaint:

Held, that the suit must be deemed to have been instituted on the date of the representation of the plaint which the Court had jurisdiction to accept and was, therefore, barred by limitation. The plaintiff could not claim the benefit of s. 14 Lim. Act, because he deliberately undervalued his relief in the first instance. *THADI CHANDRAYYA v. YAITLA SEETHANNA Mad. 646*

s. 19. See Limitation Act, 1908, s. 4 *806*

s. 19—Signature—Giving name of firm only, in statement of accounts—Whether amounts to signature.

Limitation Act—contd.

It is customary in business circles in India to give the name of the firm only in statements of accounts, and this amounts to signature for the purpose of s. 19, Lim. Act. *HET RAM PADAMOHAND v. SUBHAG CHAND RIKHAB DAS* Oudh 168

—s. 20—Money sent by debtor to his friend for payment to creditor—Friend sending same to creditor through messenger with letter that money was sent by debtor for payment to him—Payment, if amounts to acknowledgment.

Money was sent by a debtor to his friend for making payment to the creditor as part of the principal. The money however, was not actually paid by the friend himself but was sent to the creditor through a messenger with a letter that the amount had been sent to him by the debtor for payment and that it may be credited in the debtor's account:

Held, that the friend was debtor's agent within the meaning of s. 20, Lim. Act, and the payment operated as an acknowledgment of the debt. *VASIREDDI BALACHANDRASEKHARA VARAPRASAD BAHADUR v. MALLELA LAKSHMI NARASIMHAM* Mad. 707

—s. 21—Mortgage by Muhammadan brother and sister—Payment by one if saves limitation against other.

A payment by one of co-mortgagors (a Muhammadan brother and sister) cannot save limitation against the other. Nor can the brother be deemed to be his sister's agent for making payments to creditor in absence of proof of authority. *EUSOOL KARWA v. NIEMEYER* Rang. 177

—s. 23—Owner of gairmazrua-am and ahar land completely dispossessed by other person by building chabutra on land—Suit for possession beyond 12 years is barred—S. 23 does not apply.

Where an owner of land recorded as gairmazrua-am and ahar is dispossessed completely by building a chabutra on that land by another person, a suit for possession brought by the owner after more than 12 years is barred by limitation. Section 23, Lim. Act, does not apply to such a suit as the case is not one of a continuing wrong but of complete ouster. *AKHAURI HALIWANT SAHAY v. DEO NARAIN MALI* Pat. 243

—s. 23—S. 23, if distinguishes between private and public suits.

Section 23, Lim. Act makes no distinction between private suits and public or representative suits. *AKHARI HALIWANT SAHAY v. DEO NARAIN MALI* Pat. 243

—ss. 26, 28—Provides for acquisition of ownership by possession.

The Lim. Act not only deals with the limitation of suits, but also contains in Part. IV (ss. 26 to 28) a set of provisions relating to acquisition of ownership by possession. *AKHAURI HALIWANT SAHAY v. DEO NARAIN MALI* Pat. 243

—ss. 28, 26—Encroachment—Extinction of owner's title—Whether gives good title to wrong doer.

Under s. 28, Lim. Act, the owner's title to the portion encroached upon and built over is extinguished at the end of 12 years, the period limited for instituting a suit for possession of the land; and the extinction of the owner's title operates to give a good title to the wrong-doer. *AKHAURI HALIWANT SAHAY v. DEO NARAIN MALI* Pat. 243

—s. 29 as amended in 1922 and s. 5—Expression "the remaining provisions..." apply, meaning of—S. 5, applicability of, to appeal under s. 29, Cantonments (House Accommodation) Act (VI of 1923).

Limitation Act—contd.

The expression "the remaining provisions of this Act shall not apply" in the amended s. 29 Lim. Act simply means that they are not to apply *proprio vigore*, that is, merely by virtue of the Lim. Act, itself, and that if they are to apply, the grounds for applying them must be found in the special or local Act itself. The Cantonments (House Accommodation) Act is a special Act and s. 5 Lim. Act does not apply to an appeal under s. 29, Cantonments (House Accommodation) Act. *CHHEDA LAL JAIN v. OFFICER, COMMANDING STATION MEERUT CANTT.* All. 404

—Arts. 7, 102—Suit by village barber for remuneration for services rendered—Article applicable.

Article 7, Lim. Act is confined to suits for the wages of a household servant, artisan or labourer. Village barbers are not household servants. They are not labourers in the sense in which the term 'labourer' is used in that Article. It is used there with reference to a man who does work chiefly requiring bodily strength. That are not also artisans, though the modern hairdresser who works on the heads of fashionable ladies, may be considered an artists. Consequently a suit by a village barber for remuneration for services rendered, is governed by Art. 102 and not by Art. 7, Lim. Act. The mere fact that a village barber who may not be as highly skilled as a person as a village carpenter or a village blacksmith gets a longer period of limitation would not justify the Court in straining the meaning of the words employed in Art. 7. *TULSIRAM v. PAIKAN* Nag. 580

—Art. 12—Applicability to suit for declaration that plaintiff's interest is not affected by sale where sale is nullity.

Where a sale held in execution of a rent decree was valid Art. 12, Lim. Act applies but if the sale a nullity there is no occasion to set it aside and a suit for a mere declaration that the plaintiffs' interests are not affected by it, is not governed by Art. 12. *NEHAL KHAN v. FULU DOME* Pat. 435

—Art. 52—Single contract of commission agency held not contract for goods sold and delivered.

A certain firm agreed to act as commission agent for the another firm. There was a single contract, viz., a contract of agency. The commission agent firm submitted accounts annually and the amount due at the end of each year was added to the account for the following year. The former firm sued to recover certain sum found due on adjustment of accounts or alternatively for an account and decree for the amount found due.

Held, that this was not a contract for goods sold and delivered. Consequently Art. 52, Lim. Act, had no application. *MAMRAJ MANIRAM v. MUHAMMAD HASHIM* Cal. 727

—Arts. 74, 75—Instalment bond with default provision—Article applicable.

In the ordinary way when a debt is payable by instalments and there is no default provision, a new cause of action arises upon each default, and the plaintiff can recover in respect of instalments falling due within three years before suit, [vide Art. 74]. But if there is a default provision, Art. 74 cannot be relied upon, and under Art. 75 if the plaintiff sues more than three years from the first default and there is no waiver, the suit is totally time-barred, that is he cannot recover even those instalments which fell due within three years of suit. But facts should be so interpreted, if possible, as favouring the view that the creditor has waived the exercise of the option on the first instalment when he bases his suit on subsequent default

Limitation Act—contd.

which are within limitation and does not seek to found his cause of action on the earlier default. *GAYA PRASAD v. AHMAD HUSAIN* Oudh. 744

Art. 75—Option of suing for whole sum on default of six-monthly instalments—Suit, when should be instituted—Waiver—Limitation.

In a case of an instalment bond payable in monthly instalments which default cause giving an option to the creditor to sue for the whole amount on failure of six instalments, under the provisions of Art. 75 the creditor can institute that suit within three years of the 6th default, and in that suit he can claim not only the instalment still outstanding at the date of the suit and the instalments which had fallen due within three years of the suit, but also the six instalments which constitute his cause of action. The principle which holds good in regard to the first exercise of the option under the default clause holds equally good in respect of a claim founded on subsequent defaults and accompanied by a waiver of the option which accrues to the plaintiff on the earlier default. In effect the plaintiff is in any case entitled to claim the instalments of three and a half years, that is 42 past instalments in addition to the instalments still remaining, in the future at the date of the suit. *GAYA PRASAD v. AHMAD HUSAIN* Oudh 744

Arts. 97, 62—Execution sale confirmed—Objections subsequently allowed and confirmed in revision—Suit by auction-purchaser to recover purchase price—Article applicable—Starting point for limitation.

Where an execution sale is confirmed and the objections to the sale are subsequently allowed and also confirmed in revision, a suit by the auction-purchaser for recovery of the purchase price on failure of consideration for sale, falls under Art. 97 and not under Art. 62, Lim. Act and the cause of action arises either from the date of the order allowing the objections or from the date of the order in revision confirming the objections. *MIRZA JAN GHULAM HAIDAR v. GHULAM RAZA MIAN MOHAMMAD* Pesh. 565

Art. 102. See Limitation Act, 1908, Art. 7 580

Art. 120—Suit for accounts by one co-owner against another—Art. 120, applies—Right to sue when accrues.

A suit for accounts by one co-owner against another co-owner in sole possession of property belonging to the co-owners is governed by Art. 120, Lim. Act, and the right to sue accrues only when there is a demand for accounts and a refusal to render them. Where there has been no demand for accounts and refusal to render the same the plaintiff is entitled to an account from the defendant for the entire period during which the defendant was in sole possession of the property. *KHEMOCHAND DAYARAM v. DAYARAM JESSOMAL* Sind 137

Art. 182 (2)—“Appeal” in Art. 182 (2) is not limited to competent appeals—It applies whenever there is appeal—Presentation of memo of appeal is preferring appeal.

The reference to an appeal in Art. 182 (2), Lim. Act, is not limited to an appeal which is a competent appeal; the article applies whenever an appeal has been preferred; and the presentation of a memorandum of appeal is preferring an appeal. *MOHAMMAD NAQIR v. ALAUDDIN AHMAD* Pat. 608

Art. 182 (3)—Plaintiff's suit and first appeal dismissed with costs—Second appeal also dismissed with costs for failure to file talbana—Application for restoration also dismissed—Execution of decree for costs of suit and appeals—Time held ran from date of dismissal of second

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appeal and not from date of dismissal of restoration application.

The plaintiff's suit as well as the first appeal, were both dismissed with costs. The second appeal was also dismissed with costs for his failure to file talbana in time. He filed an application for restoration of the second appeal which was also dismissed. The respondents sought to compute the period of limitation for the execution of the decree for costs of the suit and appeals from the date of the dismissal of the plaintiff's application for restoration of the second appeal:

Held, that the restoration application must be treated as an application for review and since it had been rejected, time for execution of the decree for costs of suit and appeals ran from the date on which the second appeal was dismissed. *MOHAMMAD NAQIR v. ALAUDDIN AHMAD* Pat. 608

Art. 182 (3), (2)—“Review of judgment,” meaning explained—Review application rejected—Art. 182 (3), if applies.

The words “when there has been a review of judgment” in Art. 182 (3), Lim. Act must mean a review by some one who can review the judgment, that is to say, by the Court which pronounced the judgment to be reviewed. Hence the article will have no application where an application for review has been rejected, because in that case there has not been a review of judgment. The words “review of judgment” cannot be construed to mean proceedings for review of judgment. *MOHAMMAD NAQIR v. ALAUDDIN AHMAD* Pat. 608

Madras Agriculturists Relief Act (IV of 1938)—Appellate Court's decree declaring liability for first time—No written application raising plea for relief under Act before Appellate Court—Proper procedure.

When a liability is being declared in the Appellate Court's decree for the first time and a plea is open to the defendants under the Act there should be a written application raising this plea before the Appellate Court and on such application the Appellate Court should either give its own decision or reserve in its decree the right to have the matter decided by the Court below.

It is doubtful whether an order reserving a plea under the Mad. Agri. Relief Act for subsequent adjudication should be passed in the absence of an express prayer for the benefits of the Act. But the irregularity, if irregularity it be, should not deprive the defendants of their remedy when both parties have treated the order as binding upon them. *KANNABHIRAN PILLAI v. GOVINDASWAMI PILLAI* Mad. 757

s. 8—Debt incurred before October 1, 1932—Decree passed after commencement of Act—Debt cannot be scaled down under s. 8.

A debt for the repayment of which a decree has been passed after the commencement of the Mad. Agri. Relief Act, is not liable to be scaled down in accordance with s. 8 of the Act when the debt is one incurred before October 1, 1932. The word ‘decree’ in ss. 7, 8 and 9 must be taken to refer to decrees passed before commencement of the Act. *KOTAYA v. VENKATA PUNNAYYA* Mad. 753

ss. 8, 9—Debt incurred before October 1, 1932, ripened into decree after such date—Scaling down is governed by s. 8 and not by s. 9.

Clause (1) of s. 8, Mad. Agri. Relief Act clearly contemplates the debt incurred before October 1, 1932, as the original debt which ultimately ripened into a decree, and consequently it must be the date of the original debt which is the governing factor and not the date of the decrees. When, therefore, there is a debt incurred before October 1, 1932, which has ripened

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into a decree after October 1, 1932, the scaling down must be governed by s. 8 and not by s. 9. NIMMA-GADDA RAMASHAYYA v. ADUSUMILLI KUTUMBA RAO

Mad. 655

— **ss. 8, 9—Liability to pay principal sum originating in contract or tort—Compensation for withholding payment, if interest—Whether can be scaled down.**

Whatever be the nature of the liability to pay the principal sum—whether it originates in contract or in tort, the compensation awarded for wrongful withholding of its payment can appropriately be regarded as "interest" and is thus liable to be scaled down under the Mad. Agri. Relief Act. VENDOOR THAZHATH PARAVAN v. VENTHRAYIL TARWAD KARYAN GOPALAN NAIR

Mad. 408

— **s. 9. See Madras Agriculturists' Relief Act, 1938, s. 8**

408, 655

— **ss. 11, 19—Interest on costs, if excluded from scaling down operation.**

There is nothing in the Act which excludes from the scaling down operation interest on costs. There is nothing in s. 19 which is inconsistent with the view that the appropriation therein provided for was intended to be only in respect of the principal sum for costs or that this provision had any other object than to give effect to the provisions of s. 11. When there is a decree for costs which forms part of a decree being scaled down under s. 19, the provisions of the decree relating to interest on costs should be amended by the process laid down in ss. 8 and 9. PALANI GOUNDAN v. MUTHUSWAMI GOUNDAN

Mad. 36

— **s. 19—Order passed under, dismissing application of judgment-debtor—Applicability of—Rules issued by Government providing appeal not retrospective—Nature of order under s. 19.**

No appeal lies from an order under s. 19, Mad. Agri. Relief Act, dismissing the application of a judgment-debtor even if an execution petition is pending in any Court. The rules issued by Govt. in October 1939, providing for appeal in such cases, have no retrospective effect. Orders under s. 19 of the Act cannot be deemed to be orders under s. 47, Civil P. C. Application under s. 19 is to be made to the Court which passed the decree, not to the Court which is executing the decree. In this view the fact that an execution petition is pending makes no difference; nor does it make any difference that the executing Court happens to be the Court which passed the decree. PAKKIRI MUHAMMAD v. U. T. SYED SAHIB

Mad. 607

— **s. 19—S. 19—Applicability, to decree passed after Act.**

Section 19, has no application to a decree passed after the Act came into force. KANNABHIRAN PILLAI v. GOVINDASWAMI PILLAI

Mad. 757

— **s. 20—Father not following up his stay application with application under s. 19 but dying before expiry of sixty days—His son impleaded as legal representative, if can file fresh application under s. 20.**

Where a father did not follow up his stay application under s. 20, Mad. Agri. Relief Act with an application under s. 19, but died just before the expiry of the sixty days, time allowed under s. 20, his son who is impleaded as his legal representative cannot file a fresh application under s. 20. SUNDARA REDDIAR v. ALAGAPA CHETTIAR

Mad. 134

Madras Children Act (IV of 1920), s. 26

(1) Son sentenced to pay fine for offence—Father directed to pay fine under s. 26 (1) without giving him opportunity to show that he did

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not neglect to take care of son—Order held improper—Proper order stated.

A young person was convicted under s. 326, I. P. C., and sentenced to pay a certain fine. His father was directed to pay the fine under s. 25 (1), Mad. Children Act without giving him opportunity of showing that he did not neglect to exercise due care on his son. Nor did it appear from the report of the probation officer that the offence was due to any neglect of the father:

Held, that the order under s. 26 (1) must be set aside and that the proper course was to commit the son to the custody of his father on his executing a bond to be responsible for the good behaviour of the son. HUSSAIN KHAN, In re

Mad. 98

Madras City Tenants' Protection Act (III of 1922), s. 5. See Madras City Tenants' Protection Act, 1922, s. 11

788

— **ss. 11, 5—Compensation—How, determined.**

What has to be decided in determining under the City Tenants' Protection Act is the lowest value that prevailed within seven years before the date of the decree or of the order in ejectment. RAHMAT BI SAHEBA v. R. KRISHNA DOSS LALA

Mad. 788

— **ss. 11, 5—Notice under s. 11, if condition precedent to filing of suit—Notice, whether must be served to all joint tenants and their assignees—Defect of non-service, if cured by subsequently making them parties.**

It is clear from s. 11, City Tenants' Protection Act that the issue of the necessary notice is a condition precedent to the filing of the suit itself. *Prima facie*, when the section talks of notice to the tenant, it must include all the tenants if there are several tenants in respect of the same land. Hence all the joint tenants and their assignees must be served with a notice and a notice sent to one joint tenant only, is not sufficient to found suit for ejectment against all the tenants. Particularly in the case of the City Tenants' Protection Act there is greater reason to hold that the plaintiff must serve notice upon the persons who are entitled to the lease-hold interest at the time when he seeks to eject. The defect of non-service cannot be cured by adding some of them as defendants later on. RAHMAT BI SAHEBA v. R. KRISHNA DOSS LALA

Mad. 788

Madras Co-operative Societies Act (VI of 1932), s. 48—Liquidator appointed—Suit against society without leave of Registrar, if maintainable.

In view of the clear provisions of s. 48, Mad. Co-operative Societies Act, a suit against a Co-operative Credit Society instituted without the leave of the Registrar when a liquidator has been appointed must be dismissed. KUPPU GOVINDA CHETTIAR v. UTTUKOTTAI CO-OPERATIVE SOCIETY

Mad. 769

Madras Court of Wards Act (I of 1902), s. 49—Suit by managers of temple—Notice under s. 49 giving name and address of temple and not those of managers—S. 49, if complied with.

A Hindu idol is founded upon the religious customs of the Hindus and is a 'juristic entity'. It has a juridical status with the power of suing and being sued. Although the managers are often described as trustees they are not trustees in law as the Devasthanam properties are not vested in them in trust. A notice, which complies with the requirement of s. 49, Mad. Court of Wards Act so far as the temples are concerned, cannot therefore be said to be open to objection for the reason that the names and addresses of the managers have not been stated if in the notice in ques-

Madras Court of Wards Act—concl'd.

tion the names of the temples and also the village in which they are mentioned. *NAGAPA CHETTIAR v. ZAMINDAR OF SIVAGANGA* *Mad. 786*

Madras District Municipalities Act (V of 1920), s. 93 (1)—*R licensed distiller owning distillery at B maintaining depots for sale of arrack at A through his agent—Agent A contracting for sale of arrack on behalf of R—Held, that R must be deemed to be carrying on business at A within meaning of s. 93.*

One R was a licensed distiller and owned an arrack distillery at B. Under the terms of his license he was required to maintain depots for the sale of arrack at various places in the District. One of these places was A. The depot at A was in charge of an agent of R and he used to sell arrack to licensed retail dealers. The price was fixed by the Govt. and the sales were restricted to licensed retail vendors. The money received in respect of arrack sold at the A depot was paid by R's agent into the treasury the same evening. R's agent in charge of A depot entered into contracts for the sale of arrack on behalf of his master who made profits on these transactions:

Held, that as a person who sells goods in a particular place must be deemed to be carrying on business in that place R must be deemed to be selling arrack at A. The fact that the prices which he charged were fixed by the Govt. did not make his transactions any the less sales: nor did the fact that the R's only customers at A were licensed retail dealers alter the character of his transactions. The fact that R's agent was required to pay into the treasury at the close of a day's business the moneys which he received for the arrack sold that day had no bearing on the question and the same could be said with regard to the keeping of accounts at B. R sold arrack at A and, therefore, was carrying on business at A within the meaning of s. 93 of the Mad. District Municipalities Act. It would be a different matter if all contracts for the supply of arrack were made in B and goods were merely delivered in A through an agent. *MUNICIPAL COUNCIL, ADONI v. G. V. C. BABU NAIDU* *Mad. 722*

Madras Estates Land Act (I of 1908, as amended in 1936), ss. 3 (2), 181, 77, (3) (10)—*Lands admitted to be kambattam within Mokhasa village—Village, if "estate" within meaning of Act before amendment—Land-holder possessing private land within estate selling kudivaram right—Landlord must be deemed to have converted land into ryoti land—Additional terms, if alter nature of transaction or whether void—Instrument held converted kambattam land into ryoti land—Additional terms stipulating for payment of fixed rent, interest on rent arrears, making rent first charge on land and entitling landholder to trees standing on land at date of contract, held not inconsistent with ryoti tenure.*

Where the lands are admitted to be kambattam lands within a Mokhasa village, it follows that the village was an "estate" within the meaning of the Mad. Estates Land Act, even before the amendment in 1936.

Where a landholder possesses private lands within an "estate" and sells the kudivaram right in those lands but retains the melwaram right he must be deemed to have converted the lands into ryoti lands, and additional terms will not alter the nature of the transaction. The additional terms will stand, provided that they are not inconsistent with what the statute states shall apply to ryoti tenure. To the extent that

Madras Estates Land Act—concl'd.

the additional terms are inconsistent with ryoti tenure they must be regarded as being void.

The khat executed by the vendee embodying the terms of the contract, after reciting that the landholder had agreed to sell to him the kudivaram right in the lands for Rs. 33,192 and that they had received the purchase consideration, proceeded: "You have hereby sold to us all the rights possessed by you in the said lands excepting the melwaram rights there to. Therefore, in the matter of our enjoying the said lands henceforth from son to grandson and so on in succession with powers of alienation by way of gift, exchange, sale, etc., you or your heirs shall never raise dispute either with us or with our heirs. Then followed the other terms relating to the sale, stipulating for the payment of a fixed rent and for the payment of interest at ten annas per cent. per mensem on arrears of rent. The cist payable to the landholder was to be a first charge on the land, and the landholder was to be entitled to the trees standing on the land at the time of the contract, but trees grown after that date were to belong to the vendees:

Held per Full Bench (Krishnaswamy Ayyangar, J., contra)—That the document read as whole operated to convert the kambattam lands into ryoti lands and that the additional terms were not inconsistent with ryoti tenure. *CHELIKANI KONDAYYA RAO v. UPPALAPATI NAGANNA* *Mad. 470 F B*

Madras Hereditary Village Offices Act (III of 1895), s. 3. See Madras Hereditary Village Offices Act, 1895, s. 5 *797*

ss. 5, 3—Madras Government, regarding inam lands as falling under Act—Patna Courts, if bound by it—Party conceding at trial and in first appeal that inam lands were protected—Party, if can resile from his admission in second appeal.

The fact that the Madras Govt. regarded the inam lands as falling within the Mad. Hereditary Village Offices Act is not binding on the Patna Court. But where a party concedes as the trial and also in first appeal that the inam lands in question were protected under the aforesaid Act, it is not open to him in second appeal to resile from his admission and to contend that it was not established that the lands in question were protected under the Act. *ANTARJYAMI NAIK v. B. S. RATH* *Pat. 797*

ss. 5, 3—Question as to how much of profits of inam land is necessary to maintain inam holder—Courts, if can enter into.

The Court cannot go into the question as to how much of the profits of the inam lands is necessary to maintain the holder thereof. *ANTARJYAMI NAIK v. B. S. RATH* *Pat. 797*

ss. 5, 3—Service inam lands—Crops growing on if can be attached—Inam holder ceasing to be useful—Whether ground for depriving him of aforesaid protection.

Growing crops on service inam lands cannot be attached in execution of a decree held against the holder of the inam lands.

The fact that the holder of the inam lands has long since the grant, ceased to be useful, is no ground upon which a Court can hold that he is not entitled to the protection which the law gives to his property. *ANTARJYAMI NAIK v. B. S. RATH* *Pat. 797*

Madras Hindu Religious Endowments Act (II of 1927)—Scheme of Act—Court has no residuary power to frame scheme where Board has refused to do so.

The scheme of the Act was to place in the Board power of supervision of Hindu temples and maths in Madras province and in proper cases the control of

Madras Hindu Religious Endowments Act
concl.

the management. As s. 92, Civil P. C., has now been replaced by the Mad. Hindu Religious Endowments Act, 1926, so far as Hindu religious endowments of this province are concerned that Act alone can be looked at for ascertaining what the powers of the Court are. There can be no residuary powers because the former powers are taken away by the present Act. **T. S. PICHU AYYANGAR v. PERARULALA RAMANUJA JEER**
Mad. 809

ss. 44-B (2) (a) and (2) (d) (i)

Dismissal of application for resumption of temple inam by Collector—Appeal lies to District Collector who can confirm order or cancel it and grant appropriate relief.

The words "may...pass an order confirming, modifying or cancelling the order of the Collector" in s. 44-B (2) (d) (i) Mad. Hindu Religious Endowments Act, are not intended to be confined to an order of resumption. An unqualified right of appeal is given, and if the Collector passes an order dismissing an application for resumption of a temple inam under s. 44-B (2) (a) an appeal lies under s. 44-B (2) (d) (i) to the District Collector who can confirm it or cancel it and he has the power to grant appropriate relief. **KALLALAGAR DEVASTHANAM, MADURA v. DISTRICT COLLECTOR, MADURA**
Mad. 830

ss. 62, 63, 65—Board, if can be compelled to hold inquiry—Its decision that inquiry is unnecessary, if final.

The Board cannot be compelled under s. 62, Mad. Hindu Religious Endowments Act to hold an inquiry. If it decides that an inquiry is not necessary the applicants can carry the matter no further. **T. S. PICHU AYYANGAR v. PERARULALA RAMANUJA JEER**
Nag. 809

s. 63—Refusal of Board to frame scheme—

Power of Court in the matter.

Section 63 does not give authority to the Court to frame a scheme in the event of the Board refusing to do so. The only orders which the section refers to are: (1) An order settling a scheme; (2) an order modifying a scheme; and (3) an order cancelling a scheme. The words "institute a suit in the Court to modify or set aside such order" are intended only to refer to an order settling a scheme or modifying or cancelling one. **T. S. PICHU AYYANGAR v. PERARULALA RAMANUJA JEER**
Mad. 809

ss. 63, 65. See Madras Hindu Religious Endowments Act, 1927, s. 62
809

s. 65—S. 65, scope and interpretation of—
Court can settle scheme only where one is framed by Board.

Section 65 is merely intended to give the Court power after a scheme has been framed, to modify or cancel it at any time. Under s. 65 the Court has power to settle a scheme, but it must be a scheme which has first been framed by the Board. **T. S. PICHU AYYANGAR v. PERARULALA RAMANUJA JEER**
Mad. 809

Madras Motor Vehicles Taxation Act (III of 1931), s. 2 (iii)—Steam roller, if "motor vehicles."

Steam rollers are motor vehicles within the meaning of s. 2, Mad. Motor Vehicles Taxation Act. **CORPORATION OF MADRAS v. SECRETARY OF STATE**
Mad. 821

Madras Village Courts Act (I of 1889), s. 13. See Limitation Act, 1908, s. 4
434

s. 20. See Limitation Act, 1908, s. 4
434

Maintenance. See Hindu Law
569, 750

Maintenance—concl.

Rate of, fixed in decree—Its alteration or variation, how obtained.

A written agreement for maintenance can be varied without the necessity of instituting a suit for that purpose. But the rule is different when the rate of maintenance is fixed in a decree. In such a case its alteration or variation can only be obtained by a separate suit properly framed for the purpose. **GHASIKAM v. KUNDANBAI**
Nag. 361

Malicious prosecution. See Tort
263

Suit for damages—Essential—Municipal Corporation prosecuting Pleader in spite of his paying requisite license-fee—Pleader discharged on his producing requisite license—Pleader's suit against Corporation for damages for malicious prosecution—Pleader held had no cause of action—Corporation, if can rely on entries or absence thereof in their books—Corporation Officer responsible for prosecution knowing that Pleader had paid license-fee—Malice or reasonable and probable cause for prosecution.

There are three sorts of damage any one of which is sufficient to support an action for malicious prosecution. First, damage to a man's fame, as if the matter whereof he is accused be scandalous. Secondly, damage to his person, as where a man is put in danger to lose his life, limb or liberty. Thirdly, damage to his property, as where he is forced to expend money in necessary charges to acquit himself of the crime of which he is accused. It is no answer to an action for malicious prosecution to show simply that the offence, which was the subject-matter of the prosecution, is punishable with fine only.

A Pleader was prosecuted by the Municipal Corporation for practising without licence in spite of his having paid the requisite licence-fee. He was, however, discharged on his production of the license. The Pleader thereupon instituted a suit for malicious prosecution:

Held, that there was no danger to life, limb or liberty in the case because failure to take out a license when practising a profession was punishable with fine only. Similarly the matter of the plaintiff was accused could not be described as scandalous. The charges incurred by the plaintiff in engaging the Pleader could not also be said to be justified. If there had been witnesses to be cross-examined, it might have been different, but as it was the plaintiff, who himself was a professional man, had a complete answer to the charges in the form of the license granted by the Corporation, the plaintiff had no cause of action.

Held, further that the Corporation could not rely on the entries or the absence of the entries in their books or the absence of corrections in their books which were due solely to their own failure to maintain proper supervision. If any Corporation Official who was responsible for the prosecution knew that the plaintiff had paid his license-fee there was no reasonable and probable cause and equally there must have been malice. **JATINDRA MOHAN BANERJEE v. CORPORATION OF CALCUTTA**
Cal. 374

Marz-ul-maut. See Muhammadan Law
77

Mense Profits. See Civil Procedure Code, 1908;
s. 149
840

Minor—Contract—Minor representing to be major entering into contract—Contract, validity of—Whether can be compelled to refund money received by minor.

Minor—concl.

Where a minor representing to be a major has entered into a contract, the contract is void and unenforceable against the minor. The minor cannot even be compelled to refund the money received by him under the contract. *B. KALA RAM S. BHAG SINGH v. MAZAL BARI KHAN* Pesh. 824

—*Marriage—Contract of, between minor girl and major person—Breach of promise—Minor, if can sue for compensation—Father's consent to contract, whether makes it valid.*

Where a person who is major has entered into a contract of marriage with a minor girl, she cannot sue for compensation for breach of promise of marriage. The fact that her father consented to her making the contract does not make it any the more a valid contract although it might have made the marriage a valid marriage if it had taken place. *MA E THWE v. U THA YIN* Rang. 785

Natural guardians.

It is only the father and mother who are the natural guardians of a minor. *KHEMOHAND DAYARAM v. DAYARAM JESSOMAL* Sind 137

Mortgage.

See Court-fees

See Transfer of Property Act, 1882, s. 68 (2)

—*After born son, if can challenge—Cause of action—His rights.*

An after-born son has no cause of action to sue for a declaration that a mortgage is not binding on him nor can he create a cause of action for himself by waiting until he is dispossessed and then suing for possession; nor can he set up rights while he could not urge in a suit of his own by way of defence when the mortgagee sues. The cause of action to challenge the mortgage arises at the date of its execution and hence a son born and conceived after that date cannot challenge the mortgage though he still has a right to redeem. *KASHINATH VISHVANATH JOT v. BAPURAO* Nag. 189

—*Anomalous or by conditional sale—Test to determine—Mortgage held anomalous.*

The test whether a particular document is a mortgage by conditional sale or is some other kind of mortgage, is not what the parties have said it is, but is rather whether it fulfils those statutory requirements which the Legislature has laid down. The parties can call it by whatever name they like, but that will not make it a mortgage of a particular kind, unless it complies with the requirements of such a mortgage as defined by the Act.

A mortgage-deed stated that the property was mortgaged without possession. There was a covenant to pay interest, then a covenant to pay the principal and the accumulated compound interest, "at the stipulated period," that is, at the end of the period of five years. Thirdly, a provision that the mortgagors were not to be entitled to redeem earlier than at the expiration of the five years, and finally it provided.....that in case of non-payment of the entire amount of principal, interest and compound interest the mortgagees would after the expiry of the stipulated period, have power to obtain proprietary possession of the entire property mortgaged by bringing a suit for a decree for foreclosure and that the mortgagors would not have any objection thereto:

Held, that the mortgage was not a mortgage by conditional sale but an anomalous mortgage. *UJAGAR LAL v. BAHADUR LOKENDRA SINGH* All. 520

Mortgage—contd.

—*Mortgage by undivided co-parcener of share in particular portion of family property—Rights of mortgagee and non-mortgaging co-parcener—Mortgage by undivided co-parcener of his share in particular part of family property—In subsequent partition in family, mortgaged property allotted to non-mortgaging co-parcener—Non-mortgaging co-parcener undertaking to pay-off mortgage—Mortgagee can sue non-mortgaging co-parcener on mortgage.*

When an undivided co-parcener purports to mortgage his share in a particular part of the family property something less than that interest which passes on a mortgage by a man severely seized of the mortgaged property is transferred. The mortgagee's main right is, after foreclosing or purchasing his mortgagor's rights, to get defined by partition what it is that is mortgaged. In a case where the subject matter of the mortgage is the mortgaging co-parcener's share in a village the mortgagee would have the right to demand a partition and any Court entertaining such an application for partition, failing agreement, would be bound to partition the family property in accordance with justice and equity, that is to say, in the same way that a reasonable and honest co-parcener would agree to have the joint family property partitioned. The fact that there has been such a mortgage would not in the least debar a non-mortgaging co-parcener from having the family property partitioned as though there were no mortgage but it would debar the mortgaging co-parcener from assenting to any such partition as would imperil his mortgagee's rights. A Court entertaining such a suit for partition in such circumstances should, unless there are countervailing reasons due to interests other than those of the family calling for consideration, so divide the family property that the property mortgaged by the mortgaging co-parcener goes to that co-parcener and the non-mortgaging co-parcener gets other property.

Where an undivided co-parcener mortgages his share in a particular part of family property and on partition in the family the mortgaged property is allotted to non-mortgaging branch and the mortgage has not been taken into account (and of course where fraud or collusion does not enter into the story) the mortgagee cannot proceed against the subject-matter of his mortgage but has substituted for his security any property that has been given to his mortgagor in the partition. But if in fact the mortgaged property has been taken by a non-mortgaging branch and that branch has at the same time and as part of the partition arrangement undertaken to pay that mortgage-debt, then the true position is that the non-mortgaging co-parceners have in effect obtained the equity of redemption only and are liable in the first place to the mortgagee who may sue them on the mortgage. *ATMARAMSAO v. BHUPENDRANATH* Nag. 537

—*Suit on—One of defendants claiming paramount title and disclaiming any interest in equity of redemption—Question of title, if can be decided.*

In a mortgage suit no question of title arises. The mortgagee clearly has no interest and in fact cannot, if he wishes to succeed, challenge the title of his mortgagor. All that the Court is concerned with in a mortgage suit is the question of redemption. Only the persons who are interested in paying in order to save the property are necessary parties to the suit. All other matters are irrelevant. Where, therefore, in a mortgage suit one of the defendants claims a paramount title and disclaims all interest in the equity of redemption, this defendant must be discharged from the suit for

Mortgage—concl'd.

the question of his title cannot be tried in such a case. Where in such a case the lower Court passes a wrong order, the High Court can interfere because the question of parties and persons is fundamental and goes to the very root of jurisdiction. *SHAKUNTALABAI v. ROSHAN-LAL* Nag. 19

Muhammadian Law — *Co-heirs of deceased Muhammadan succeeding to his property hold it as co-owners until partition—Possession of one is possession of all.*

The co-heirs of a deceased Muhammadan, who have succeeded to his property in specific shares under their personal law, hold it as co-owners until there has been a partition by metes and bounds, and possession of one is the possession of all. *MOHAMMAD SOHAIL v. GHULAM RASUL* Lah. 125 F B

Decree against all heirs of deceased Muhammadan for debts due by deceased—Heirs in joint possession of property — Decree-holder held should be allowed to execute decree against property as a whole without interfering with extent of liability of heirs inter se.

Where a decree was obtained against all the heirs of a deceased Muhammadan for debts due by the deceased but the estate was not distributed among the heirs who were in joint possession of the estate :

Held, that there should be decree against the heirs which would enable the decree-holder to execute it against the property as a whole without interfering with the extent of liability of heirs inter se. *MAMRAJ MANIRAM v. MUHAMMAD HASHIM* Cal. 729

Dower — Prompt — Lapse of time — Effect.

Although prompt dower, according to Muhammadan Law, is payable immediately on demand, yet in a large majority of cases it is rarely demanded and is rarely paid : in practice a Muhammadan husband generally gives little thought to the question of paying dower to his wife save when there is domestic disagreement, or when the wife presses for payment upon the husband's embarking upon a course of extravagance and indebtedness without making any provision for her. Lapse of time since marriage raises no presumption in favour of payment of dower. *FAQIR BUX v. THAKUR PRASAD* Oudh 588

Gift—Hiba-bil-iwaz — Essentials — Actual delivery of possession, if necessary—Declaration as to, in deed—Whether binding.

In the case of a *hiba-bil-iwaz*, only two conditions are necessary to establish the validity of such a transaction, (1) actual payment of consideration (*iwaz*), and (2) a *bona fide* intention on the part of the donor to divest himself in *praesenti* of the property and to confer it upon the donee. The adequacy of consideration is not material ; but whatever its amount, it must be actually and *bona fide* paid. As regards the second condition, the circumstances that no mutation was either claimed or obtained by the donee in the lifetime of the donor and that possession remained with the donor till his death, are wholly irrelevant. Delivery of possession, is not at all necessary in the case of a *hiba-bil-iwaz*. The declaration in the deed by the donor as regards the delivery of possession to the donee is binding upon the heirs and representative of the donor and is quite sufficient to establish delivery of possession even if it is necessary to do so. *MOHAMMAD KAZIM HUSAIN v. NADRI BEGUM* Oudh 87

Gift—Marz-ul-maut—Death bed gift amongst Sunnis to an heir without consent of others, validity.

Muhammadian Law—concl'd.

So far as Sunni Law is concerned a death bed gift to an heir is void in toto in the absence of consent by the other heirs. *SAKINA BEGUM v. HAFIZ-UD-DIN* Lah. 77

Marz-ul-maut — Gift during death illness, when valid—Death illness, what is.

In order to invalidate a death bed gift it must be shown (1) that at the time of the execution of the deed of gift, the donor was suffering from a serious disease which it was known would in all probability terminate fatally, (2) that the disease was such as to engender in the patient the apprehension of death, and (3) that the illness incapacitated him from the pursuit of his ordinary avocations. It is not necessary to come to a definite finding that the disease was the immediate cause of death. *SAKINA BEGUM v. HAFIZ-UD-DIN* Lah. 77

Murder. See Criminal trial

332

Mussalman Wakf Act (XLIII of 1923 as amended in Bombay by Act XVIII of 1935), ss. 2 (e), 3—Trustee, if can dedicate.

It cannot be said that the only person who can dedicate a property must be a beneficial owner; a trustee can also dedicate. The collection of money on terms which made it charitable in the hands of the trustees who held it, their subsequent investment of that money in immovable property, and their declaration of a trust of that immovable property for the charitable purpose for which it was held constitutes a good dedication. *GULAM-HUSSEIN ALIBHOY JARIWALLA v. EMPEROR* Bom. 115

s. 3—Applicability of Act to any property of waqf within jurisdiction of local Court.

A *mutwalli* with property within the local limits of the Small Cause Court at Bombay, has to furnish under s. 3 the required particulars, although other properties of the *waqf* may be situate and those who benefit from the *waqf* may be resident, outside Bombay or outside British India. The Act applies to any property of a *waqf* within the jurisdiction of the local Court. *GHULAM-HUSSEIN ALIBHOY JARIWALLA v. EMPEROR* Bom. 115

s. 5 (3)—S. 5, scope of.

There cannot be an offence under s. 5 unless a statement has been delivered under s. 3. *GHULAM-HUSSEIN ALIBHOY JARIWALLA v. EMPEROR* Bom. 115

s. 10—District Judge if has jurisdiction to enquire into nature of property.

In proceedings under s. 10, Mussalman Waqf Act XLIII of 1923, the District Judge has no jurisdiction to hold an inquiry into the nature of the property where the alleged *mutwalli* denies the existence of the *waqf*. *SHIA YOUNGMEN'S ASSOCIATION v. FATEH ALI SHAH* Lah. 351 F B

s. 10—Non-compliance by mutwalli with provisions of Act—District Judge, if can impose fine.

In case the *mutwalli* has not complied with the provisions of the Act the District Judge is not empowered himself to impose a fine on him. The offence must be dealt with by a Court constituted under Criminal P. C. i. e., by a Magistrate. *SHIA YOUNGMEN'S ASSOCIATION v. FATEH ALI SHAH* Lah. 351 F B

s. 10-B—Mussalman Waqf Rules, 1936, r. 26—Person failing to deliver accounts under s. 3—Court holding that person fell within terms of Act and directing papers to be sent to Public Prosecutor—There was held sufficient compliance with r. 26.

The accused was called upon to deliver accounts

Mussalman Wakf Act—concl.

under s. 3, Mussalman Wakf Act, and, he failed to do so. Thereupon the Court, the Chief Judge of the Small Cause Court—holding that the accused fell within the terms of the Act, directed that the papers be sent to the Public Prosecutor in order that he might take the appropriate action:

Held, that there was sufficient compliance with r. 26 of Mussalman Wakf Rules, 1936, as required by s. 10-B though it would be better in order to avoid any question, that formal sanction should be given independently of the judgment. **GULAMHUSSEIN ALI KHAN JARIWALA v. EMPEROR** Bom. 115

N.-W. F. P. Law and Justice Regulation (VII of 1901), s. 34—Land in suit valued at Rs. 388-2-0 and other property at Rs. 1,900-8-0—Two values, if can be combined—Second appeal, if maintainable.

The value for jurisdiction of the land in suit, was Rs. 388-2-0 and the like value of the other property was Rs. 1,900-8-0:

Held, that the value of each portion of the suit being below the prescribed limit, the two values could not be combined to make the case liable to further appeal under s. 34, N.-W. F. P. Law and Justice Regulation. **ZAMO v. HABIB KHAN QADIR**

Pesh. 135

N.-W. F. P. Muslim Personal Law (Shariat) Application Act (VI of 1935), s. 27—Succession—Questions coming up before Court after Act came into force—Muhammadan Law must be applied irrespective of fact whether succession opened after or before Act.

All questions of succession which come up before the Courts after Act VI of 1935 has come into force, must be decided according to Muhammadan Law irrespective of the fact as to whether the person whose estate is in dispute had died before that Act came into force or after. **ZAMO v. HABIB KHAN QADIR**

Pesh. 135

Negotiable Instruments Act (XXVI of 1881), s. 10 See Negotiable Instruments Act, 1881, s. 85 **330**

s. 20—Stamped and signed paper delivered to person—Power of such person to complete it in favour of any person.

Section 20 of the Negotiable Instruments Act gives general authority to a person to whom a stamped and signed paper is delivered to convert it into a negotiable instrument payable to any specified person and accordingly it is open to a person receiving a blank inchoate instrument to complete it in favour of any person besides himself. **HARI KANT JHA v. NATU CHOUDHURY**

Pat. 433

ss. 85 (1), 10—Plaintiff having current account in Bank drawing post dated cheque on Bank in favour of M—Plaintiff subsequently counter-mandating his order for payment—Bank acknowledging instruction but yet cashing cheque and making payment to M—Payment, if made without negligence—Payment, if in due course so as to discharge Bank.

The plaintiff had at all material times a current account with the defendant Bank. He drew a cheque on the Bank in favour of M post dated March 20, 1937. On February 14, 1937, he wrote to the Bank counter-mandating that order for payment which was acknowledged by the Bank on March 20, 1937. Nevertheless, and contrary to these instructions, on June 10, 1937, the Bank cashed the cheque, made payment to M, and debited the plaintiff's account with the amount:

Negotiable Instruments Act—concl.

Held, that the payment in this case was not made "without negligence" and was not, therefore, a payment made in due course, within the meaning of ss. 85 (1) and 10 so as to discharge the Bank. **MARHOMMED YABUB v. IMPERIAL BANK OF INDIA** Cal. 330

New plea. See Practice **380**

Oudh Rent Act (XXII of 1886), s. 108.

See U. P. Tenancy Act, 1939, s. 276 **543**

s. 151—Decree-holder to prove that decree cannot be satisfied against movable property of judgment-debtor—Nature of proof—Burden, when shifts—Evidence Act (I of 1872), ss 101 106.

It is for the decree-holder to show in the first instance under s. 151, Oudh Rent Act that satisfaction of the decree cannot be obtained against the movable property of the judgment debtor but very little evidence is required to shift the burden on to the judgment-debtor. Whether a judgment-debtor has or has not movable property from which a decree may be satisfied is a matter specially within his own knowledge, and if the decree holder shows that there is reason to think that he has no such property, and files an affidavit to that effect it is for the judgment-debtor to prove that he has such property. **DEPUTY COMMISSIONER, PARTABGARH v. SHAHZAD KOER** Oudh 437

ss. 152, 154—Suit by superior proprietor for arrears of under-proprietary rent—Mortgagee of under-proprietor not made party—Decree against under-proprietor and purchase of property by superior proprietor in execution—Mortgage-decree—Under-proprietary rent, whether charge on mortgaged property—Liability of mortgagee, if came to end by satisfaction of rent decree.

It is true that under s. 154 of the Oudh Rent Act where an under-proprietor creates any incumbrance and fails to pay to the proprietor all or any part of the rent subsequently accruing in respect of the land subject to the incumbrance the incumbrancer shall be liable to pay to the proprietor the whole or part of that rent as the case may be. This section lays down the liability of a mortgagee of any under proprietary tenure for payment of arrears of rent due to the superior proprietor but where the superior proprietor in his suit for rent did not make the mortgagee of the under-proprietor a party and sued the under-proprietor alone obtaining a decree against him and in execution of that decree has purchased the property put up for sale, the decretal amount is satisfied and the liability to pay rent by the mortgagee thus comes to an end. Section 152 of the Oudh Rent Act provides that where a decree is for an arrear of rent due in respect of an under-proprietary right the interest of a judgment-debtor in that right may be sold in execution of the decree. This shows that if the under-proprietary holding has been mortgaged by the judgment-debtor, the only thing that can be sold is the interest of the judgment-debtor, which in such a case would be his equity of redemption. The auction-purchaser therefore cannot claim priority against the mortgagee who is no longer liable for any payment under the provisions of s. 154. Hence in such a case the under-proprietary rent is not a charge on the mortgaged property and the mortgaged property can be sold in execution of the mortgage-decree. **KANTZ BAQAR v. KANTZ ABID** Oudh 22

Partition. See Hindu Law **137, 304, 724**

Suit for—Court-fees. See Court Fees Act, 1870, Sch. II, Art. 17 **230**

Partnership Act (IX of 1932), ss. 9, 29—

S. 9, construction of—Subsequent sections are

Partnership Act—concl'd.

mere amplifications and illustrations of principles embodied in s. 9.

All the subsequent sections to s. 9 of the Partnership Act dealing with the relations of partners to one another are no more than amplifications and illustrations of the principles contained in s. 9. **MULCHAND TAGIOMAT v. SHAMDAS JETHANAND** *Sind 380*

s. 29—Assignment by ex-partner in firm after dissolution—Suit by transferee for accounts of dissolved partnership as whole and not for accounts after dissolution only—Assignors, if necessary parties—Transfer of Property Act (IV of 1882), s. 130 (2), effect of.

In a suit by a transferee or an assignee from an ex-partner in a firm after the dissolution of the partnership for accounts of the dissolved partnership as a whole and not for accounts after the date of the dissolution only, the assignors are necessary parties. Hence, when they are not joined either as plaintiffs or defendants till more than three years after the dissolution of the partnership the entire suit must stand dismissed. Section 130 (2) T. P. Act, does not obviate the necessity of impleading the assignor in such a suit. **MULCHAND TAGIOMAT v. SHAMDAS JETHANAND** *Sind 380*

s. 29—Partner's position—His rights and obligations, if chose in action—Right to recover share in partnership property, whether assignable.

The position and rights and obligations of one partner in a partnership in relation to the other partners is clearly not a chose in action and cannot be assigned. But the share of a partner in a partnership is property and may be assigned. The right to recover it is a chose in action. **MULCHAND TAGIOMAT v. SHAMDAS JETHANAND** *Sind 380*

ss. 59, 68—Registration of firm—Presumption arising from—Certificate of registration—Evidentiary value of—Proof of signature of member of firm on application for registration, if necessary.

The registration of a firm under s. 59, Partnership Act, raises a presumption that the parties shown as members of the firm and registered as such are actually members of it. The presumption is, however, rebuttable and it is for the party denying the membership to rebut it. A certificate of registration is sufficient proof, in the absence of evidence to the contrary, that a person is the partner of the firm and it is not necessary to prove that the application for registration bore his signature. **FIRM HET RAM PADAM CHAND v. FIRM SUBHAG CHAND RIKHAB DAS Oudh 168**

s. 69. See Partnership Act, 1932, s. 74 (b) *344*

ss. 74 (b), 69—S. 74 (b), scope of—Whether limits exemption from operation of s. 69 only to pending proceedings.

Sub-section (b) of s. 74, Partnership Act, relates to those legal proceedings or remedies which were open to a party in respect of any right, title, interest, obligation or liability which had already been acquired accrued or incurred before the commencement of the Act. It does not limit the exemption from the operation of s. 69 only to pending proceedings. **RAMGOPAL SRINIWAS v. NET RAM** *All. 344*

Penal Code (Act XLV of 1860), ss. 21, Expl. 2, 167—"Public servant"—Person in actual possession of situation—Absence of formal appointment—If public servant—Word "charged", construction—Appointment of Head Clerk to prepare electoral rolls under r. 13 (1), Bihar Municipal Election Rules 1937, of Municipality of five

Penal Code—concl'd.

wards—Subsequent Government Notification dividing Municipality into sixteen wards—Appointment of Head Clerk neither revoked nor fresh formal appointment made—He, continuing to work—Head Clerk held public servant charged with preparation of electoral rolls.

The Chairman of a Municipality, acting under r. 13 (1) of the Bihar Municipal Election Rules, 1937 appointed a Head Clerk of the Municipality, to prepare the electoral rolls of all persons entitled to be registered as voters in each of the five wards into which the Municipality was divided at that time. Subsequently by a Govt. Notification the Municipality was divided into sixteen single seated wards instead of the former five plural-seated wards:

Held, that as the appointment of the Head Clerk was not revoked subsequent to the Govt. Notification and he continued to work as such he was public servant within the meaning of s. 167 read with s. 21, Expl. 2, I. P. C. The absence of his formal appointment subsequent to Notification was immaterial as the Head Clerk was indubitably "in actual possession of the situation of a public servant."

Held, further that the word "charged" in s. 167 is not to be very narrowly construed. It was no part of the ordinary duty of Head Clerk to prepare any electoral roll but as he was expressly appointed to prepare the electoral rolls under the Election Rules he was a public servant charged with the preparation of electoral rolls. **BRJJBHARI v. EMPEROR** *Pat. 108*

ss. 34, 302—Intention to cause death—Series of acts of violence—Mere fact that Court cannot determine at what precise point deceased expired if material.

Where the intention to cause death has been present it will make little or no difference that the Court cannot determine at what precise point in the course of a series of acts of violence the victims of the crime expired. **MAHADEO NATH KHETRI v. EMPEROR** *Pat. 622*

ss. 34, 302, 201 to 203, 107, 114—

—Murder—Common intention—Four persons taking part in commission of murder—No evidence to prove which of accused committed crime—All if can be convicted of murder.

Mere presence without proof of any act or omission done to facilitate the offence or at least without proof of the existence of a common intention will not be sufficient under s. 34, I. P. C., to support a conviction.

Where however four persons were inside the house in which a murder was committed and although the victim was crying out loud enough to be heard by the neighbours as well as those inside the house none of them did anything to prevent the commission of the crime:

Held, that the statutory duty was cast upon the persons who were inside the house by s. 44, Criminal P. C. to take measures to prevent the completion of the crime and as none of them did any such thing all of them must be held either to have taken an active part or by wilful acquiescence to have furthered the intention of all that the crime should be carried to its completion and that no outsider should have a chance to interfere.

Held, further that in the circumstances of the case even if there was no evidence to prove as to which of the persons present in the house committed the murder all the four could be convicted of murder. **MAHADEO NATH KHETRI v. EMPEROR** *Pat. 622*

s. 70. See Criminal Procedure Code, 1898, s. 386 (1) (b) *217*

Penal Code—contd.

s. 70—Imprisonment suffered in default of payment of fine—Fine, if can still be recovered. The property of the accused is liable to the payment of fine even if he has undergone imprisonment in default of payment of fine. *COLLECTOR OF BROACH AND PANCH MAHALS v. GOCHAVLAL BHIKALAL*. Bom. 217.

s. 75—Case falling under s. 75—Trial under s. 260, Criminal Procedure Code (Act V of 1898), if bad—S. 75, whether creates separate offence.

While the circumstances of a case where s. 75, I. P. C., can be applied make it desirable that the offence should not be tried in a summary way and that in such cases if the trial has started in a summary way the provisions of sub-s. (2) of s. 260, Criminal P. C., should be followed, nevertheless it cannot be said that a trial in which a charge under s. 73, could be framed is necessarily bad in law because the offence is tried summarily. It may, indeed, almost always be inexpedient in the interests of justice to do so, but s. 75, is an enabling section and merely applies a principle; it does not create a separate offence or indeed, an offence at all and hence the question whether s. 260, Criminal P. C., applies to offences under s. 75, does not arise. *EMPEROR v. SHIVBUX AMRO* Sind 819.

s. 75—Court can take into consideration previous convictions apart from s. 75.

Previous convictions can however be taken into account under s. 14, Evi. Act even when s. 75, I. P. C., is not to be applied. After an accused has been convicted and before sentence is passed a Court can for the purpose of deciding what sentence should be passed, take into consideration previous convictions, any question of s. 75, apart. *EMPEROR v. SHIVBUX AMRO* Sind 819.

s. 75—S. 75 not to be applied to case but previous convictions to be taken into account—Summary trial is not appropriate.

A trial in a summary way is not an appropriate procedure when s. 75 is to be applied. Nor, indeed, would it be an appropriate procedure when s. 75, is not to be applied, but previous convictions are to be taken into account in determining what punishment within his ordinary powers a Magistrate should impose because of the limited nature of the sentence which may be passed under s. 202, Criminal P. C. *EMPEROR v. SHIVBUX AMRO* Sind 819.

s. 84—Brutal assault by husband on wife—Husband not known to be ill-treating his wife—Insanity of husband, if can be presumed from mere absence of motive.

Per *Gentle, J.*—Where a husband who has never been known to have ill-treated his wife, assaults his wife which results in her death, from the mere fact that there was an absence of a deep-seated motive, it cannot be said that the husband must have been insane. *SANKAPPA SHETTY, In re* Mad. 332.

s. 84—Circumstances to be considered in considering plea of insanity—Principles to be applied to case of insanity, stated.

Per *Patanjali Sastri, J.*—It is true that a mere lack of apparent motive for the deed does not necessarily or always lead to an inference of intellectual aberration or insanity, but a total lack of an apparent motive may in some cases, taken along with other facts legitimately give rise to an inference that the act was done under an insane impulse. Similarly, it is true to say, that a crime is not excused by its own atrocity. But it cannot be said that the nature of the act or the mode of perpetrating it can under no circumstances be taken into account in considering a plea of insanity. It may be that as a rule of prudence, Courts

Penal Code—contd.

will be slow to infer from such material that the person committing the act was not conscious of its criminality. But there is no warrant for laying down, as a rule of evidence that one must look outside the act itself for the evidence as to how much the accused knew about it. The truth is that in dealing with all such cases no general rule can be applied and the only proper course to adopt is to decide each case on its own peculiar facts bearing in mind, of course, that the point for determination is whether the evidence before the Court is sufficient to establish that the person charged with the offence was not conscious of the nature of the act he was doing or that he was doing what was wrong or contrary to law. *SANKAPPA SHETTY, In re* Mad. 332.

s. 84—Conflicting statements by person, whether sign of insanity.

A conflicting statement by a person is not necessarily a sign of insanity. *SANKAPPA SHETTY, In re* Mad. 332.

s. 84—Plea of insanity—Burden of proof.

Per *King and Patanjali Sastri, JJ.*—The burden of proving insanity is cast upon the accused by s. 105, Evi. Act. and under s. 84, I. P. C., he must prove that at the time of the killing he was by reason of unsoundness of mind, incapable of knowing the nature of his act or that he was doing what was wrong or contrary to law. *SANKAPPA SHETTY, In re* Mad. 332.

ss. 84, 302—Held on facts that plea of insanity was not established and accused guilty of murder—Case held did not call for extreme penalty.

A loving husband and an affectionate father who had never been known to have beaten or ill-treated his wife on any previous occasion suddenly killed her in a closed room bolted from inside by battering her head and body with a sitting plank inflicting as many as twenty wounds and bruises. There was an absence of any motive for the crime. The accused pleaded insanity. The evidence showed that the accused had been strange and eccentric in his actions for some days previous to the committing of the crime. He was labouring under a delusion that some relation of his had given him drugs and that *krutrima* (witch craft) had been done to him. After the room in which the occurrence took place was broken open by five persons, the accused made no attempt to escape but appeared dazed:

Held, (per *King and Gentle, JJ., Patanjali Sastri, J., contra.*)—That the offence committed was murder and the plea of insanity was not established.

Held, further that the case did not call for the extreme penalty of the law and the sentence of transportation was proper as there was no premeditation and the accused must have received what he felt to be considerable provocation before he attacked his wife in the way he did. *SANKAPPA SHETTY, In re* Mad. 332.

s. 99—Constable not having power to arrest trying to arrest person and meeting with resistance by third person—S. 99, if applies.

While the protection of s. 99, I. P. C., extends to acts that are not strictly justifiable by law, it does not extend to acts which are *ultra vires* and have no legal basis. The section applies indeed to a case where an official has done wrongly what he might have done rightly but not to cases where the act could not have been done rightly at all by the official concerned.

Consequently where a Police constable could not have rightly exercised the authority he did in arresting a person unless he had promoted himself to be an officer in charge of a Police Station or to the rank of a Sub-Inspector, there is no legal basis to his action and if the constable is met with resistance by third person

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s. 99 cannot protect his action. BHAIRO MURID JAGRANI v. EMPEROR *Sind* 759

—ss. 107, 114—Abetment, what amounts to—Presence of abettor—He must be deemed to have committed crime.

It amounts to abetment within s. 107, I. P. C., if a person intentionally aids by any act or illegal omission the doing of a criminal act and if a person is present, who if absent would be liable to be punished as an abettor, he is deemed under s. 114 to have committed the crime. MAHADEO NATH KHETRI v. EMPEROR *Pat.* 622

—ss. 143, 144. See Penal Code, 1860, s. 295 *476*

—ss. 149, 436—Common intentions should be established.

Where no common intention to burn the houses is proved all the accused cannot be convicted under ss. 436/149, I. P. C. KING-EMPEROR v. GAYA PRASAD *Oudh* 557

—s. 167. See Penal Code, 1860, s. 21 Expl. 2 *108*

—s. 167—Preparation and framing of electoral rolls, difference—Signing and delivery of rolls is essential to framing required by s. 167—Electoral rolls prepared by Head Clerk charged with such duty—Signing and delivery by his locum tenens—Head Clerk, if liable under s. 167.

Under s. 167, I. P. C., there is no difference between the preparation and the framing of an electoral roll. The signature and the delivery of the electoral rolls under r. 13 (1), Bihar Municipal Election Rules are operations subsequent to the preparation under sub-r. (1), and serve to indicate that the preparation was complete, but cannot be said to be essential to the framing required by s. 167, I. P. C., for it is not always impossible to show in other ways that the process of preparing was complete.

A Head Clerk of a Municipality appointed under r. 13 (1) of the Bihar Municipal Election Rules, 1937, to prepare the electoral rolls, prepared them but went away on leave before signing or delivering them and they were therefore, signed and delivered by his locum tenens:

Held, that for s. 167, I. P. C., to apply the preparing and framing must be complete and final so far as the author is concerned, and it was difficult to exclude anything that it would have been permissible for the Head Clerk to do to the rolls until the time came for his signing them and delivering them. He could not therefore be convicted under s. 167. BRIJ-BEHARI v. EMPEROR *Pat.* 108

—ss. 182, 211—False complaint against unknown persons, whether offence under s. 182 or s. 211—Complaint by Police, if competent.

An offence, constituted by a false complaint against unknown persons is not one under s. 211, Penal Code, but one under s. 182 of the Code. If is, therefore, within the competence of the Police authorities concerned to complain of that offence and within the competence of the Magistrate, on receiving that complaint, to issue summons under s. 182. RAM RENU CHATTARAJ v. EMPEROR *Cal.* 799

—ss. 201 to 203—Offender committing crime and causing evidence of its commission to disappear, if can be convicted under ss. 201 to 203.

Per Shearer, J.—A person who, having committed an offence, subsequently causes evidence of the commission of that offence to disappear, does not in so doing, commit another separate and distinct offence for which the Courts have in strict law jurisdiction to impose a separate punishment.

Penal Code—contd.

Quere.—Whether s. 201, I. P. C., applies to the accused who has committed an offence and caused the evidence of its commission to disappear with the intention of screening himself from legal punishment. MAHADEO NATH KHETRI v. EMPEROR *Pat.* 622

—ss. 201 to 203—Ss. 201 to 203, applicability of.

Per Rowland, J.—The true principle is that there is no law preventing the main offender being convicted under ss. 201 to 203, but in practice no Court will convict an accused both of the main offence and under these sections. MAHADEO NATH KHETRI v. EMPEROR *Pat.* 622

—s. 211. See Penal Code, 1860, s. 182 *799*

—s. 225—Police Officer in arresting person not acting on his own initiative but merely on verbal orders of his superior without written order under s. 51, Criminal Procedure Code (Act V of 1898)—Arrested person is not lawfully detained within meaning of s. 225.

Where while arresting a person a Police Officer is not acting on his own initiative or independently, but is merely doing what his superior officer verbally tells him to do, an order in writing must be delivered to him under s. 56, Criminal P. C. Where an arrest is made without such order in writing the arrested person cannot be said to be lawfully detained within the meaning of s. 225, I. P. C. THE KING v. SRIDHAR RANG. *843*

—s. 294-A, second part—Large number of lottery tickets found in shop of accused—Name of accused on counterfoils in space provided for name of seller to ultimate purchaser—Printed forms containing name of accused in capitals and proposal to purchasers to buy shares in lots also recovered—Proposal and sale, if established within meaning of s. 294-A—Publication, by reason of document having been printed in press.

A large number of lottery tickets were found in the shop of the accused. The name of the accused had been entered in the counterfoils in space provided for the name not of the purchaser of the ticket but of the seller of the ticket to the ultimate purchaser. A printed document headed by the name of the accused in large capitals containing a proposal to purchasers to buy shares each amounting to 1/72nd in lots of twelve tickets of the Irish Free State Hospital Sweepstake, and reciting that the holder of the document was entitled to 1/73rd share of any prize won by any one of the twelve tickets was also found:

Held, that proposal and sale had been established within the meaning of s. 294-A, I. P. C.

Held, also that publication was established by the very fact that the proposal forms had been printed in press. LILOMAL MANUMAL v. EMPEROR *Sind* 704

—ss. 295, 379, 144, 143, 425—Hut on agricultural land, if could be turned, without knowledge of landlord into mosque—Saying of prayers—Whether gives any sacred character to such hut—Felling down of such hut by persons other than landlord—Offence, if falls under s. 295—Conviction under ss. 420-144—Charge under s. 379 referring to individual accused—No finding that any of accused individually took away materials—Conviction held cannot be sustained.

The use of a hut on an agricultural land, without the permission of the landlord, as a public mosque with the azan or public call to prayers is entirely unwarranted; and if the hut is not a mosque but a particular community were only attempting to convert it into one, it is clearly not, "a place of worship" under the law. Where none of the members of the

Penal Code—contd.

community was in a position validly to make the implied dedication a mere fact of saying *azan* does not make it a public mosque. The hut cannot also be regarded as "any object held sacred by any class of persons" within the meaning of s. 295. Nothing of religious reverence, no sacred character, could attach to the hut apart from its attempted conversion into a mosque as this attempt itself is contrary to law; to allow any sacred character to the hut would be to enable the community under the guise of religion to vest the shed as a public mosque in the religious body for whose observance it was to be used, to the detriment of the landlords, who had only settled the land with the tenant for agricultural purposes. Where the *azan* or public call to prayers is found to have begun only about a year before, the landlords do not lose by prescription their right to eject the tenant for the attempted perversion or misuse of the land, rendering it unfit for the purposes of the tenancy. Though this would not entitle others some of whom are amongst the landlords of the village, to take the law into their hands, yet their destruction of the hut does not constitute an offence under s. 295. The conviction under this section is bad in law.

That the hut standing on this land, though it was destroyed, was not a mosque properly so called does not mean the failure of the charges under ss. 144 and 143. Where the common object of destroying the mosque makes no reference to s. 295, and the destruction of the hut, even if it was not a mosque, clearly amounts in the circumstances to mischief as defined in s. 425, I. P. C., it follows that the unlawful assembly must be taken to have had the common object of committing mischief in respect of the hut. The conviction under ss. 144 or 143, as the case may be, is proper.

Where the charges under s. 379 did not refer to the common object of the unlawful assembly. But the charges of theft were intended by the Magistrate to refer to the acts of individual accused apart from their doings as members of the unlawful assembly and there was no finding that any of the accused individually took away any of the materials of the hut, the conviction under s. 379 against the accused cannot be sustained. *BECHAN JHA v. EMPEROR* Pat. 476

—s. 302 See Penal Code, 1860, s. 34 622

—s. 302. See Penal Code, 1860, s. 324 547

—s. 302—Murder — Sentence — Absence of motive is material in considering question of sentence—Act unpremeditated and result of impulse and temper—Proper sentence.

Per *Gentile, J.*—The absence of an apparent motive on the part of the accused in committing a murder is material when the question of sentence is considered. Where the offence committed was not premeditated in any way but was the result of impulse and temper, the proper sentence is one of transportation for life, though the assault was a violent one. *SANKAPPA SHETTY, In re* Mad. 332

—s. 302—Sentence — Youth of 17 committing murder in company with elder relative—Transportation for life held proper sentence.

Youth, undoubtedly, in some cases may be a very excellent ground for giving the lower sentence. It is a very rare thing for the High Court to sentence a youth of 17 or below to death. It would only be in a very exceptional case that this would be done. In fact the normal sentence for a youth of this age would be transportation for life. A very strong case, indeed, would have to be made out in order to justify the hanging of a youth of this age. When a youth of this age commits a murder in company with an elder relative that is an-

Penal Code—contd.

other excellent reason for giving only transportation for life. *MAGHAR SINGH NAHAR SINGH v. EMPEROR* Lah. 719

—s. 304. See Penal Code, 1860, s. 324 547

—ss. 304-A, 326—S. 304-A must be read with ss. 336 to 338—Accused while using spear against his assailants accidentally striking deceased who had intervened to separate fighting persons—Accused is guilty under s. 326 and not under s. 304-A.

Section 304-A, Penal Code, must be read along with ss. 336, 337 and 338, of the Code: All the sections are confined in their operation to acts done without any criminal intent, apart from the rashness or negligence which is their essential ingredient. Reading s. 321, with s. 322, it is obvious that the guilt of an accused person remains just the same whether in seeking to inflict simple hurt or grievous hurt, as the case may be, upon one person he actually causes the intended hurt to that person or to some other.

Where in using his spear against his assailants the accused accidentally struck the deceased who had intervened to separate the fighting persons:

Held, that the accused was guilty under s. 326 and his conviction s. 304-A was illegal. *CHHALU v. EMPEROR* All. 794

—ss. 324, 304, 302—Injury by accused on deceased's head not of nature to entail serious consequences in man of normal health—Deceased suffering from chronic malaria—Formation of abscess due to lowered vitality—Offence held fell under s. 324—Use of dangerous weapon held no indication of intention to cause injury likely to cause death—Offence, therefore, held did not amount even to culpable homicide.

The injury inflicted by accused on the head of the deceased was not such as to entail serious consequences to a man in normal health. It had healed up at the end of seven days, but he had a temperature and on this account the doctor advised him to remain in the hospital until the temperature had subsided. However, the deceased stated that he suffered from chronic malaria and that his fever was due to malaria, and he insisted on leaving the hospital. He was brought back to the hospital again. He was then partially paralyzed on the left side, and there was an abscess over the seat of the first injury, which, was healed. An operation was performed on the same day; the abscess was lanced, and about eight ounces of pus were removed, but he became unconscious and died. Had the deceased stayed in hospital as advised, even if the abscess on the injury had formed, it would have been a simple matter to have cured it and no abscess on the brain would have formed at all and the deceased would have recovered. The deceased suffered from chronic malaria, and this malaria lowered his power of resistance and helped the formation of pus when there was an open wound. Death was not due directly to the enlarged spleen or to the heart, but these contributed indirectly because they lowered the vitality and power of resistance of the deceased. Thus the immediate cause of his death was his debilitated condition for which the injury was in no way responsible:

Held, that the accused was guilty of causing simple hurt, with a weapon for cutting, punishable under s. 324, I. P. C.

Held, further that the fact that a dangerous weapon was used was often and might be indeed generally, a matter to be taken into account in deciding questions of intention; but circumstances alter cases, and, hav-

Penal Code—contd.

ing regard to the medical evidence as to the wound itself, it was impossible to say that there was an intention to cause such injury as was likely to cause death. The offence could not, therefore, amount even to culpable homicide. *NGA MOE v. THE KING*

Rang. 547

— s. 326. See Penal Code, 1860, s. 301 A

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— s. 341—Wrongful restraint—Complainant on tumbum—Accused obstructing it and preventing complainant from proceeding on his way—Offence under s. 341, held committed.

Where the complainant was proceeding on a road on tumbum and by obstructing the tumbum the accused prevented the complainant from proceeding on his way and assaulted him ;

Held, that the facts constituted the offence of wrongful restraint under s. 341, I. P. C. *MANGAL v. EMPEROR*

Pat. 30

— s. 379. See Penal Code, 1860, s. 295

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— s. 379—Accused seizing cattle of complainant for certain dues although the complainant had already paid them—Accused subsequently attempting to return animal—Accused held guilty under s. 379.

A contractor for payment of *tirni* or grazing dues seized an animal of the complainant although the latter had already paid the dues. The contractor subsequently attempted to return the animal to the complainant who refused to take it back ;

Held, that the complainant was caused a wrongful loss although the contractor did not intend to deprive the complainant permanently of the animal. The contractor therefore was guilty under s. 379, I. P. C. *ABDUL KHALIQ KHAN v. EMPEROR*

Lah. 800

— s. 379—In execution of decree property belonging to other person than the judgment-debtor taken away by bailiff—Property taken back by person owning it and by his associates—No offence under s. 379.

It is an absurd doctrine to apply to the people of a Punjab village that if their property is wrongly taken by some one acting under colour of Govt. office it is their duty to go to the Police or to the Court and that it is a crime to take back the property.

Where in execution of a decree against a certain person, property belonging to another person is being wrongfully taken away by the bailiff and the latter and his associates take back that property, this is not an offence under s. 379, I. P. C. *JAHANA v. EMPEROR*

Lah. 564

— ss. 390, 394—Words 'for that end', in s. 390, meaning explained—Accused first beating complainant and then committing theft—If offence under s. 394 committed.

The words 'for that end' used in s. 390, I. P. C., clearly mean that the hurt caused by the offender must be with the express object of facilitating the committing of the theft or must be caused while the offender is committing the theft or is carrying away or is attempting to carry away the property obtained by the theft. It does not mean that the assault or the hurt must be caused in the same transaction or in the same circumstances.

Where it was established that the accused persons first belaboured the complainant and his servant and subsequently committed the theft of the cash ;

Held, that in the circumstances it could not be said that whatever injury was caused it was caused when the assault was made with the primary object of

Penal Code—contd.

enabling the accused to the committing of the theft. The assault or the beating had no relation whatever to the commission of the theft, although the theft was committed at the same time or immediately afterwards. The accused were not, therefore, guilty of an offence under s. 391. *BISHAMBHAR NATH v. EMPEROR*

Oudh 222

— s. 394. See Penal Code, 1860, s. 390

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— s. 395—Evidence of identification of those taking part in dacoity—Value of.

Evidence of identification of those taking part in dacoities at night is apt to be unreliable. *BIRAM SARDAR v. EMPEROR*

Bom. 122

— s. 397 as amended by Burma Act (IV of 1940)—Offences committed before March 16, 1940—Amending Act IV of 1940, does not apply—Offence before March 16, 1940, but conviction after that date—S. 397 as it stood before amendment must be applied.

The provisions of Burma Act IV of 1940, have no application to offences which were committed before March 16, 1940. Consequently, the provisions of s. 397, I. P. C., as they existed prior to the amendment must be applied in a case where the accused committed the offence before March 16, 1940, but was convicted after that date, for it is by reason of the commission of the offence that the offender incurs the punishment and not by reason of his conviction by a Criminal Court. The trial, ending in a conviction, is merely the means whereby a Court of criminal justice ascertains that the accused is the person who has incurred the punishment by having committed the offence. This is made clear by s. 5, General Clauses Act. *SHWE HLA U v. THE KING*

Rang. 720

— s. 425. See Penal Code, 1860, s. 295

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— s. 425—Magistrate satisfied from evidence that offence under s. 425, Penal Code (Act XLV of 1860), is committed—Conviction, if can be given—Judgment, if should contain precise expression used in section defining the offence.

Where the Magistrate applies his mind to the evidence and in finding that the accused had caused mischief to the complainant he must have been satisfied that the ingredients of the offence defined in s. 425, I. P. C., were present the finding is sufficient to warrant a conviction. It is not necessary in a case of this sort to embody in the judgment the precise expressions which have been used in the section of the I. P. C., which defines the offence of which the accused person is convicted. *HAFIZUR RAHMAN v. AMINAL HAQUE*

Cal. 38

Permanent Settlement Regulation (I of 1937. Construction—Effect of. See Bihar Agricultural Income Tax Act, 1922, s. 2 (a)

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Pleadings. See Practice

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Amendment—Arguments in appeal before High Court heard—Amendment of cause title of plaint cannot be allowed.

It would be highly undesirable from every point of view to allow applications of the cause title of the plaint which are made after the whole case is argued, and the parties have an opportunity of knowing or at least guessing with some degree of accuracy what is going to happen to their case. *KUPPU GOVINDA CHETTIAR v. UTTUKOTTAI CO-OPERATIVE SOCIETY*

Mad. 769

Amendment—Plaintiff knowing plaint to be defective—Opportunity to amend given—Defect

Pleadings—contd.

not removed—Further application to amend beyond limitation, held could not be allowed.

The plaintiff knew at an early stage of the proceedings that his plaint was defective. He was given an opportunity to amend his plaint. His amendment did not, however, remove the defect. He subsequently applied for further amendment:

Held, that in all the circumstances, and especially since the application for amendment was made well beyond the period of limitation no further indulgence could be granted to the plaintiff. *BANWARI RAM v. MUHAMMAD YAR KHAN* All. 72

Amendment—Proposed amendment should be submitted before leave is granted—Original claim based on renewal given to plaintiff of earlier pro-note in favour of deceased—Amendment suing on earlier pro-note as deceased's executor—Amendment, if alters suit.

It is usual and generally most desirable that a party desiring to amend his pleading should submit his proposed amendments in explicit form before the leave sought is granted, that is, he should formulate and state in writing the exact amendments for which he asks.

The fundamental character of the suit is not altered where the plaintiff first bases his claim on a renewal given to him of a pro-note, executed in favour of the deceased and subsequently amends his pleadings and sues on the original pro-note as executor of the deceased. *EUSOOF KARWA v. NIEMEYER* Rang. 77

Practice—Adjournment—Illness of party—Court's duty.

Ordinarily a party is entitled to be given a reasonable opportunity for being physically present himself when his case is being heard, and if his physical presence is made impossible by reason of illness, justice requires that he should be given an adjournment for the purpose of enabling him to be present. *MANTHIRI GOUNDAN v. ARUNACHALAM GOUNDAN* Mad. 795

Appeal—Appeal presented and request for time to obtain necessary record made—It should not be disposed of on same day.

An appeal should not be disposed of on the same day on which it is presented in spite of the request of the Advocate for time to obtain the necessary records. *PONNUSWAMI REDDIAR, In re* Mad. 256

Appeal—Decree adjudicating rights between defendant No. 1 and plaintiff—Other defendants discharged under O. I, r. 10, Civil Procedure Code (Act V of 1908)—Appeal against decree—Question of liabilities of defendants discharged cannot be agitated.

The judgment and decree of the Court below did not contain any adjudication regarding the liability of defendants Nos. 2 to 9 who were discharged under O. I, r. 10 by a separate order passed by the Court. The decree in the case was a decree which could be said to be adjudicating the questions as between the plaintiff on the one hand and defendant No. 1, on the other only:

Held, that in an appeal from such a decree it was not possible for the plaintiff to have raised the contention regarding the liabilities of defendants Nos. 2 to 9. *LALSA MOTISA v. BHAGWANT RAMJI NAIK KANAK* Nag. 37

Appeal—New plea—Legality of partnership as regards constitution, is mixed question of law and fact.

The question as to the legality of the constitution of a partnership is clearly a mixed question of law and fact and the Appellate Court cannot for the first time

Practice—contd.

raise such a question and decide it. *MULCHAND TAGO-MAL v. SHAMDAS JETHANAND* Sind 380

Duty of Court—Appealable case—Court's opinion on all important issues must be recorded.

In appealable cases Courts are bound to record their opinion on all important issues. *LOKE NATH MUKHERJEE v. ABANI NATH MUKHERJEE* Cal. 374

New plea—Plea of res judicata for first time in second appeal.

The plea of res judicata is not a pure question of law and where the point was neither raised nor pleaded in either of the lower Courts it cannot be allowed in second appeal. *GHASIRAM v. KUNDANBAI Nag.* 361

Non-joinder of parties—Suit cannot be dismissed.

A suit cannot be dismissed in toto on the mere ground of non-joinder of parties. *CHAGGANLAL MARWARI v. INDRA KROT* Pat. 459

Pleadings—Limitation—Owner of land dispossessed and his irrigation rights obstructed—He cannot circumvent law by suing for injunction in respect of irrigation rights.

An owner of ahar land whose rights of irrigation have been obstructed and who has been dispossessed, can bring a suit for possession and he cannot be allowed to circumvent the law of limitation by suing for injunction in respect of irrigation rights. *AKHAURI HALIWANT SAHAY v. DEO NARAIN MALI* Pat. 243

Pleadings—Plaint returned for presentation to proper Court—Subsequent representation to same Court—Plaint re-admitted without giving old number—True copies of written statement of old plaintiff put on record—No objection by plaintiff—They held must be taken to have admitted these as pleading of defendant.

The plaintiff was at first returned to the plaintiffs for presentation to the proper Court and was then re-presented to the same Court when it was re-admitted without giving to the suit on re-admission the same number as was given to the proceeding in the old suit, when the written statement already filed by the defendants in the first suit would automatically have become part of the record of the proceedings in the second. However, true copies of the defendants' written statement in the first proceedings were put upon the record in these proceedings, and neither plaintiff nor the defendant objected:

Held, that it must be taken that they accepted these true copies of these written statements as the pleadings of the defendants in the case. *MULCHAND CHANDUMAL v. HARKSHINDAS PARMANAND* Sind 461

Precedents—Right acquired not under statute but under deed—Cases of Hindu widow or widows of taluqdars cannot be relied on.

It would not be safe to rely on the cases of Hindu widows or the widow of taluqdars, where the right has come into existence under the deed and not under any statute. *HARI SARAN DAS v. HAR KISHAN DAS* Oudh 16

Suit for declaration of plaintiff's title to land sold in execution of rent decree to which he was not made party, against auction-purchaser—It cannot be dismissed merely because some of persons having interest in holding were not impleaded.

Where one of the tenants who was not impleaded in a suit for rent of holding brings a suit subsequent to the sale of the holding in execution, against the auction-purchaser, for declaration of his title to the land, so far as the plaintiff and the auction-purchaser are concerned, the suit cannot be defeated merely on the ground that some persons who might possibly have an interest in the holding are not made parties though the

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decision is not binding against such persons. NEHAL KHAN v. FELU DOME Pat. 435

Precedents. See Practice

Pre-emption—*Pre-emption suit decreed—Amount deposited by pre-emptor—Vendee withdrawing same—During execution proceedings by pre-emptor for possession pre-emptor and vendee entering into compromise under which vendee paying certain amount to pre-emptor before Court which ordering execution to be filed in full satisfaction—Compromise held out and out sale.*

A pre-emption suit was decreed on payment of Rs. 1,800. This sum was deposited in Court and was taken out by the vendee. The pre-emptor subsequently applied for execution of his decree by being put in possession. But during these proceedings the pre-emptor and the vendee entered into a compromise whereby the vendee paid Rs. 2,000 to the pre-emptor to cover the cost of the land and the expenses incurred by him in the litigation and the pre-emptor agreed that the suit should be considered as dismissed. Rs. 2,000 was paid in the presence of the Court and the Court passed an order that the execution should be filed in full satisfaction :

Held, that the question whether a sale was a sale of land or not must depend on the circumstances of each particular case, and that there was an out and out sale of land by virtue of the compromise inasmuch as the land had vested in the pre-emptor by virtue of the decree when he deposited Rs. 1,800 in Court and he was at the time of the compromise the absolute owner of the property of which he could get possession by execution. INZAR GUL SAID ANWAR v. HAJAB GUL TAZA GUL Pesh. 92

Presidency Towns Insolvency Act (III of 1909), ss. 8 (2) (b), 36 (Rangoon)—*Letters Patent (Rangoon), cl. 13—"Judgment", meaning of—Insolvency proceedings, whether "suits"—Decision whether witness should or should not be further examined under s. 36, if judgment—Refusal to exercise jurisdiction, if judgment.*

The word "judgment" in cl. 13, Letters Patent (Rang.) means and is a decree in a suit by which the rights of the parties at issue in the suit are determined. For the purposes of appeals the various proceedings in an insolvency should be regarded as a series of "suits" arising out of one failure and that is a "judgment" for this purpose which finally determines the substantive rights of those concerned in any one such "suit". A decision, therefore, which finally determines the question whether a witness should or should not be further examined under s. 36 of the Presi. Towns Insol. Act, is a "judgment" within the meaning of cl. 13 of the Letters Patent and is therefore, appealable. A "judgment", properly so called, must be an exercise of jurisdiction and therefore a refusal to exercise jurisdiction, at all events if it be a lawful refusal, cannot be a "judgment." EBRAHIM MOHAMED BODI v. K. BA GYI Rang. 250

s. 17. See Presidency Towns Insolvency Act, 1940, s. 49 318

s. 36. See Presidency Towns (Rangoon) Insolvency Act, 1909, s. 8 (2) (b) 250

s. 36—Costs—Witness legally represented at examination, if entitled to costs.

A witness who is legally represented at an examination under s. 36 is not entitled to costs of such representation. It is a measure of prudence which he takes at his own expense. A witness who is, rightly or wrongly made a respondent to an appeal from an order

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under s. 36 and served as such but against whom no substantive relief was asked for and who would not have been out of pocket by reason of the appellate decision, had it gone against him, if he had not contested the appeal is not entitled to costs. EBRAHIM MOHAMED BODI v. K. BA GYI Rang. 250

s. 36—Discretion under s. 36 in refusing to summon witness or further examine him, if can be interfered with in appeal.

The discretion of the Court under s. 36 in refusing to summon or further to examine a witness is not lightly to be interfered with on appeal. It is not enough for the appellant to show that the discretion was wrongly exercised, but he must go further and show either that it was not exercised at all, or, if exercised, was exercised either unjudicially, or on a wrong principle of law, or on a wrong appreciation of the facts. But a right decision even if reached in the wrong way will not be interfered with. EBRAHIM MOHAMED BODI v. K. BA GYI Rang. 250

s. 36—Examination under s. 36, nature of—Right of.

The only right which the section gives to the Official Assignee or to any creditor who has proved is a right to apply to the Court to summon a witness. It is in the discretion of the Court whether or not it will do so at all, and if it does do so, the examination of the witness is, in theory, an examination by the Court; it is only as a matter of practice that the person applying for the summons is permitted to attend and question the person summoned at all. EBRAHIM MOHAMED BODI v. K. BA GYI Rang. 250

s. 36—Examination, when should be ordered—Fact that litigation against witness may ensue, if ground for refusing to examine witness.

The Court ought not to make an order for the examination of a witness under s. 36 of the Act unless there is ground for thinking that the order is likely to be of some use. Sub-sections (4) and (5) of s. 36 make it quite clear that the mere fact that the litigation against the witness may ensue cannot be a ground for refusing the examination. EBRAHIM MOHAMED BODI v. K. BA GYI Rang. 250

s. 36—Exercise of powers under s. 36.

Section 36 confers on the Court an extraordinary and inquisitorial, though certainly a necessary power, to be exercised in the interests of the due administration of the insolvent's estate without fear, but not without scrupulous regard to considerations of economy and of fairness to the person examined. EBRAHIM MOHAMED BODI v. K. BA GYI Rang. 250

s. 36—Scope of examination under s. 36.

It is impossible to lay down any hard and fast rule limiting the scope of a private examination under s. 36 and though the Court may (not must) think it proper to confine it to questions arising out of the matters stated in the affidavit leading to the summons there is certainly no rule that only those matters themselves may be put to the witness.

Section 36 is not in terms restricted to the examination of persons who are thought to be indebted to or possessed of part of the debtor's estate but extends to "any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property". EBRAHIM MOHAMED BODI v. K. BA GYI Rang. 250

ss. 49, 17, 60—Preference of one creditor over another—After-acquired property of insolvent—Payments by insolvent before adjudica-

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tion to creditor without notice of insolvency, if protected.—Prior to adjudication insolvent obtaining loan from bank and undertaking to pay in monthly instalments from salary—Insolvent authorizing and requesting employer to pay instalments out of his salary—Completed assignment or charge, if created in favour of bank—Insolvent's adjudication, effect of, on contract—Amount ordered, by Court under s. 60 (2), if vested in Official Assignee and balance, if belonged absolutely to insolvent—Official Receiver, if can recover amount paid to bank out of such balance.

The insolvency law aims of equal and rateable distribution of the property of the insolvent among the creditors who are entitled to prove their debts in insolvency without any preference of one creditor over another. The property of the insolvent comprises also what is known as the after-acquired property, and the payments made by the insolvent to any of his creditors will be protected provided they are made before his adjudication and the creditor has no notice of the insolvency.

Sometimes before his adjudication, the insolvent got a loan from a bank during the pendency of a prior insolvency proceeding. The insolvent undertook to pay back the loan in monthly instalments out of his salary and authorized and requested his employer, the Railway Co., to pay the said instalments to the bank and the bank which had no notice of the insolvency as per contract continued to recover the instalments even after the adjudication, until the debts was fully recovered :

Held, (i) that on the date of the insolvency there was only an authority or direction and request by the debtor to the Railway Co., to pay a portion of his salary to the bank or at best a contract to assign the future salary as and when it was earned and that there was no completed assignment or charge. By the adjudication of the insolvent the contract was revoked and consequently the liability of the insolvent or his estate for breach of such contract was only in damages and the creditor was not entitled to enforce the transaction as against his subsequent salary, at any rate not against the assignee in bankruptcy.

(ii) that although any dealing by the insolvent with reference to after-acquired property was protected if the assignee acted *bona fide* and prayed value, no matter that he had knowledge of the insolvency, a distinction had been made between the insolvent's after-acquired property in general and his pays, salary or other income, by reason of the provisions contained in s. 60, Presi. Towns Insol. Act, and that only the amount ordered by the Court under s. 60 (2) vested in the Official Assignee; and the balance being at the absolute disposal of the insolvent, he was free to pay any one of his creditors in full and consequently the Official Receiver could not recover the amount paid by the insolvent to the bank out of such balance subsequent to his insolvency.

(iii) that the letter of the Official Assignee permitting the bank to collect the amount from the Railway Co. according to the contract amounted to a voluntary payment. *OFFICIAL ASSIGNEE v. SECRETARY, M. & S. M. RAILWAY EMPLOYEES CO-OPERATIVE URBAN BANK, LTD.*

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ss. 53 (3), 51—Execution sale—Purchase in good faith prior to adjudication order—Purchase, if can be assailed under s. 51—Person relying on s. 53 (3)—Burden is on him to show that he is covered by it.

Sub-s. 3 of s. 53, Presidency Towns Insol. Act, has this effect that if it can be shown that a purchaser in

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execution proceedings has purchased in good faith prior to the order of adjudication, his purchase cannot be assailed on grounds based on s. 51, Presidency Towns Insol. Act. If a party seeks to validate an otherwise invalid purchase by relying on sub-s. (3), the burden falls on him of showing that he is covered by it.

In re KEDARNATH SEN

Cal. 423

s. 60. See Presidency Towns Insolvency Act, 1909, s. 49

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s. 60—Rule for fixing amount under s. 60 (2).

The first one hundred rupees of the insolvent's salary and a half of the excess over one hundred are exempt from attachment; and therefore there is no reason why the balance at least should not be required to be paid for the benefit of the creditors. That should be the ordinary rule in fixing the amount under s. 60 (2). *OFFICIAL ASSIGNEE v. SECRETARY, M. & S. M. RAILWAY EMPLOYEES' CO-OPERATIVE URBAN BANK, LTD.*

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Press (Emergency Powers) Act (XXIII of 1931), s. 4 (1) (a) and (d)—Common sense interpretation must be given to document complained of—Poem entitled "Labourers, the mainstay of the world", urging labourers not to tolerate exploitation of their masters and inciting bloody revolution and destruction of present social order by force—Poem held fell under s. 4 (1), cl. (a), and not under cl. (d).

A common sense interpretation must be given to the document complained of namely, the impression it gives to a man of ordinary common sense.

In order to show that certain words come under s. 4 (1) (a) of the Press (Emergency Powers) Act, it is unnecessary to show that the words tend to incite to, or to encourage the commission of a particular offence or offences. It is sufficient if they tend to incite to or to encourage the commission of cognizable offences of violence in general.

A poem in Hindi was entitled "Labourers—the mainstay of the world." It began emphasising that labourers are the mainstay of the present world and then proceeded to describe their unfortunate and pitiful lot. The author subsequently pointed out that though speechless to-day, when organized they would be as powerful as millions and this portion of the poem ended with these words: "Why are you helplessly tolerating the exploitation of your masters". The remaining lines were as follow :

"Labourers. Raise now the cry of Revolution.

The heavens will tremble, the Universe

Will shake and the flames of revolution

Will burst forth from land and water. You who

have been the object of exploitation,

Now dance the fearful dance of destruction on this earth.

Truly, labourers. Only total destruction will create a new world order and that will bring happiness to the whole world":

Held, that the words "masters or exploiters" are too wide and vague to denote a definite or ascertainable class so as to come within cl. (d) of s. 4 (1) of the Act.

Held, further that the poem contained words tending to incite to or to encourage bloody revolution, and the destruction of the present social order by bloodshed and force and clearly came within s. 4 (1) (a) of the Act. *BADRI NARAIN SINGH v. CHIEF SECRETARY TO GOVERNMENT, BIHAR*

Pat. 273 S B

Presumption. See Evidence Act, 1872, s. 114 (d)

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Principal and agent—Power-of-attorney—
Authority to adjust matters—Whether includes power to refer to arbitration.

Where a power-of-attorney authorises the agent to adjust a matter, the power does not include a power to refer the matter to arbitration on the principle underlying the maxim *delagata potestas non potest delegari*. P. L. S. S. RAMANATHAN CHETTIAR v. K. M. V. V. KUMARAPPA CHETTIAR *Mad.* 826

Promissory note—One of parties promising to execute pro note but not doing so—No evidence that he authorized anyone to affix his mark—His liability under pro note—Pro note purporting to be jointly executed by A and B in renewal of old joint pro note—A alone executing it—No evidence whether A executed only on faith that B would also execute—Note, if binding on A.

Where there is no evidence that a party to a promissory note authorized anyone to affix his mark and all that is in evidence is that he promised to execute the note and went away without doing so there was no execution either by him or by a person authorized to execute on his behalf. He is not, therefore, liable under the promissory note.

When A executes a bond on the faith that B will also execute it and that B fails to do so, A has an equity in his favour relieving him from a liability which he never intended to undertake. But it is also settled that if A signed the bond without any regard to the question whether B signed it or not and if he delivered it as his bond, he is liable thereon, even though B did not sign. The question whether a particular instrument was signed by one of the parties on the faith, that the other would also sign is a question of fact and or is a ground of defence which must be established by the person who has signed the instrument.

When there is a promissory note purporting to be a joint promissory note of A and B, in renewal of previous joint promissory note and A alone executes and delivers that note and B fails to execute it, the note is binding on A, when there is no evidence one way or the other whether or not A executed only on the faith that B would also execute. BOLISETTI SUNDAM v. KANUPARTHI VENKATAPPADASU *Mad.* 846

Stamped and signed paper delivered by defendant to a person—Suit by plaintiff on hand note—Defendant producing receipt executed by such person—Question whether hand note was completed in favour of plaintiff at date of receipt is one of fact.

A hand-note is certainly a negotiable document, but if it is found as a fact that it was never negotiated that would alter the situation. Where the defendant had delivered a stamped and signed paper to a person, the question as to whether at the time when the payment was made by the defendant under a receipt purported to have been executed by such person, the hand-note had already been completed in favour of the plaintiff who has brought a suit on the hand note, is a question of fact. HARI KANT JHA v. NATHU CHOUDHURY *Pat.* 433

Provincial Insolvency Act (V of 1920), ss. 4, 53—Question relating to fictitious character of transfer not falling under s. 53—If can be tried under s. 4—Held that gift made by insolvent in favour of his son and nephew was not fictitious and could not be annulled under s. 4.

It is open to an Insolvency Court to try a question under s. 4 of the Prov. Insol. Act relating to the fictitious character of the transfer even though it does not fall under s. 53 of the Act the petition having been made by the creditor more than four years after the transfer.

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A donor who was subsequently adjudicated insolvent had made a gift of his property to his minor son and nephew. The mutation of names was effected in favour of the donees in respect of the property gifted. No *khevat* stood in the name of donor after the date of the gift and donor no longer retained possession over the gifted property. The amount of indebtedness admitted by the insolvent did not show that the insolvent was under any pressure from his creditors which led him to make the gift in question. It had not been shown that any of the debts was a decretal debt or that there was any execution of decree pending against the insolvent.

Held, that in the circumstances of the case there was no evidence whatsoever to show that the deed of gift was a fictitious or colourable transaction which was not intended to take effect. Therefore, the insolvent had no interest in the property gifted and the gift could not be annulled under s. 4. AVADH RAJ SINGH v. MANGREY *Oudh* 600

— **s. 28.** See Provincial Insolvency Act, 1920, s. 51 *605*

— **s. 28—S. 28, scope of—Execution sale confirmed after insolvency proceedings were over—Judgment-debtor cannot ask Court not to confirm it.**

Section 28, Prov. Insol. Act bars the remedy of the creditor only during the pendency of the insolvency proceedings but where the sale was confirmed after they were over the judgment-debtor has no right to ask the Court not to confirm the sale. SURAJ BALI v. GANGA PERSHAD *Oudh* 605

— **ss. 51, 28—Property sold and purchased by decree-holder—No claim laid by Receiver—Judgment-debtor cannot say that sale should not be confirmed.**

Under s. 51, Prov. Insol. Act the decree-holder will not be entitled to the benefit of his execution against the Receiver only, but where the Receiver has laid no claim to the property sold and purchased by the decree-holder the judgment-debtor has no right to say that the sale held in favour of the decree-holder should not be confirmed. SURAJ BALI v. GANGA PERSHAD *Oudh* 605

— **s. 53.** See Provincial Insolvency Act, 1920, s. 4 *600*

— **ss. 72, 75—Court's refusal to prosecute on creditor's application—Creditor, if has right of appeal.**

Where the Court refuses to prosecute the insolvent under s. 72, Prov. Insol. Act on a creditor's application it is doubtful whether the creditor has a right of appeal. CHIMAKURTI SESHAYYA v. HIRACHAND CHUNILAL *Mad.* 33

— **s. 72 (2)—Court prosecuting undischarged insolvent under s. 72 (2)—Before dismissal of appeal, insolvent obtaining discharge—Proceedings against him, if made void.**

Where the Insolvency Court prosecutes an undischarged insolvent under s. 72 (2), and before the dismissal of his appeal against the prosecution the insolvent obtains his discharge, the discharge cannot render the proceedings against the insolvent void. CHIMAKURTI SESHAYYA v. HIRACHAND CHUNILAL *Mad.* 33

— **s. 72 (2)—Power to prosecute under s. 72 (2)—Purpose and scope of—Bar of res judicata against Court—Insolvency Court, if can reconsider its decision not to prosecute in light of second application by creditor.**

Under s. 72 (2), there is a power given, not to the interested party, but to the Court itself on being

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atisfied that an offence of the kind contemplated had been committed, to send the case to the Magistrate. This is a power conferred not in the interests of this or that party, but in order that the Court itself may prevent an offence against the insolvency law. Hence there can be no question of a bar of *res judicata* operating against the Court. The Insolvency Court can, therefore, consider a decision of its own not to prosecute in the light of a second application from the creditor, although the Court, will not ordinarily prosecute on the strength of information on which it has previously declined to act. CHIMAKURTI SESHAYYA v. HIRACHAND CHUNILAL *Mad.* 33

— **s. 72 (2), 75**—*Before directing prosecution, notice to insolvent, if essential.*

Substantially the provisions of s. 72 (2), Prov. Insol. Act, are analogous to those of s. 476, Criminal P. C., and the Insolvency Court should ordinarily give notice to the insolvent before directing his prosecution. CHIMAKURTI SESHAYYA v. HIRACHAND CHUNILAL *Mad.* 33

— **s. 75.** See Provincial Insolvency Act, 1920, s. 72 (2) *33*

— **s. 75**—*Decision to prosecute—Insolvent has right of appeal.*

An insolvent has a right of appeal similar to that provided by s. 476-B, Criminal P. C., against the order of the Court directing his prosecution. CHIMAKURTI SESHAYYA v. HIRACHAND CHUNILAL *Mad.* 33

Provincial Small Cause Courts Act (IX of 1887), s. 25—Duty of High Court.

It is the duty of the High Court acting under s. 25 of the Small Cause Courts Act to see that substantial justice is done as between the parties. GAYA PRASAD v. AHMAD HUSAIN *Oudh* 744

Punjab Courts Act (VI of 1918), s. 41 (3)

—*Lower Court holding that plaintiff as remote reversioner is not entitled to challenge alienation by widow—Plaintiff wishing to establish custom to contrary in second appeal—Certificate, necessity of.*

Where it has been held by the lower Court that reversioners in the position of plaintiffs would ordinarily have no right to contest an alienation made by a widow with the assent of the next reversioner, the plaintiffs wishing to establish a local custom to the contrary in second appeal must produce a certificate under s. 41 (3), Punjab Courts Act. SUNDAR v. TABO *Lah.* 310

Punjab Court of Wards Act (II of 1903), s. 19—Suit against ward for declaration that plaintiff is entitled to muafidari rights in lands owned by ward—Rights neither vesting in ward nor under superintendence of Court of Wards—Notice under s. 19, if necessary.

In a suit for a declaration that the plaintiff is entitled to *muafidari* rights in land owned by a ward, when the *muafidari* rights do not vest in the ward nor are they under the superintendence of the Court of Wards, no notice under s. 19, Punjab Court of Wards Act is necessary. AMARJIT SINGH v. GURDWARA THAMJI SAHIB *Lah.* 883

— **s. 19**—*Suit under s. 25-A, Sikh Gurdwaras Act (VIII of 1925), against ward in respect of rights in property belonging to ward—Entire property under superintendence of Court of Wards—Notice under s. 19, if essential.*

Where a tribunal declares a well and two cisterns to belong to a ward (Guru) subject to certain rights therein in favour of the public, and subsequently a suit is brought against the ward under s. 25-A, Gur-

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dwaras Act, in respect of these rights and the entire property of the ward is under the superintendence of the Court of Wards, a notice under s. 19, Punjab Court of Wards Act is necessary. AMARJIT SINGH v. GURDWARA THAMJI SAHIB *Lah.* 883

Punjab Debtors' Protection Act (II of 1936), s. 9—Objections under—To be decided by executing Court—Collector's jurisdiction in this respect—Land actually alienated by Collector in full satisfaction of decree—Executing Court cannot deal with objections under s. 9.

The validity of objections under s. 9, Punjab Debtors' Protection Act can be decided by the Court which passed the decree or order that is, the executing Court. The Collector has no jurisdiction to decide such objections. The executing Court, however, has no jurisdiction to deal with objections under s. 9 regarding the attachability of the land after it has actually been alienated by the Collector in full satisfaction of the decree.

When a special jurisdiction is conferred it must be taken as strictly limited to the terms in which it is created and cannot be extended to cover matters to which no express reference has been made or which do not have to be decided in order to carry out the purpose for which the special jurisdiction has been created. LAKHMI CHAND v. AULIA KHAN *Lah.* 634

Punjab Pure Food Act (VIII of 1929), s. 13 (1) (a)—Conviction under—When can be had.

For a conviction under s. 13 (1) (a) Punjab Pure Food Act, it is essential to prove *inter alia* that the ghee was sold. Conviction cannot be based on the fact that the ghee was exposed for sale. SAT PAL TARA CHAND v. LAHORE MUNICIPALITY *Lah.* 160

Punjab Restitution of Mortgaged Lands Act (IV of 1938), ss. 2, 3, 7 and 12—Determination of validity of Act—Pith and substance—Subject-matter of Act falls within Sch. VII, Provincial Legislative List, item No. 21, Government of India Act, 1935, (25 & 26 Geo. V, Ch. 42) and is intra vires of Provincial Legislature.

The test for determining the scope and validity of legislation is to ascertain the true nature and character of the enactment, that is to say its "pith and substance." The "pith and substance" of the Punjab Restitution of Mortgaged Lands Act (IV of 1938), is to empower the Collector to extinguish subsisting mortgages effected before June 8, 1901, subject to the condition of payment of compensation in certain cases. The subject-matter of that Act falls within the expression in item No. 21, "land, that is to say rights in or over land" and consequently the restriction on the jurisdiction and powers of Civil Court, provided by s. 12 of that Act, is also within the authority of the Provincial Legislature. For the same reasons, the impugned Act cannot be said to conflict with the Contract Act in so far as it deals with land other than agricultural.

The mere fact that the subject-matter of the impugned Act may also be affected by certain provisions in the Current Legislative List, would not attract the provisions of s. 107, regarding repugnancy. Consequently the Punjab Restitution of Mortgaged Lands Act, is *intra vires* of the Provincial Legislature. MEH RAJ v. ALLAH RAKHIA *Lah.* 413 F B

Punjab Sikh Gurdwaras Act (VIII of 1925), ss. 8, 10—Power of tribunal under s. 8—Whether can adjudicate of right, title and in-

Punjab Sikh Gurdwaras Act—concl'd.

terest of Gurdwara in property mentioned in list under s. 7 (3) of Act.

Under s. 8, Sikh Gurdwaras Act, the tribunal has only to determine the nature and character of the institution and not to adjudicate upon the right, title or interest of the Gurdwara in the properties mentioned in the consolidated list published under s. 7 (3) of the Gurdwaras Act. That is a matter which has to be decided in proceedings on the petition under s. 10. The remarks of the tribunal in its judgment and decree under s. 8 regarding the right, title and interest of the Gurdwara in the properties mentioned in the consolidated list must be regarded as *obiter* and have, therefore, no legal effect as against the declaration of rights as embodied in the decree under s. 10, *AMARJIT SINGH v. GURDWARA THAMJI SAHIB*

Lah. 883

— **s. 10.** See Punjab Sikh Gurdwaras Act, 1925, s. 8 883

— **s. 45 (6).** See Punjab Tenancy Act, 1887, s. 50-A 852

— **s. 50.** See Punjab Tenancy Act, 1887, s. 50-A 852

— **ss. 50-A, 50, 45 (6)**—*Tenant ejected under s. 45 (6) or his suit dismissed under s. 50—Whether can sue in Civil Court under any title other than title as tenant.*

A suit by a person claiming possession of the land, under title of ownership or any title other than a title as tenants, (as a mortgagee with possession) is not barred under the provisions of s. 50-A, Punjab Ten. Act, even if previously the said person has been ejected by a Revenue Court under s. 45, sub-s. (6) or his suit has been dismissed under s. 50 and the Civil Court has jurisdiction to entertain such a suit. *ILAM DIN v. MANGAL SINGH*

Lah. 852 F 2

Railways Act (IX of 1890), s. 72—*Risk note form H—"Misconduct", meaning of—Duty of Court Railway held not guilty of misconduct.*

The word "misconduct" in risk note Form H means "improper conduct." The Court has in cases of this sort to consider all the facts and circumstances and then arrive at a conclusion as to whether the conduct of the railway employees was such as to render the railway administration liable in damages upon a reasonable view of the matter. If it is established that the employees of the railway administration, in defiance of the ordinary practice, placed tins of molasses in the wagon which contained the plaintiff's yarn consignment or alternatively, if they placed the plaintiff's consignment in a wagon which contained tins of molasses, it must be held that they acted recklessly, knowing that contamination and damage would be a likely and probable result, and that by their conduct they showed themselves to be indifferent to such results. Where, however, the plaintiff has merely proved that the packages were received in good condition at the station from which they were despatched and that they were found to be damaged by molasses on arrival at the destination, the railway cannot be held to be guilty of misconduct in the absence of proof that they placed tins of molasses in the wagon containing the plaintiff's yarn consignment. *WAJID ALI MOHAMMAD RAFIQ v. BENGAL AND NORTH WESTERN RAILWAY CO. FIRM*

All. 113

Receiver—Appointment of. See Civil Procedure Code, 1908, O. XL, r. 1 8

— *Receiver, appointment of, in partition suit—Receiver considering his personal interest to the exclusion of those of parties—Removal of such Receiver.*

Where the attitude of a Receiver appointed in a

Receiver—concl'd.

partition suit is inconsistent with the attitude of a Receiver, that is, where he is considering his own personal interests to the exclusion of the interests of the parties whose representative he is and whose benefit should be his concern, such Receiver should be removed. *SARBASUNDARI DASSI v. NANDARANI DASSI*

Cal. 13

Record of Rights—*Holding shown as rent-free—Court can accept evidence in rebuttal.*

Even if the record of rights had stated that certain lands were rent-free, it would still be open to a Court of fact to accept the evidence as rebutting the entry in the record of rights. *CHINTI KAHARIN v. KRIPASANKAR WARRAH*

Pat. 300

Registration Act (XVI of 1908), s. 17 (1).

(d)—*Compromise decree creating lease must be registered.*

A decree embodying a compromise, purporting to grant a lease within the meaning of cl. (d) of sub-s. (1), s. 17, Regis. Act is not exempted from registration. *JAGDISH CHANDRA DEO DHABAL, DEB v. BISSESWAR LAL AGARWALLA*

Pat. 428

— **s. 28**—*Absence of collusion between donor and donee—Registration of gift deed cannot be challenged.*

In the absence of any collusion between the donor and the donee the registration of the deed cannot be challenged as being defective in law. *MOHAMMAD KAZIM HUSSAIN v. NADRI BEGAM*

Oudh 87

— **s. 28**—*Fraud on registration—Criterion is intention of parties.*

In determining whether the requirements of the law as to registration have been complied with, the intention of the parties is the criterion by which the matter must be decided. Where the donor intended to vest the property in the donee, the inclusion of the property in a gift deed cannot be held to be a device to evade the Regis. Act. *MOHAMMAD KAZIM HUSSAIN v. NADRI BEGAM*

Oudh 87

— **s. 49**—*Lessees admitting lease but pleading inadmissibility of lease-deed for want of registration—Court, if can go behind lease and determine validity—Plea taken by one of lessees—Lease found invalid—It is invalid against all lessees.*

Where the lessee admits the lease but pleads that the lease deed is inadmissible in evidence for want of registration, the Court is fully entitled to go behind the lease and determine its validity.

And where such a plea of inadmissibility is taken only by one of the lessees and the lease is found to be invalid, it is invalid against all the lessees. *U MIN SIN v. KO KYE*

Rang. 31

Religious endowment. See Hindu Law 187

Remand. See Civil Procedure Code, 1908, s. 151

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Res judicata.

See Civil Procedure Code, 1908, O. XXII, r. 5

585

See Landlord and Tenant 428

— *Applicability—Order on execution application, when can be res judicata on point whether it is "in accordance with law"—Ambiguous order, construction of—Order held not res judicata.*

• If there is previous order of the Court operating as *res judicata* which holds that the application under consideration was not made in accordance with law, then clearly that matter cannot be reargued at a subsequent stage of the execution. But before an order can operate as *res judicata* it must clearly decide that the application in question was not in accordance with law. If it merely rejects or dismisses the application on some other ground as, for instance, the non-

Res judicata—contd.

appearance of the decree-holder, then there is no decision on the merits and when there is no decision on the merits, there is of course no *res judicata*. Where it is ambiguous whether an order is on merits, then the ambiguity must be construed in favour of a person against whom the order is made. Where the order is: "Decree-holder absent. Application incorrect. He is awaited for November 2, 1933" or "decree-holder absent. He has not yet turned up as yet though he was awaited till to-day. Application is therefore rejected with costs" the order will not operate as *res judicata*. **NATHMAL v. BALKRISHNA**

Nag. 641

—Hindu Law—Joint family—Previous decision that family was not joint at particular time, whether *res judicata* in subsequent suit where question is whether family was joint before such time.

The previous decision that a Hindu family was not joint at a particular time, cannot operate as *res judicata* in a subsequent suit in which the question is as to whether the family was joint or not before such time. **MOHAN LAL v. RAM DAYAL**

Oudh 61

—Previous decisions as to existence of law or custom of persons domiciled in Burma whether binding on Courts in Burma as *res judicata*.

No number of previous decisions as to the existence of some law or custom of persons domiciled in Burma are binding on the Courts in Burma in the sense that they are *res judicata*; all that can be said is that a long line of decisions is always taken judicial notice of by the Court, and to that extent the law is to be regarded as settled law; but if any party so chooses, the question can always be reargued and an issue must formally be framed. **YIN WIN LIN v. MA KYIN SEIN**

Rang. 323

—Suit against two defendants on basis that one of them was principal and the other surety—Question which of them was principal and which surety neither agitated nor decided—Subsequent suit by one of the defendants against the other—Defendant in subsequent suit, if can raise defence that he was not principal.

A suit was brought against two defendants on the footing that one of the defendants was principal and the other was surety. The question as to which of the defendants was surety and which the principal was neither agitated between the defendants *inter se*, nor decided. In a subsequent suit by one of the defendants against the other defendant:

Held, that the defendant (in the subsequent suit) could raise the defence that he was not the principal, such defence not being barred by *res judicata*. **LAKSHMANA SAHU v. M. SIMACHALA PATRA**

Pat. 739

—Suit for possession by monk as representative of Sanghas of Kyaungdaik, dismissed—Subsequent suit as presiding monk, if barred.

Where a suit for possession by a monk as representative of the Sanghas of Kyaungdaik is dismissed, a subsequent suit by him for possession in the capacity of a presiding monk is not barred by *res judicata*. **U ZAWTIPALA v. U THATDAMA**

Rang. 597

Right of suit—Cause of action—Anticipation of criminal complaint—Civil suit for declaration that there is no cause of action for the anticipated criminal complaint cannot lie.

The mere fact that A is supposed to contemplate the bringing of an action against B or that A may have stated that he has grounds for such an action, does not entitle B to institute an action against A, to have it declared that A has not a good cause of action against B. **KANHAIYALAL HARKARANDAS v. MOHANLAL RAMVALLABH**

Bom. 814

Riparian rights—Proprietors of estate on partition stipulating to keep watercourse joint and agreeing not to interfere with supply channels—Either party can restrain other from erecting bund and causing interference without showing damage.

Under the partition of an estate it was stipulated that the mountains, watercourses and certain other properties should be kept joint and none of the parties should cause obstruction to the supply channels and water channels flowing as per *mamool* till that date to the tanks from one part of the estate to another:

Held, that the putting up of a bund interfering with the common watercourse by one party was an infraction of the right of the other party and the latter had every right to have it removed without showing any damage. **SRETHARAMACHANDRA RAO v. KOTAGIRI SATYANARAYANA RAO**

Mad. 774

Risk note. See Railways Act, 1890, s. 72

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Sale of Goods Act. (III of 1930), ss. 21, 23

—“Specific goods,” meaning of—Contract to sell some liquor out of big cask containing large quantity, required quantity not being separated or bottled is not contract of sale of specific goods within meaning of s. 21—If falls under s. 23.

A contract to sell some liquor out of a big cask containing much large quantity, the required quantity not being separated or bottled, would not be a contract of sale of specific goods within the meaning of s. 21, Sale of Goods Act. The expression ‘specific goods’ necessarily means goods capable of being ascertained with certainty—*certum est quod certum reddi potest*. A sale of some specified quantity of liquor out of a storehouse of cask would not be capable of ascertainment until it was removed or separated. The words ‘specific goods’ would according to their natural interpretation mean goods whose delivery can be demanded in specie. A contract of sale of a small quantity of liquor stored in bulk could more properly be regarded as a contract for sale of unascertained goods. The ownership will not pass till the quantity ordered by the purchaser is ascertained and appropriated. The bottling of the liquor would be an act of ascertainment and appropriation. **EMPEROR v. KUNVERJI KAVASJI KAVARDNA**

Bom. 302

Second Appeal. See Civil Procedure Code, 1908, s. 100

172

—Custom—Wrong inference drawn by lower Courts from *wajib-ul-arz*—Question can be gone into in second appeal.

Where the Courts below have drawn an inference as to existence of certain custom from the *wajib-ul-arz* which cannot be upheld the High Court can go into the question in second appeal. **HARUN RASHID v. KANIZ FATIMA**

Oudh 394

—Finding of fact—Easement of necessity—Lower Court not appreciating what easement of necessity is—Court in second appeal can find whether such easement exists.

Where the lower Court did not fully appreciate what an easement of necessity is, its finding on the question is not binding in second appeal and so the Court can find in second appeal whether such an easement exists. **NAWAB HASAN BAHADUR v. ABIDA**

Oudh 859

—New plea—Point of minority for calling in aid s. 6, Limitation Act cannot be raised for first time in second appeal.

It is too late to raise the point of the minority of the plaintiff in the second Appellate Court for the purpose of calling in aid the provisions of s. 6 of the Lim. Act where the point was not raised in either of the Courts below. **SHIVJIRAM v. GULABCHAND**

Nag. 306

Set-off. See Companies Act, 1913, s. 229 **839**
Sikh Gurdwaras Act (Punjab Act VIII of 1925). See under Punjab Sikh Gurdwaras Act

Society—Acts of management within powers of society—Dispute between its individual members and those responsible for its management, if can be decided by Civil Court—Civil Court when can assume jurisdiction.

It is a well-established principle that, provided that the acts of the management are within the powers of the society itself any dispute between individual members of the society and those responsible for its management must be decided by the machinery provided by the rules and not in a Court of Law. It is only when an act is *ultra vires* the society that a member is entitled to come to a Civil Court and have the act of the management which is *ultra vires* declared to be void. *KOWTHA SURYANARAYANA RAO v. PATI-BANDLA SUBRAHMANYAM* **Mad. 760**

Membership—Resignation of—When takes effect—Restoration to membership—Resigning member subsequently attending meeting, effect of.

The membership of a Co-operative Society of a person ceases immediately his letter of resignation reaches the Society. There is thus an immediate cessation of his membership and there being no provision for withdrawal of any resignation in the Act or in the by-laws, he can become a member again only by complying with the provisions relating to membership. The mere fact that he refused to receive the copy of the resolution not accepting his resignation and that he attended a meeting of the Society some six or seven months later has no legal effect so far as this question is concerned in the sense that these subsequent circumstances could not possibly restore him to his membership or make him a member after he had ceased to be one. *KUPPU GOVINDA CHETTIAR v. UTTUKOTTAI CO-OPERATIVE SOCIETY* **Mad. 769**

Specific Performance.

See Contract **446**
 See Specific Relief Act, 1877, ss. 22, 22 (ii) **533**
Specific Relief Act (I of 1877), s. 9. See Court Fees Act, 1870, Sch. I, Art. 14 **70**

ss. 22, 22 (II)—Specific performance—Suit for, dismissed by trial Court—Findings leading to such decision set aside by Appellate Court—Appellate Court can decree suit in its own discretion.

Where the basic findings, which ultimately led the trial Court to dismiss the suit for specific performance are set aside on appeal by the Appellate Court no question of interference by the Appellate Court with the exercise of discretion by the trial Court arises, and the Appellate Court is competent in the exercise of its own discretion to decree the specific performance. *BENI MADHO v. RAM NATH* **Oudh 533**

s. 22(2)—Contract of sale deliberately and solemnly entered into by vendor—Court cannot interpose its aid on ground of inadequacy of price.

When a contract of sale has been entered into deliberately and solemnly by the vendor with open eyes in the presence of the Court and with the advice of Council without the slightest suggestion of the vendor having been imposed upon a Court of Equity will not be entitled to interpose its aid on the ground of inadequacy of price. *BENI MADHO v. RAM NATH* **Oudh 533**

s. 54—Defendant opening doors on his own land—No interference with plaintiff's rights—Mere apprehension that defendant may acquire easement of air and light, if justification for ordering defendant to close doors.

The grant of an absolute injunction restraining

Succession Act—contd.

a person from enjoying his own land is wholly illegal.

The defendants who have opened doors upon their own land which they are entitled to do in the exercise of their right of possession and enjoyment of their own property, cannot be ordered to close these doors merely because the plaintiff who is their neighbour apprehends that the defendants might acquire a right of easement to light and air after the lapse of twenty years if the doors are allowed to stand. *GANESH PRASAD v. BASDEO*

Oudh 73
Subrogation. See Transfer of Property Act, 1882, s. 92 **297**

Succession Act (XXXIX of 1925)—Construction of sections of Act—Reference to English Law.

The Courts should not read into the sections of the Succession Act a construction which is at variance with the ordinary meaning of the words used merely because there is a distinction in English Law between a citation to propound and prove a will and a citation to take probate. *LAKHSHMI SHANKER v. KUNWAR RAMSHANKER* **Oudh 227 F B**

ss. 229, 230—Validity of will disputed by executor—He must accept or renounce executorship before validity of will is adjudicated upon, on application of another person.

It is implied by ss. 229 and 230 of the Succession Act that an executor who disputes the validity of a will appointing him as such must accept or renounce his executorship under s. 229 before the validity of the will is adjudicated upon on an application for letters of administration by another person. *LAKHSHMI SHANKER v. KUNWAR RAMSHANKER* **Oudh 227 F B**

ss. 231, 232, 234—Word "prove", meaning of.

The word "prove" in ss. 231, 232 and 234 of the Succession Act, is used primarily in its ordinary meaning. It is not used in the sense of taking of letters of administration or of taking of probate in the case of an executor. *LAKHSHMI SHANKER v. KUNWAR RAMSHANKER* **Oudh 227 F B**

s. 278—Letters of administration—No estate and no debt—Application device to obtain decision on question of title—Letters of administration cannot be granted—Proper remedy of applicant.

Where there is no estate which stands in need of administration no suggestion that any creditors have to be paid or any debts due to the estate have to be collected and an application for letters of administration is a transparent device to secure from the Probate Court a decision upon a contested question of title to the estate, there is no occasion for the grant of letters of administration and the proper course for the applicant is to obtain an adjudication of his rights in a regular suit properly framed for the purpose. *HAJIRA KHATOON v. MUSTAFA HUSAIN* **Oudh 410**

s. 4—Suit for declaration that certain trust in respect of certain villages was public and not private trust—Valuation for purposes of jurisdiction is market value of property.

Section 4 of the Suits Valuation Act leaves no room whatever for the idea of a notional value.

In a suit for declaration that a trust created by a certain person in respect of certain villages was a public trust and not a private trust, the title to the villages is affected by the relief sought and, therefore, the suit falls within the mischief of s. 4 of the Suits Valuation Act, and the valuation for the purposes of jurisdiction is the market value of the property itself and not any

Succession Act—concl.

arbitrary valuation. **BISHAMBHARNATH v. SRI PRAKASH SINGH**. Oudh 445

s. 11 (2)(3)—Appellate Court coming to conclusion that lower Court has no jurisdiction—He should not straight way dismiss the appeal and direct the lower Court to send case to proper Court—He should consider the question whether under or over valuation has prejudiced the party, otherwise in case the objection was taken at earliest opportunity, consider the appeal on merits.

Sub-sections (2) and (3) of s. 11, Suits Valuation Act make it clear that the matter has not to be disposed of summarily merely on the ground that the Court of first instance or lower Appellate Court had no jurisdiction. Even in cases where the point as to under-valuation is properly taken, the Court can deal with the appeal provided the provisions of sub-s. (2) are complied with. If the objection is properly taken but the Appellate Court is not satisfied as to both the matters mentioned in cl. (b), that is over or under-valuation and prejudice, the Court, if it has the materials before it, can proceed to determine the appeal. However, it cannot act under sub-s. (2) if it is satisfied that the question of under-valuation has prejudicially affected the disposal of the suit on its merits. Before the Court disposes of the case, he should be satisfied himself one way or another on this question of prejudice. **FIRM BHIMRAJ-DEBI BAKSH v. GAYA PRASAD SAHU**. Pat. 385

Tea Control Act (VIII of 1938), s. 7 (2)—
Appeal under s. 7 (2)—Central Government or Tea Licensing Committee, if necessary party.

In appeals under s. 7 (2), Tea Control Act, it is not necessary for the appellant to make the Central Govt., or Indian Tea Licensing Committee a party to the appeal. The Court may, however, issue notice to the Committee to appear and support its decision or the Committee may apply to be permitted to be heard, and if necessary to lead evidence to show that its order was correct. Similarly, in some cases the Central Govt., also might like to be heard if any question of principle is involved, and the Court may permit it to do so. **HARI RAM v. CENTRAL GOVERNMENT**. Lah. 192

s. 7 (2)—Joint controller, if can engage Counsel in absence of authority from Committee.

The joint controller cannot engage or instruct a Counsel on behalf of the Tea Licensing Committee in the absence of any rule, or resolution of the Committee, authorising the joint controller to do so. **HARI RAM v. CENTRAL GOVERNMENT**. Lah. 192

Temple. See Hindu Law

Tort—Action in. That defendant committed tort must be alleged—Allegation of tort against his guardian acting for him, whether allegation against defendant.

In order to found a cause of action in tort, it must be alleged that the defendant committed the tort. An allegation that the tort was committed by the defendant's guardian purporting to act on his behalf is not a pleading of a sufficient or proper nature alleging that the defendant committed the tort alleged. **SOHAN LAL DAGA v. SRECHAND DAGA**. Cal. 119

Malicious prosecution. See Malicious prosecution

Malicious prosecution—Suit for damages—Some of defendants Police Officers—Cause of action against them, based on their acts done purported to be official Acts—Notice under s. 80, Civil Procedure Code (Act V of 1908), if necessary—Question whether acts were done in good or bad faith, if material—Bar of s. 80, Civil Procedure Code applying as against some of defendants—Whole suit is unsustainable.

Tort—concl.

The question of the good faith or the bad faith of the public officer either as regards his belief in the legality or propriety of his act or the limit of his powers or the existence of facts justifying the exercise of such powers is irrelevant in the consideration of the question whether the officer is entitled to notice under s. 80 of the Civil P. C. The section does not require that the act should have been done in good faith; it merely requires that it should purport to be done by the officer in his official capacity. If the act was one such as is ordinarily done by the officer in the course of his official duties, and he considered himself to be acting as a public officer and desired other persons to consider that he was so acting, the act clearly purports to be done in his official capacity within the ordinary meaning of the term 'purport'. The motives with which the act was done do not enter into the question at all.

The plaintiff brought a suit for damages for malicious prosecution against a number of defendants out of whom defendants Nos. 4 and 5 were Police Officers. The act on which the plaintiff rested his cause of action against the Police Officers was that they arrested the plaintiff and led him to the Police Station as a person accused of theft:

Held, that it was a Police Officer that defendants Nos. 4 and 5 took the plaintiff to the Police Station and although there may be a discrepancy as to whether one of them was in uniform or not that was an irrelevant matter because it was known to all parties concerned that they were Police Officers and it was perfectly clear that they purported to act as such whether in good or bad faith. Thus it was essential that notice under s. 80, Civil P. C., should be served on these defendants before instituting the suit:

Held, further that the bar of s. 80, Civil P. C., applied to the suit as a whole and not only to the claim for relief against those two defendants. The suit was, therefore, unsustainable *in limine*. **NOOR MOHAMMAD v. ABDUL FATEH**. Pat. 263

Transfer of Property Act (IV of 1882), s. 39—S. 39, scope of—Whether deals with charges are right falling short of charge.

Section 39, T. P. Act, does not deal with charges but with a right which falls short of a charge. The charge does not arise until it is fixed by a decree or by agreement or by operation of law. **GHASIRAM v. KUNDANBAI**. Nag. 861

ss. 39, 100—Act, if exhaustive of all charges.

The T. P. Act, does not purport to be exhaustive but only to deal with certain specific matters, and also primarily it was enacted to deal with transfers by act of parties. Of course it does touch here and there on certain allied matters but in view of the very cursory manner in which they are dealt with as compared to the more exhaustive treatment accorded to private transfers of property, and in view of the preamble, the Act cannot be regarded as exhaustive when it deals with these allied topics which are foreign to its main purpose. **GHASIRAM v. KUNDANBAI**. Nag. 861

s. 53—Colourable gift by judgment-debtor to put obstacle in way of decree-holder—Whether binding on decree-holder.

A judgment-debtor executed a deed of gift which was a colourable transaction, and the judgment-debtor after this deed of gift continued to be in possession of the property so long as he was alive and this transaction was entered into in order to put obstacles in the way of the decree-holder or to defraud him:

Held, that the transfer was void against the decree-holder. **RAM BEHARI SAHAI v. BINDA PRASAD**. Pat. 45

Transfer of Property Act—contd.

s. 53—*Objection by wife claiming property attached in execution of decree against husband as her, by reason of sale-deed, allowed—Suit by creditor for cancellation of sale-deed as being executed with intent to defeat and delay creditors held one under s. 53—Court's permission under O. I, r. 8, Civil Procedure Code (Act V of 1908), held essential for its competency—O. XXI, r. 63, Civil Procedure Code (Act V of 1908), held not incompatible with s. 53, Transfer of Property Act (IV of 1882)—Issue as to competency of suit raised in trial Court—Plaintiff not trying to amend plaint by turning suit as one in representative capacity—Amendment held could not be allowed in appeal.*

In execution an objection was raised by the wife of the judgment-debtor that the property attached belonged to her by reason of a sale deed executed by her husband in her favour. The objection was allowed. The decree-holder thereupon instituted a suit under s. 53, T. P. Act for cancellation of the sale-deed on the ground that it was executed with intent to defeat and delay creditors. The defendant's objection that the suit was incompetent for want of permission of the Court under O. I, r. 8, Civil P. C., was put in issue and disallowed. In appeal by the defendant the plaintiff sought to amend the plaint and turn the suit into a representative one :

Held, that the suit fell within the purview of s. 53, T. P. Act and, therefore, for want of Court's permission under O. I, r. 8, Civil P. C., was incompetent and that the provisions of O. XXI, r. 63, were not incompatible with s. 53, T. P. Act.

Held, further that having gone to the trial on issue of competency of suit it was far too late for the plaintiff to ask for leave to amend. It would be opposed to principle and accepted authority to allow the amendment. The course which the plaintiff should have adopted when the question was raised was to apply to the Court for permission to sue on behalf of all creditors. *MADINA BIBI SAHIBA v. ISMAIL DURGA ASSOCIATION*

Mad. 766

s. 53—*Preference of one creditor—Effect stated.*

A debtor is entitled to prefer a creditor, unless the transaction can be challenged in bankruptcy, and such a preference cannot in itself be impeached as falling within s. 53, T. P. Act. *FAQIR BUX v. THAKUR PRASAD*

Oudh 588

s. 53—*Question of adequacy of consideration, if relevant, even after amendment of Act by Act XX of 1929.*

The question of the adequacy of the consideration will be relevant in a suit under s. 53 of the T. P. Act, even after its amendment by Act XX of 1929. But to draw any inference of fraud, the inadequacy should be to a material degree. *FAQIR BUX v. THAKUR PRASAD*

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s. 53—*Scope of s. 53 (1), para. 4—Test to know whether suit is a representative one—Suit based on fictitious nature of transfer for vindication of plaintiff's personal and individual rights—Suit held not one under s. 53 and need not be in representative form.*

The case set up by the plaintiff in the plaint as regards the fictitious character of the deed of gift and the other deeds is entirely different from the scope of a suit under s. 53 of the T. P. Act, where the plaintiff has to accept the genuineness of the deed as an initial fact and has to prove that the transfer, though genuine, was made with a view to defeat or delay the creditors of the transferor. The primary object of an action under

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s. 53 of the T. P. Act, is to make the assets of the transferor available to the general body of creditors. If it would, then the action would in substance be an action under s. 53 of the T. P. Act and would have to be instituted by, or on behalf of, all the creditors. If it would not, then the action cannot be regarded as an action under s. 53 of the T. P. Act. The proper test to apply when a question of this nature is raised is to see whether if the plaintiffs succeed in the action, the property claimed in the action would be available to the general body of creditors. Where the plaintiff bases his suit upon the fictitious nature of a transfer and wants only to vindicate his individual and personal rights, it is not a suit under s. 53 and need not be in the form of a representative suit on behalf of, or for the benefit of, all the creditors. *FAQIR BUX v. THAKUR PRASAD*

Oudh 588

s. 53—*Suit under, impeaching mortgage or sale—Burden to show that they are colourable transactions is on plaintiff.*

Where a suit is brought under s. 53, T. P. Act, impeaching a mortgage or sale, the burden is on the plaintiff to show that the transaction was only a colourable transaction by proving inadequacy or absence of consideration and other circumstances suggesting that the sale or the mortgage was not meant to be acted upon. *CHAN WAN HONG TONG v. A. K. A. C. T. V. CHETTY*

Rang. 270

s. 54—*Mortgagor entering into contract with third person to sell property before mortgaging it but sale completed after mortgage—Mortgagee, when entitled to precedence over purchaser.*

An agreement of sale gives the purchaser an equitable title as owner in the property concerned. But ordinarily, this is good only against the vendor himself, and does not operate against a person who obtains a legal interest in the same property in good faith without notice of the equitable title. Hence where the mortgagor enters into an agreement with a third person to sell property before mortgaging that property and the sale is completed after the mortgage, the mortgagee is entitled to precedence over the purchaser, if he had acted in good faith and had no notice of the agreement of sale. *JALAL-UD-DIN v. MIRAN BAKHS*

Lah. 787

s. 58—*Mortgage or sale—Deed, construction of—Test—Intention of parties—Surrounding circumstances, if can be considered—Unnecessary details in deed as to rights and liabilities of vendee—Emphasis on vendee being representative of vendor—Inadequacy of price—Period of 15 years given for re-purchase at exact sale price—Parties Muhammadans—These factors show that transaction was mortgage and not sale.*

The question whether the sale-deed and "ikrarnama" executed on the same day record an out and out sale with a contract or condition for repurchase or they record a transaction of mortgage is in the first instance one of construction of the deed, but the Court is entitled to take it to consideration a certain number of surrounding circumstances, as for example, the circumstances in which the document was executed, the price at which the sale was concluded, the existence or non-existence of bargaining and the like. The crucial test is the intention of the parties.

• The test whether the document or documents create the relationship of creditor and debtor, is not a very satisfactory one. It would be difficult to say that even a mortgage by conditional sale creates a "debt", since such a mortgage creates in the mortgagee no right to realise the consideration of the mortgage either as a personal liability or as a liability under the mortgage.

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Reference to unnecessary details of the rights and liabilities of the vendee in the deed, the emphasis on the transferee being a representative of the vendor, the inadequacy of price and the vendor's not gaining any particular advantage by entering into a transaction of sale, go to show that the transaction was not a sale.

Where the parties to the transaction are Muhammadans, there is some amount of presumption in favour of the transaction being a mortgage concealed under the cloak of a sale-deed with a contemporaneous contract for resale.

Where a period as long as 15 years is given for repurchase at the exact sale price, the probabilities are in favour of mortgage rather than sale. A period of 15 years is a long period within which there may be considerable rise or fall in the value of the property.

MEDHI HUSAIN V. MOHAMMAD JAWAD Oudh 417

— ss. 58, 67—Remedy by way of foreclosure, if applicable to anomalous mortgage.

The remedy by way of foreclosure is not exclusive to a mortgage by conditional sale. It is equally applicable to an anomalous mortgage. UJAGAR LAL V. BAHADUR LOKENDRA SINGH All. 520

— s. 68 (a)—Mortgage—Construction—Usufructuary mortgage—Held on construction that there was no covenant by mortgagor to pay, within meaning of s. 68 (a).

A usufructuary mortgage for a term of five years contained the following term "when the term of this deed will expire in the month of *Bhado* 1338 *Fasli*, then at that time the executant on paying the entire mortgage money will get back the deed and the *rahan* will be redeemed. In case of non-payment, this deed with all the above conditions will precisely remain intact and hold good till the payment of the said *rahan* money, that is, for nine years from 1334 to 1342. When we shall pay the said *rahan* money we shall pay it towards the end of *Bhado* of any year."

Held, on construction that there was no covenant by the mortgagor to pay within the meaning of cl. (a) of s. 68, T. P. Act. There was merely a provision that the bond might be redeemed at the end of *Bhado* 1338; but if it was not, the terms of the bond was extended. There was no promise by the mortgagor to repay the amount, and hence the suit to recover the amount of money advanced could not succeed. JAMUNA SINGH V. SHEONANDAN SINGH Pat. 392

— s. 72. See U. P. Encumbered Estates Act, 1934, s. 14

— s. 76. See Transfer of Property Act, 1882, s. 71

— ss. 76 (h), 77—Mortgage in possession—Suits by him to recover arrears of rent—Whether act of management—Costs, if can be recovered by him.

The filing of suits to recover arrears of rent by a mortgagee in possession is an act of management within the meaning of s. 76 (h), T. P. Act and any expenses incurred in connection therewith are recoverable by the mortgagee. KHAN BAHADUR V. ALI MOHAMMAD Oudh 615

— ss. 77, 76—Usufructuary mortgage—Profits to be appropriated in lieu of interest—Mortgagor covenanting to make good loss arising from reduction of profits—Profits reduced by remission of rent—Liability of mortgagor to make good deficiency.

A usufructuary mortgage provided for the appropriation of the profits in lieu of interest and the mortgagor stipulated to make good any loss due to reduction of the profits mentioned in the deed. The profits were reduced by remissions of rent:

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Held, that the mortgagor was clearly liable to make good the deficiency. The mortgage deed was a contract within the meaning of s. 77 of the T. P. Act, and the covenant entered into by the mortgagor could be enforced although the mortgagee was not liable to accounting. KIRAT SINGH V. RAM SARAN Oudh 405

— s. 92—A getting tagai loan of Rs. 1,000 from Government under Land Improvement Loans Act and making it charge on land No. 1, and offering lands Nos. 2, 3 and 4, as collateral security—A subsequently mortgaging lands Nos. 2 and 3 to B and selling lands Nos. 1 and 4 to P and leaving Rs. 1,000 with him for paying off Government loan—Few days before aforesaid sale C attaching land No. 1 in execution of his decree and purchasing it at execution sale—Suit by P claiming charge over lands Nos. 1, 2 and 3 and recovery of amount paid by him to Government from A, B and C—Neither s. 92, Transfer of Property Act nor s. 69, Contract Act (IX of 1872), held applied—P held not entitled to reliefs claimed—Proper remedy was by suit for damages against A.

One A obtained from Govt. under Land Improvement Loans Act in 1927 a sum of Rs. 1,000 as tagai loan. It was made a charge on his land No. 1 for the improvement of which the loan was taken. His other lands Nos. 2, 3 and 4 were offered as collateral security. In 1929 A mortgaged lands Nos. 2 and 3 to B and on January 25, 1932, sold lands Nos. 1 and 4 for Rs. 5,000 to P and kept Rs. 1,000 with P out of the purchase-money for paying off the Govt. loan. On January 21, 1932, that is four days before the sale, C attached land No. 1 in execution of his money decree and purchased it himself at the execution sale. In 1935 P filed a suit claiming that he was entitled to a charge on lands Nos. 1, 2 and 3 and to recover the amount paid by him to Govt. from A, B and C:

Held, (1) that if P came within the terms of s. 92 he would have the same rights as Govt. not only against A who borrowed the money from Govt. but also against B and C who derived their rights from A. But P did not fall under s. 92 as there was in fact no mortgage to Govt. but only a statutory charge under Land Improvement Loans Act, on the lands:

(2) that part of the consideration for sale of land No. 1 retained by P for the discharge of Govt. loan must be regarded as the money of A and therefore P was not entitled to subrogation under para. 1 of s. 92. Nor could P come under para. 3, because there was no registered agreement giving him the right of subrogation;

(3) that the same reasoning which ruled out s. 92, T. P. Act, rendered s. 69, Contract Act, also inapplicable. If the repayment of the tagai loan to Govt. was to be regarded as the act of the vendor, A and not the act of P, the purchaser P, obviously did not come within the terms of s. 69. Moreover, even if it were possible to say that there was a payment by P within the meaning of s. 69, it was a payment which he was bound to make under the terms of his agreement with A and it would not, therefore, be open to him to say that it was a payment which some other person was bound to make;

(4) that P's suit was misconceived and that his only legal remedy was to sue A his vendor, for damages. VITHALDAS BHAGWANDAS DARBAR V. TUKARM VITHOBA KSHATRI Bom. 632

— s. 92—Applicability to Punjab—Principle of subrogation as embodied in amended s. 92, applies to Punjab.

If a principle is to be imported from a statute and

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acted upon in a province where the statute does not apply it is not fair to pick and choose for that would always lead to arbitrary results. The principle of subrogation as it stands is now embodied in s. 92, T. P. Act, and must be applied in the Punjab on the lines indicated there. Consequently where the mortgagor executes a third mortgage of his property without disclosing the second mortgage and pays off the original mortgagee from out of the consideration received from the third mortgage, the third mortgagee does not become subrogated to the rights of the original mortgagee. No question of keeping the original mortgage alive can arise inasmuch as the third mortgagee had no knowledge of the intermediary mortgage. *SHAM LAL v. CHHAJU RAM* **Lah. 297**

— **s. 100—Charge created by decree, if comes under s. 100.**

A charge which is created by a decree is not created by act of parties, and it cannot be said to have been created by operation of law. Such a charge does not fall under s. 100, T. P. Act, nor does the principle underlying it apply to it. *GHASIRAM v. KUNDANBAI* **Nag. 861**

— **s. 100—Charge in India, whether same as charge in England—Interest in property, if should be created under Indian law—Deed held created charge.**

Charge in India cannot usefully be compared with a charge, legal or equitable, in England because in India such a charge is defined by statute. What is essential is that immovable property must be made a security for the payment of money in such a way that the transaction does not amount to a mortgage in the Indian law sense. In that sense a mortgage is a transfer of an interest in specific immovable property for the purpose of securing money. Of course if the transaction falls within s. 58 it is outside s. 100. So a charge is something other than a transfer of an interest in specific immovable property. It is not a question whether there is an expression of an intention to create an interest but whether on its true construction, the document makes immovable property security for the payment of money.

One J by a document admitted liability. In respect of this liability he undertook to execute a charge bond over a specified share and rights in a village together with the *sir* land. He further undertook to get sanction for the transfer of *sir* and not to assign certain property until the above were carried out:

Held, that the only possible purpose of the last undertaking was to segregate the property so that it would be answerable in the hands of J should he fail to give the charge bond, and that made this property a security for the payment of money. Thus a charge was created by the deed. *DAW BHAIROPRASAD v. JUGALPRASAD* **Nag. 761**

— **s. 107—Rice mill leased for one month—If after expiry of lease unmilled paddy was left, fixed monthly rent was payable for five years—Lease held for over one year.**

Where a lease of a rice mill is executed for one month with a condition that if there was paddy left unmilled at the expiry of the lease a fixed monthly rent would be paid every month for five years, the lease is a lease for over one year and requires registration. *U MIN SIN v. KO KYE* **Rang. 31**

Trial by Jury. See Criminal Procedure Code, 1898, s. 289 **5 F E**

Trust. See Contract Act, 1872, s. 65 **105**

— **Trustee acting contrary to trust—Principle that creditor advancing money to trust for trust purposes cannot be defeated by contention that**

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duties could have been performed on less elaborate scale, does not apply.

• The principle that where it appears to a creditor advancing money to a trust that the money is being used for the trust and not for the trustee's private purposes and where the money is definitely applied, the creditor cannot be defeated by a contention that the duties could have been performed on a less elaborate scale, is true only where a trustee acts in the discharge of his duties as trustee. The principle cannot be applied where a trustee is acting contrary to the trust or to the rules imposed on him by a scheme. *BAVA C. GOPALASWAMI MUDALIAR v. ANNADAMA KATTALAI OF SRI TYAGARAJASWAMI* **Mad. 105**

Trusts Act (II of 1882), s. 94—“Beneficial interest,” scope of—Non-mortgaging co-parcener is saddled with obligation in nature of trust, and must hold property to benefit of mortgagee to extent necessary to satisfy his demand.

The term “beneficial interest” as used in s. 94, Trusts Act should not be given any restricted or technical meaning. The sum total of the interests of a beneficial owner contains among other things freedom from encumbrances. If the property is encumbered, then there is something missing from the whole beneficial interest, namely the interest which the mortgagees have acquired. In that sense the mortgagees can be regarded as having in them a fraction of the whole beneficial interest. As against their mortgagors this makes no difference for they have there in addition the legal interest into which the lesser equitable interest merges. But if for some reason they are unable to avail themselves of the legal interest, there is no reason why they should also be cut off from the equitable beneficial interest. Consequently where an undivided co-parcener has mortgaged his share and on partition the property is allowed to non-mortgaging co-parcener who undertakes to pay off the mortgage he is saddled with an obligation in the nature of a trust and is bound to hold the property for the benefit of the mortgagees to the extent necessary to satisfy their demands. *ATMARAMSAO v. BHUPENDRANATH* **Nag. 537**

— **ss. 94, 95—Co-owner in possession of entire estate held in co-ownership, whether constructive trustee of minor co-owner in respect of his share.**

A co-owner in possession of the entire estate held in co-ownership is constructive trustee of the minor co-owner in respect of his share. Sections 94 and 95, Trusts Act, are clearly applicable to such a case. *KREMCHAND DAYARAM v. DAYARAM JESSOMAL* **Sind 137**

U. P. Agriculturists' Relief Act (XXVII of 1934), s. 3 (2)—Request that s. 3 (2) be applied, if can be entertained for first time in appeal.

A request that the provisions of s. 3 (2), U. P. Agri. Relief Act may be applied to the case cannot be entertained for the first time in appeal. *MOHAMMAD MOHTASHIM v. JOTI PRASAD* **All. 801**

— **s. 7—Applicability—Suit to recover unsecured debt—One of debtors non-agriculturist—S. 7 does not apply.**

The provisions of s. 7, U. P. Agri. Relief Act have no application in a suit for recovering an unsecured loan. Where one of the debtors is a non-agriculturist, the onus lies upon the party claiming the benefit of this section, to prove that all the debtors are agriculturists. *HET RAM PADAM CHAND v. SUBHAG CHAND RIKHAB DAS* **Oudh 168**

— **ss. 12, 23. See Court Fees Act, 1870, Sch. I, Art. 1, s. 7 (ix)** **425**

U. P. Agriculturists' Relief Act—concl'd.

s. 23 (2)—*Appellate Order under s. 23—Case fulfilling requirements of s. 115, Civil Procedure Code (Act V of 1908)—Revision against maintainable.*

The language of s. 23 of the Agri. Relief Act does not divest the Chief Court of the power of interference in revision if the case fulfils the requirements of s. 115 of the Civil P. C. **AMJAD HUSAIN v. RAISUNNISA**

Oudh **855**

s. 39—*Question of jurisdiction—Receipt drawn up on printed form showing that defendant received certain sum of money from plaintiff in consideration of promissory note—Whether document furnishing evidence of loan—Scope of s. 39.*

Receipt, drawn up on a printed form showing that the defendant had received Rs. 150 from the plaintiff in consideration of a promissory note which he had executed in his favour, furnishes evidence of the loan taken by the defendant from the plaintiff. Section 39 does not prescribe any particular form of a written document to evidence the loan. The words "written document" used in the section are wide enough to cover any writing which would unmistakably show that a loan was taken by the debtor, and no particular form of writing is necessary to evidence the transaction of the loan. The intention of the section is that loans taken by agriculturists shall be evidence by a writing and should not be made dependent upon parole testimony. It is only to guard against an oral or parole transaction of loan that the section insists that the transaction shall be evidence by a document. **BRIJ LAL v. SURAJMAN**

Oudh **662**

s. 39—*Question whether particular receipt was a written document evidencing "loan" determination of—Court's decision, if open to revision.*

It is open to the Courts to determine the question whether the receipt upon which a suit is filed for the recovery of the amount was a written document evidencing the "loan" within the meaning of s. 39 of the U. P. Agri. Relief Act. In coming to a decision upon that question the Courts do not act illegally or with material irregularity. In such a case no question of the exercise of a jurisdiction not vested in the Courts by law, or failure to exercise jurisdiction so vested, or the exercise of jurisdiction illegally or with material irregularity arises. In this view of the matter the revision application against its decision is incompetent and cannot be entertained. **BRIJ LAL v. SURAJMAN**

Oudh **662**

U. P. Encumbered Estates Act (XXV of 1934), s. 4. See U. P. Encumbered Estates Act, 1934, s. 11

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s. 7—*Section is mandatory—Controversy as to applicability of s. 7—Court holding s. 7 applies, and ordering stay—Order is appealable.*

Section 7, U. P. Encum. Estates Act is mandatory and gives no discretion to the executing Court. Where a controversy arises between the parties as to whether s. 7 applies and the Court holding that it applies, orders stay of execution, the order staying execution is appealable. **RAM KISHORE v. YASHPAL KUNWAR**

All. **568**

ss. 7, 45—*Order of Civil Court refusing to stay execution under s. 7—Not appealable under s. 45.*

An order of a Civil Court refusing to stay execution proceedings under s. 7, U. P. Encum. Estates Act is not appealable under s. 45. **INAYAT BEG v. ABDUL RAHMAN BEG**

All. **69**

s. 7 (1) (a)—*Held, that applicant could not invoke s. 7 (1) (a).*

One U brought a mortgage suit against F and H who

U. P. Encumbered Estates Act—cont'd.

was then a minor and obtained a decree for sale. Subsequently H attained majority, and sold a portion of his property covered by the decree for sale to I. Hereafter both H and I filed a suit for a declaration that the decree for sale obtained by U was not binding on H and was not enforceable against his properties, as H was not represented by a duly appointed guardian, in the suit filed by U. This suit was ultimately decreed and, as a result of the decree passed in the suit, the original suit filed by U was reopened so far as H was concerned. I was also impleaded as a defendant in U's suit when that suit was reopened against H. The suit was again decreed against H and a preliminary decree under O. XXXIV, r. 4, Civil P. C., was passed. Though in this preliminary decree I's name figured as one of the defendants, the decree was solely against H and there was no liability cast on I by that decree. The decree was made final in due course. But in the final decree the name of I did not appear as a judgment-debtor and the decree was only against H. After the passing of the final decree, I filed an application under s. 4, Encum. Estates Act and sought to invoke the provisions of s. 7 (1) (a):

Held, that in view of the facts, I not being under the obligation to satisfy the decree could not invoke the provisions of s. 7 (1) (a). He was also debarred from further seeking the aid of those provisions by reason of his being a purchaser pendente lite. **INAYAT BEG v. ABDUL RAHMAN BEG**

All. **69**

ss. 7 (1) (a), 7, 45—*S. 7 (1) (a), scope of—When comes into play—If subject to s. 52, Transfer of Property Act (IV of 1882).*

Section 7 (1) (a), U. P. Encum. Estates Act is confined in its operation to proceedings in respect of a debt (1) to which the landlord applicant is subject or (2) with which his immovable property is encumbered. If neither of these conditions is satisfied cl. (a) does not come into play. The provisions of cl. (a) are subject to the rule of law enacted by s. 52, T. P. Act, and a purchaser pendente lite is not entitled to invoke that clause to his aid. **INAYAT BEG v. ABDUL RAHMAN BEG**

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ss. 9, 10. See U. P. Encumbered Estates Act, 1934, s. 11

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ss. 11, 9, 10, 4—*Application under s. 4—Issue of notice under s. 9—Alleged creditor denying to be creditor and claiming to be lessee of applicant's mahals and claiming protection of possession during term of lease—Claim, if falls under s. 11—Whether must file fresh claim after notice under s. 11.*

A claim under sub-s. (2) of s. 11, U. P. Encum. Estates Act, has to be filed within a period of three months from the date of the publication of the notice in the Gazette. But this provision does not debar the Court from entertaining, and adjudicating upon, a claim which was filed before the publication of the notice, if, in fact and in substance, the claim amounts to a claim under sub-s. (2) of s. 11. Where therefore the alleged creditor in an application under s. 4 appears in consequence of a notice under s. 9 and files a written statement denying his status as a creditor and claiming protection of his possession of the applicants' mahals on the ground of his being a lessee, during the term of the lease, his claim falls within the purview of sub-s. (2) of s. 11 and not within the purview of s. 9 and 10. The lessee need not file a fresh written statement after the publication of a notice under s. 11 and no question of his claim being time-barred under s. 11 (2) arises. **B RAMMAN LAL v. RAGHUNATH SHANKER**

All. **347**

s. 14—*Proceedings ripening into decree under s. 14 (7), nature of—Claimant, mortgagee—*

U. P. Encumbered Estates Act—concl'd.

Amount payable to him at time of redemption—That amount is to be determined and included in decree passed by Special Judge under s. 14 (7).

Proceedings under the Encum. Estates Act, ripening in a decree under s. 14 (7) are at the same time proceedings for the determination of the amount due from the landlord to the claimant on the date of the application under s. 4, and also proceedings for redemption of the mortgaged property. In effect by merely filing his application under the Encum. Estates Act the debtor applicant has instituted proceedings for redemption of all his mortgaged properties. Where the claimant creditor is mortgagee, if any amount is payable to him under the provision of the mortgage deed at the time of redemption, then that amount is to be determined and included in the simple money decree passed by the Special Judge under s. 14 (7) of the Encum. Estates Act. *KIRAT SINGH v. RAM SARAN*

Oudh 405
—s. 14—*Provision for pendente lite interest, if retrospective.*

The provision for *pendente lite* interest in s. 14, U. P. Encum. Estates Act, has retrospective effect. *KHAN BAHADUR v. ALI MOHAMMAD*

Oudh 615
—ss. 14, 18, 35—*Transfer of Property Act (IV of 1882), s. 72—Civil Procedure Code (Act V of 1908), O. XXV, rr. 2, 7—Mortgagee entitled to get possession in default of payment of interest—Default made and possession not given—Mortgagee suing for possession—Amount spent to obtain possession, if can be recovered in proceedings under Encumbered Estates Act.*

Where a mortgage bond provides that in case of default of payment of interest by the mortgagor, the mortgagee should obtain possession of the mortgaged property and the mortgagor makes a default and does not deliver possession to the mortgagee, the mortgagee is entitled to sue for possession and the amount thus spent in obtaining the decree for possession can be recovered by him in proceedings under the U. P. Encum. Estates Act as he can do in a suit for redemption by reason of O. XXXIV, rr. 2 and 7, because the amount so spent is spent to make good his title against the mortgagor within the meaning of s. 72, T. P. Act. *MOHAMMAD EJAZ RASUL KHAN BAHADUR v. ALI MOHAMMAD*

Oudh 615
—ss. 14, 18, 35—*Transfer of Property Act (IV of 1882), s. 72—Mortgagee in possession—Deficiency in profits—Mortgagor personally liable for such deficiency—Mortgagee, if can recover deficiency and interest thereon at time of redemption.*

Where the mortgage deed does not provide that the interest be not a charge on the property and by a covenant the mortgagor has undertaken a personal liability to pay the deficiency in profits, the mortgagee in possession is entitled to recover the deficiency in the profits at the time of redemption but not the interest thereon. *KHAN BAHADUR v. ALI MOHAMMAD*

Oudh 615
—s. 45. See U. P. Encumbered Estates Act, 1934, s. 7

U. P. Land Revenue Act (III of 1901), s. 14—Claim to separate ownership of sir land—Whether question of proprietary title.

The question of a claim to separate ownership of sir lands is a question of proprietary title. *INDERJIT v. KANHAIYA LAL*

Oudh 849
—s. 14—*Discretion of Revenue Court to extend time prescribed for objection.*

The Revenue Courts have discretion to extend the time prescribed for preferring objections under s. 111, U. P. Land Revenue Act. *INDERJIT v. KANHAIYA LAL*

Oudh 849

U. P. Land Revenue Act—concl'd.

—s. 111—*Partition—Objection filed after prescribed time—Order passed by Revenue Court under s. 111 (1) (b)—Civil Court, if can question.*

The question whether an objection is barred as not having been made within the time prescribed by s. 111, U. P. Land Revenue Act, is essentially a question for the Revenue Court to decide, and it is not open to the Civil Court to question the decision of Revenue Courts on this point. The only circumstance in which the Civil Court would be justified in questioning the order passed by the Revenue Court under s. 111 (1) (b) is where the Civil Court finds that the question raised is not a question of proprietary title. *INDERJIT v. KANHAIYA LAL*

Oudh 849
U. P. Stay of Proceedings (Revenue Courts) Act (IV of 1937). See Contract Act, 1872, s. 23

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—s. 2. See U. P. Stayed Arrears of Rent (Remission) Act, 1939, s. 3

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U. P. Stayed Arrears of Rent (Remission) Act (VIII of 1939). See Contract Act, 1872, s. 23

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—*Act if applies to suit on contract in Civil Court.*

The intention of the Legislature in enacting U. P. Stayed Arrears of Rent (Remission) Act, was to remit arrears of rent which had accrued prior to Rabi 1341, by barring their recovery in the Revenue Courts. The provisions of the Act are, therefore, inapplicable to a suit on a contract in a Civil Court unless they can be indirectly invoked by means of some other provision of the law. *RAM PIARI v. DAYA SHANKER*

All. 427
—*Act not ultra vires.*
The U. P. Stayed Arrears of Rent (Remission) Act XVIII of 1939, is not *ultra vires* of the Provincial Legislature. *HARI SARAN DAS v. DHANI RAM*

Oudh 387 F B
—U. P. Acts of 1937 and 1939, are not connected with arrears irrecoverable at law.

The U. P. Acts IV of 1937 and XVIII of 1939, are not concerned with arrears of rent which are irrecoverable at law. *RAM PIARI v. DAYA SHANKER*

All. 457
—s. 3—*Suit or appeal liable to be stayed under s. 2 of Act IV of 1937—No stay order passed—Whether can be dismissed under s. 3 of Act XVIII of 1939.*

Where it is provided by the U. P. Stay of Proceedings (Revenue Courts) Act that all suits shall be stayed, all such suits are stayed automatically, and no order of the Court is necessary. Where, therefore, a suit or an appeal is liable to be stayed under the Stay of Proceedings Act 1937, it is liable to be dismissed under s. 3 of the Stayed Arrears of Rent (Remission) Act, 1939, even if no stay order has been passed under s. 2 of the former Act. *HARI SARAN DAS v. DHANI RAM*

Oudh 387 F B
—s. 3—U. P. Stay of Proceedings (Revenue Courts) Act (IV of 1937), s. 2—*Appeal pending when Act IV of 1937 came into force—If liable to be dismissed under s. 3 of Act XVIII of 1939.*

Section 3 of the U. P. Stayed Arrears of Rent (Remission) Act operates to dismiss all suits for arrears of rent stayed under Act IV of 1937, or which if instituted, would have been stayed that is to say all suits for arrears of rent prior to Rabi 1344 F. It also operates to dismiss all applications for the recovery of arrears of rent that is, so far as the Oudh Rent Act is concerned, all applications for execution of decrees for arrears of rent already instituted or which might have been instituted relating to the same instalments prior to the instalments for Rabi 1344 F. Where the suit relates to the arrears of rent prior to

U. P. Stayed Arrears of Rent (Remission) Act—concl'd.

Rabi 1344 F. an appeal pending when the U. P. Stay of Proceedings (Revenue Courts) Act IV of 1937, came into force is liable to be dismissed because even if the appeal be allowed to proceed and the plaintiff-appellant be successful in his appeal he will be unable to institute or prosecute any application for execution of his decree since that decree relates to arrears of rent and to instalments prior to *Rabi 1344 F.* **HARI SARAN DAS v. DHANI RAM** Oudh 387 F B

U. P. Tenancy Act (XVII of 1939), s. 243.

See U. P. Tenancy Act, 1939, s. 276. 543

ss. 276, 243 - Civil Procedure Code (Act V of 1908), s. 115—Revision—Suit under s. 108, Oudh Rent Act (XXII of 1886), when it was in force—Order restoring suit dismissed for default passed when U. P. Tenancy Act was in force—Application for revision is governed by Tenancy Act—S. 115, Civil Procedure Code does not apply—Revision not maintainable under s. 276, Tenancy Act.

The revisional remedy is not the right of any party and so it cannot be said that the U. P. Ten. Act could not affect the rights acquired by a party before it came into force. Where the suit was instituted under s. 108 (15) Oudh Rent Act on September 18, 1939, when the Oudh Rent Act was in force, but the U. P. Ten. Act, was in force on March 16, 1940, when the order complained of restoring suit dismissed for default was passed, the application for revision of the order is governed by the U. P. Ten. Act. The revision is not maintainable under s. 115, Civil P. C., in view of s. 243, U. P. Ten. Act, nor is it maintainable under s. 276, U. P. Ten. Act; as the order complained of was not appealable to the District Judge. **JAGANNATH SINGH v. SITA RAM** Oudh 543

Usufructuary mortgage. See Transfer of Property Act, 1882, s. 77. 405

Vendor and purchaser—Suit for purchase price paid under abortive sale is one for money had and received—Liability to pay when arises.

A suit by a purchaser for recovery of the purchase money paid under an abortive sale is one for money had and received to his account and when there is no consideration and the sale fails *ab initio* the liability to refund the purchase money arises when it is received by the vendor. **VENDOR THAZHATH PARAVAN v. VENTHRA-YIL TARWARD KARNAVAN** Mad. 408

Wajib-ul-arz. See Custom. 394

Will—Construction—Hindu testator having two widows and no children, bringing up R, a daughter of his wife's brother as his own daughter—Property devised in favour of one of widows, providing that after her death property should go to his two brothers and R in equal shares—No restriction placed on R's power of alienation—Will held gave absolute estate to R.

P a deceased Hindu had two widows but no children. R the daughter of a brother of one of the widows, was brought up from her infancy with P as if she were his own daughter. Before his death, P had executed a will. By the will he devised all the properties to his junior wife. She was directed to give one of the houses to the senior wife for residence for her life and also a monthly maintenance allowance of Rs. 10. The rest of the income, the junior wife was allowed to use in any way she liked. As regards the corpus of the estate, she was prohibited from selling it, except certain unproductive properties which she could sell with the consent of his brothers. After her death the whole property was to be divided in three equal shares two to his two brothers and one to R. There was no restriction on R's power of alienation. On the contrary she

Will—concl'd.

was treated on the same footing as the testator's brothers: *Held*, that the intention of P was to confer an absolute estate on R. **GURAN DITTA MAL v. RAM RAKHI** Lah. 742

Construction—Principles—Intention of testator—Garden in compound of building is presumed to be for the benefit of all the occupants of the building in the absence of words allocating it to occupant's of particular floor.

The Court has no power to give effect to a hypothetical intention by supplying lacunae in the will and thereby making a new will for the testator. The Court cannot speculate as to what the testator may suppose to have intended to write. The only intentions of the testator which the Court can carry out are intentions either expressly or impliedly expressed in the will. No indication of intention is sufficient to induce the Court to hold that a certain bequest has been made, unless, as a matter of fact, the bequest is made either expressly or by necessary implication in the will. Necessary implication does not mean natural necessity but so strong a possibility of intention that a contrary intention cannot be supposed.

The natural presumption is that a garden in the compound of a building is intended for the benefit of all the occupants of the building unless there are words allocating the whole of it to the occupants of some particular floor. Where there are no such words in the will the Courts are entitled to infer that the garden appertains to the whole building. **LOKE NATH MUKERJEE v. ABANI NATH MUKERJEE** Cal. 874

Construction—"Satyadhikari Oh Dokholikar" and "Satyaban Oh Dokholikar Purusannukromah", meaning of—Principles of construction.

Where a clause or a word in a will is susceptible of two meanings it must be interpreted according to that sense to which the law will give effect.

According to a will by a Hindu the testator's grandson R was to become with previous arrangement (made in some previous will) 'Shatyadhikari Oh Dokholikar' (of the disputed property). If at the time of his death he were to leave no male child then R's uterine brother S and on his death his eldest son was to become 'Shatyaban Oh Dokholikar Purusannukromah.' If two aforesaid grandsons and or any male child of their family *bangsha* be not in existence then the testator's existing son P or his eldest son was to become 'Satyaban Oh Dokholikar' none of the testator's heirs was given power to transfer.

Held, that the words "Shatyadhikari Oh Dokholikar" were not used to convey all the interest possessed by the testator. He must have used the word to confer some interest which was less than his own interest. The estate was given to R simply without express words of inheritance. It would in the absence of a conflicting context carry by Hindu Law an estate of inheritance. The estate given to R was therefore was not an English estate tail male.

Held, also that the word "purusannukromah" meant "generation after generation." S therefore got an estate of general inheritance and the prohibition against alienation of this estate was void in law. **ABANI NATH MUKHOPADHAYA v. AMAR NATH MUKHOPADHAYA** Cal. 448

Words and Phrases :

'Bankar', 'Lahkar' and 'Phalkar', meaning explained. See Bihar Agricultural Income Tax Act, 1938, s. 2 (a) 203 SB

"Belagan". See Landlord and tenant 300

Wrongful restraint. See Penal Code, 1860, s. 341 30

Zarepeshgi lease. See Deed 347

INDIAN CASES

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JOURNAL

Vol. 194

[Editors do not hold themselves responsible for the views expressed by the contributors.]

ON DEBT.

[By Phani Bhushan Sinha, B. L. Pleader, Gaya.]

Debt as a legal phenomenon presents us an interesting history. It has engaged my special attention as it offers us fresh field with golden harvest to provide our mind with ample materials for new enquiries and researches. It reveals to our mind various strata of legal epochs as excavation divulges to us various strata of historical epochs. Let us now go deep into the legal history and investigate by scientific study into the origin of debt and its successive stages of development. The idea of debt originated in human minds from some form of belief that Gods take active interest in human affairs. They do good to men and thereby put them in debt which men are morally bound to re-pay in some form or other. The oldest literature of ancient India, Greece and Rome and their respective laws are bound up with the same belief. The Vedas and the Upanishads, the oldest literature of the ancient Indo Aryans which demand from the students of research the most respectful attention on account of its remote antiquity shed new light on this point. The Rigvedic gods Indra (God of thunder), Usa (God of dawn) Surja (God of Sun), Varuna (God of Wind) and other Gods are always doing good to men and putting them in debt which is being re-paid by them by means of prayer or sacrifices.

It is very interesting to quote the following hymn of the Rigveda addressed to the God-Indra (God of Thunder) for illustration.

"Worship God Indra (God of Thunder). He is the best of all friends (as he gives us son and wealth) and he protects us and knows us all."
(Rigveda Book 1).

Now let us turn to the Upanishad which is supplementary to the Vedas and which gives us the exact word "Rina" that corresponds to the English word "debt." The

Taitriya Upanishada says that a Brahmin at the very moment of his birth becomes involved in three kinds of debts (1) Debt to the sages (2) Debt to the Gods (3) Debt to the mains. The first is discharged by the learning of the Vedas, the second is discharged by the performance of sacrifices, the third is discharged by the procreation of children. The word debt here connotes the idea of moral duty to re-pay. The sages, the Gods, the mains gave the Brahmins blissful life, hence they are morally bound to discharge the debt in the ways referred to. It is also interesting to note that the great sage Manu also referred to these debts in his code Chap. IV Verse No. 257 which says.

"When he (Brahmin) has paid according to law, his debts to the great sages, to the mains and to the Gods, let him make over everything to his son and dwell (in his house) not caring for worldly concern."

(Sacred Book of the East-Manu-Maxmuller's edition.)

The ancient literature of Greece and Rome furnishes us similar facts that ancient Greeks and Romans were under the belief that they were indebted to Gods for the benefits given to them and were morally bound to discharge the debt by means of prayer and sacrifices. The Greek God Appollo was worshipped for giving light and joy. The cock was specially sacrificed to the Greek God Asclepius (God of Storm) for averting stormy wind. It is interesting to refer to the last words* of the great philosopher Socrates addressed to Orito his disciple "Orito, we owe a cock to Asclepius, discharge the debt and by no means omit it." These words clearly refer to the moral obligation of Socrates to discharge the debt to Asclepius (God of

*Ancient history of Vincent Smith.

Storm) who took away his stormy life and freed him from the worldly bondage. This shows that even the great philosopher Socrates was not free from the old idea that men are morally bound to re-pay the debt to Gods by means of prayer and sacrifices.

Similar was the belief of the ancient Romans that they owed to Gods who gave them blessing, victory, love and beauty and they were morally bound to discharge the debt by offering homage and worship to their divine creditors. Jupiter, the mightiest deity was worshipped by the ancient Romans in His famous temple at Elis and the white animals were sacrificed to him for his giving benefit and blessing to the Roman citizen. The Venus, the Goddess of love and beauty was offered myrtle, rose and apple because she gave beauty and progeny. The Mars (God of War) was worshipped as he gave, victory in War. These facts can be said to be mythological but by the science of mythology we can get the history, philosophy, law and religion of ancient nations. These facts bring to light one important secret that primary source or of the idea of debt was the receipt of benefit from Gods which carried with it the idea of moral duty to repay. The idea of receiving benefit from Gods and the corresponding idea of returning the same gave rise to a new form of moral idea in the course of social evolution that every man is morally bound to return the benefit received from his fellowmen and thus arose in the human society the idea of human debtor and creditor. That every human debtor was morally bound to return the thing received was the law set up by the Gods and in violation of which the debtor was punishable by the ancient society. The ancient people knew no distinction between moral obligation and legal obligation, moral law (*Jus*) and juristic law (*jus civile*).

The obligation which was moral to them was also legal to them and was enforceable by their crude and undeveloped state. With the gradual development of the idea of state the moral obligation attached to debt was transformed into a legal obligation enforceable by the King. Thus we find that the debt involved two elements in the second stage of its evolution. (1) Receipt of the thing; (2) legal duty to return the same and hence it was enforceable on the ground of a delivery of property. The modern idea of debt as a contractual obligation is the latest juridical phenomenon unknown to

ancient people. Street, one of the greatest jurists of England makes the following observation which is worth quoting for illustration.

"Early real contract or simple debt was directly founded on legal duty and does not derive its obligatory force from any word or promise of either party".

(See "Street's Foundation of Legal Liability, Page 2).

This observation is applicable to all ancient systems of law such as ancient Hindu Law, classical Roman Law and other continental laws such as English, German, French and Muhammadan Law of the past. In ancient Hindu Law "*Rina*" and in the classical Roman Law, *Mutuum* and *commodatum* were the earliest forms of debt founded upon a delivery of a thing giving rise to a legal liability to repay.

The early German, English and French Laws being child of ancient Roman Law adopted the Roman idea of *Mutuum* and *commodatum in toto*. The ancient Muhammadan Law was also much influenced by the Roman classifications of debt as aforesaid.

The "*karz*" or "*Arreeut*" of the ancient Muhammadan Law corresponded with the *Mutuum* and the *commodatum* of the ancient Roman Law.

(See Ballie's Muhammadan Law, Page 799.)

Thus we find practically all systems of ancient law exhibit the fundamental unity of legal idea that early debt is based on legal duty to repay the thing delivered, in other words it was enforceable on the ground of a delivery of property.

Let us now look to the third stage which brings to our mind the idea of debt as a contractual obligation. Such an idea is of comparatively recent origin in the history of legal institution as pointed out by Sir Henry Maine in his book on "Ancient Law" and originated at the time when the idea of contract had come into existence and respect for contractual obligation began to develop. Debts, in modern law, are not founded on moral duty or legal duty but they are founded on mutual agreement which is alone sufficient to create an obligation enforceable at law. Thus we find that debt as a legal phenomenon passed through several stages of evolution in its onward march of progress. In the beginning it was a moral obligation, subsequently it became a legal obligation and finally it was changed into a contractual obligation giving up its old form and character.

SIMULTANEOUS CONVICTIONS FOR SUBSTANTIALLY THE SAME OFFENCE.

Much confusion may result, where a statute, *ex majore cautela*, provides against what is, or what seems to be, substantially the same offence in several different ways. Recently, in *Kite v. Brown* (30th October, 1940), in the Divisional Court, the Rationing Order, 1939, (S. R. & O.; 1939, No. 1856), arts. 2 and 7 (a) and (c) were considered very carefully in this connection.

Article 2 provides: "Except under the authority of the Minister or under and in accordance with the provisions of this order or any direction or licence issued thereunder, a person shall not obtain or attempt to obtain, or supply or offer or attempt to supply any rationed food for household consumption, or any rationed food for the purposes of any establishment." Article 7 provides: "Except where the Minister shall otherwise authorise, no person may obtain any rationed food for household consumption unless the following conditions are complied with: (a) A person who is the holder of a general or child's ration book shall obtain rationed food only from a retailer with whom he shall be registered in accordance with directions of the Minister . . . (c) the appropriate coupon or coupons representing the amount of food obtained must be detached and retained by the retailer and no more may be obtained on any coupon than the amount prescribed for such coupon . . ."

In the first two informations offences were charged relating to the supply of rationed food to the same person. The first charge was that she was supplied with rationed food although she was the holder of a general ration book and not registered with the appellant. The second charge related to the supply of rationed food to the same person for household consumption without a coupon. In both cases the offences charged related to the same $\frac{1}{2}$ lb. of butter.

Counsel for the appellant cited *R. v. Kenny*, 21 Cr. App. Rep. 78, as authority for the proposition that two informations should not be laid for what is substantially the same offence. In that case the appellant had pleaded guilty to charges of pavilion breaking and larceny and also to committing malicious damage. He was sentenced to two concurrent sentences for the pavilion breaking and larceny, and for the malicious damage respectively. Lord Hewart said: "The malicious damage in this case was an incident of the breaking

in, but nevertheless the appellant was sentenced in respect of each offence as though they were distinct offences. . . . It is obvious that there should not be concurrent sentences for two aspects of the same matter. . . ." The court accordingly quashed the conviction for malicious damage, and substituted a smaller sentence for that in respect of the pavilion breaking and larceny.

Viscount Caldecote, L. O. J., rightly pointed out an unsatisfactory feature of the report of this case in that, although the appeal was stated to be against the sentences, the court was said to have quashed one of the convictions. He stated, apparently on this ground, that he was unable to derive any assistance from that case. He said that he had, however, come to the clear conclusion that there were in *Kite v. Brown* two definite offences, one of which was possibly more serious than the other. That objection therefore failed.

With regard to the report of *R. v. Kenny*, 21 Cr. App. Rep. 78, if in fact the appeals were against sentence, it might well be a relevant consideration in mitigation of the sentence that substantially only one offence had been committed, and that the defendant should not be punished as if he had committed two offences. It is fairly clear from the remarks of the Lord Chief Justice in that case, that whether the appeals were against convictions and sentences or merely against sentences, the learned judge in making his general pronouncement deplored the duplication of sentences and not the duplication of convictions for what amounted to two aspects of the same matter. It would indeed be surprising if the actual decision went further than that, although if after conviction or acquittal on one charge a defendant were tried on a different charge which was in respect of substantially the same offence, he might then be entitled to an acquittal. The offences would, however, have to be as nearly identical possible (*Bannister v. Clarke*, 26 Cox. 641), as the ground of a successful plea of *autrefois convict* or *autrefois acquit* is that "it is an established rule of the common law that a man may not be put twice in peril for the same offence" (2 Hawk. c. 35). Simultaneous convictions on two charges involving substantially the same offence could hardly, it is submitted, be bad on this ground.

In this connection, however, it should always be borne in mind that under s. 33 of the Interpretation Act, 1889, "where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law. . . the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be punished twice for the same offence."

In *Kite v. Brown* a further objection was raised with regard to another pair of informations against the same defendant, that they were bad for duplicity. They were similar offences to those charged in the first informations, but in this case the informations particularised $\frac{1}{2}$ lb. of butter and $\frac{1}{2}$ lb. of bacon in each case. Viscount Caldecote, L. C. J., said that the fact that two different articles of rationed food were stated to have been supplied in no wise made the informations bad for duplicity. A case to which he had been referred (*R. v. Hammick* (1918), 87 L. J. K. B. 846) was under a very different order, and did not affect his opinion. He therefore held, and the rest of the court agreed, that the convictions were good.

In *R. v. Hammick*, *supra*, the defendant was convicted for that he on or between 9th April, 1917, and 22nd November, 1917, did unlawfully acquire various articles of food, to wit sugar and flour, so that the quantity in his possession at any one time exceeded the quantity ordinarily required for use and consumption in his household, contrary to the Food Hoarding Order, 1917, art. 1. This conviction was held to be bad for duplicity, and the ground of the decision was that the article created a separate offence in respect of each separate article of food hoarded. This is not so in the Rationing Order, 1939, arts. 2 and 7,

which refer generally to "rationed food" and not to particular items of such food.

There is a danger of an information or indictment being bad for duplicity wherever a statute describes the same offence in different or alternative ways. In *R. v. Young* at the London Sessions on 30th September, 1937 (unreported, but see 81 Sol. J. 832), a count charging a defendant with driving a motor vehicle on a road when under the influence of drink or a drug to such an extent as to be incapable having proper control of the vehicle contrary to s. 15 of the Road Traffic Act, 1930, was held to be good. On the other hand, convictions were held to be bad for duplicity in *R. v. Wilmot*, 24 Cr. App. Rep. 63; *R. v. Surrey J.J.* [1932] 1 K. B. 450; and *R. v. Disney* [1933] 2 K. B. 138. There was a conviction for driving a motor-car recklessly or at a speed or in a manner which was dangerous to the public, contrary to s. 11 of the Road Traffic Act, 1930; the second was for driving a motor vehicle without due care and attention or without reasonable consideration for other person using the road, contrary to s. 12 (1) of the Road Traffic Act, 1930, and the third was for unlawfully taking or destroying game or rabbits in or being on certain land by night with a gun, net or other instrument for the purpose of unlawfully taking or destroying game or rabbits, contrary to s. 1 of the Night Poaching Act, 1848.

In the last case the Lord Chief Justice said that it was impossible to say of what the appellant had been convicted. In *Kite v. Brown* there was no such uncertainty, but the fact that such a defence could be raised illustrates the extreme care which must be taken in framing indictments and informations where a statute is more than usually verbose.—S. J.

ASSISTING THE POLICE

At page 780 of volume 99, we had an article on this subject. We return to it in view of the present position, when we are all not only in the war in the sense that we are, soldiers and civilians alike, exposed to the hostile action of the enemy, but also each carrying an individual responsibility for the maintenance of order and decent behaviour, both when under fire and when going about our ordinary avocations.

One of the healthiest features of the British constitution is that it recognises no

fundamental distinction between the classes of citizens selected for special functions, such as soldiers and policemen, and the ordinary run of men and women. Superior orders will not exonerate either a soldier or a policeman from the guilt of any unlawful action he may perform. No doubt if action taken under orders results in his arraignment before a criminal court, he will be dealt with more gently on that account, unless the action was so outrageous that no re-

reasonable being ought to be allowed to plead in mitigation the duty of obedience to orders. But such an argument would not be admitted as a ground for acquittal.

This steady insistence on equality before the law has more than one consequence. There is on the one hand the protection of all and sundry from violent and oppressive military or police action, but there is also a duty laid on all and sundry to assist in keeping the King's peace. This is altogether apart from the special emergency law by which we have now all placed our persons and property unreservedly at the disposal of the government for the time being, for the purpose of prosecuting a war in which we must be successful or perish.

It is our ancient Common Law which lays on each of us the duty to interfere to prevent riot, gives us the power to arrest for felony, compels us under pain of punishment to assist a policeman in the execution of his duty when called upon to do so.

One man or woman can do little to help in suppressing a riot of any gravity, though there have been instances where a person of force of character, acting promptly and before the trouble has gone very far, has quelled an outbreak of disorder. But usually, organisation and direction are essential to success in dealing with a mob.

Riot is rare in England, and in modern times there is nearly always readily available sufficient organised force to deal with riot if it arose. The great reinforcement of the police by the special constabulary, and of the military by the Home Guard, ensures that any trouble of this kind promoted by the treacherous fools, fortunately few in this country and probably now all safely under lock and key, who have a queer hankering for the new order whose prophet is Hitler, and whose essence is the tyrannous domination of one race over all others, is very unlikely to arise. But the fact remains that if on any occasion the organised forces need assistance in dealing with riot, every man of us, special constables, home guards and the un-uniformed man alike must help according to his strength. In the past it was tacitly assumed that the citizen's duty to uphold the King's peace lay upon male citizens alone. There can be no doubt that women, with the franchise and with all legal disqualification for office of all kinds formally removed, have exactly the same duty in this regard as men. To do them justice, few of them shrink from

this position. Indeed, long before the emancipation of women some of the boldest and most determined helpers of policemen in trouble were those in petticoats, and the athletic young women of nowadays are not likely to be less forthcoming in this respect than their grandmothers.

When a policeman calls upon a bystander to help, that bystander must respond if it is not physically impossible to do so. An elderly man or woman with a weak heart or rheumatic legs, would meet with no punishment or even reproach for non-fulfilment of this public duty. But the physically fit are in danger not only of being regarded as morally weak and miserable; one of them might find himself in the dock indicted for a common law misdemeanor. This is not mere ancient thunder. In the article referred to above, an instance is cited of one such indictment at the Wiltshire Quarter Sessions for October 1935. A policeman was struggling with a prisoner who had been engaged in a fight. The constable called on the accused by name to assist him, but the accused not only sought excuse for doing nothing, but took on himself to say, "You can't arrest him." Later he added, "Why call me when there are plenty of others about?", an argument equally available to every man jack of those present, and if adopted, resulting in no assistance being given at all. A fine of five pounds was thought sufficient to meet this case, but a common law misdemeanor will carry imprisonment as well as a pecuniary penalty.

The leading case on Assisting the Police is *R. v. Brown* (1841), Car. and M. 314; 174 E. R. 522. In that case, Mr. Baron Alderson laid down as requisite to support an indictment for refusal to assist the police: the constable must see a breach of the peace being committed, there must be a reasonable necessity for calling for assistance, and a refusal without physical impossibility or lawful excuse, to render the assistance called for.

"Whether the aid of the defendant, if given would have proved sufficient or useful, is not the question or the criterion. Every man might make that excuse and say that his individual aid would have done no good."

"Constable" will of course, include special constable. As we have repeatedly pointed out, a special constable on duty is as fully a constable as any member of a police force; it is not necessary to travel again over that piece of ground.

There are other decided cases in point. *Glamorgan County Council v. Glasbrook* (1924) 88 J. P. 111, citing *R. v. Brown*, supra, recognised the citizens' duty "to aid and assist a constable in the preservation of order." For a form of indictment held good and sufficient, see *R. v. Sherlock* (1866), 30 J. P. 8.

The law protects the citizen who assists a constable as it protects the constable himself, see *R. v. Porter* (1873), 12 Cox 444.

The protection may not be very effective when a violent prisoner is going "all out" to defeat his captors, and it is perhaps small comfort to the upholder of the law that, if he is killed his assailant will probably be hanged. But he is a poor citizen who, in a critical moment, stops to regard his own skin, and certainly every case of severe punishment for violence to a constable or his lawful assistant, tends to deterrence.—*J. P.*

RETROSPECTIVE EFFECT OF PENALTY SECTIONS

If a statutory enactment increases or decreases the term of imprisonment or the amount of the fine which may be inflicted for an existing statutory offence, is the new enactment retrospective so that a person who committed an offence before the passing of the amending legislation becomes subject to the new penalties, or does the new section apply only to offences committed after its passing?

One general principle as to the retrospective effect of legislation is thus laid down in Halsbury's "Laws of England," second edition, volume 31, at p. 513. "A statute is *prima facie* prospective and does not interfere with existing rights unless it contains express words, or there is the plainest implication to that effect. The fact of a statute being remedial, or designed to protect the public interest, is a matter to which great weight is to be attached and a different principle prevails where the statute is one that introduces a new remedy." But there are cases in which it may be argued that amending legislation must affect acts already done, and that penalties must be imposed under the new Act. This may be clear from the language of a section. Section 53 (1) of the Children and Young Persons Act, 1933, reads as follows: "Sentence of death shall not be pronounced on or recorded against a person under the age of eighteen years, but in lieu thereof the court shall sentence him to be detained during His Majesty's pleasure, and, if so sentenced, he shall, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place and under such conditions as the Secretary of State may direct." This would have prevented the passing of a death sentence upon a person who committed murder before the passing of that statute, and who might have been liable to the death sentence had it not been passed, provided he

was under the age of eighteen years at the time of the trial.

We know of no case in which the point as to the retrospective effect of penalties has been decided, though it may be supposed it must often have arisen. At the present time, it may often arise, for there are several instances where under the Defence Regulations terms of imprisonment or penal servitude or the maximum amount of fines have been increased by amending regulations.

There are many authorities bearing more or less upon the question, a few of which may now be noted. In *R. v. Cator*, (1767), 4 Burr 2026: 98 E. R. 56, Lord Mansfield, C. J., was dealing with the enticement of artificers into foreign service, for which the penalty under a statute, 5 G. I. c. 27, was £100 and three months' imprisonment, but under a later statute, 23 G. II, c. 13, was £500 and twelve months' imprisonment. He observed: "The latter Act seems to be a repeal of the former: it was made to supply the deficiencies of the former." It would seem to follow from this judgment that the penalty section was regarded as retrospective, since if the earlier statute was repealed by the later, the later would govern the whole proceedings and the penalty, no penalty under a repealed statute being possible.

Maxwell, on "The Interpretation of Statutes," p. 162 says: "Where a statute alters the quality and incidents of an offence, as by making that which was a felony merely a misdemeanour, it would be construed as impliedly repealing the old law. Thus, 16 Geo. III, c. 30, which imposed a pecuniary penalty merely on persons who hunted or killed deer with their faces blackened, was held to have repealed so much of the "Black" Act (9 Geo. I. c. 22) as made that offence capital.

Again, he says, "where the punishment

or penalty is altered in degree but not in kind, the later provision would be considered as superseding the earlier one," and quotes *Henderson v. Sherborne*, (1837), 2 M. & W. 236, 150 E. R., p. 743. In that case, Lord Abinger, C. J., said "The principle adopted by Lord Tenterden, that a penal law ought to be construed strictly, is not only a sound one, but the only one consistent with our free institutions. The interpretation of statutes has always, in modern times, been highly favourable to the personal liberty of the subject, and I hope will always remain so. But I think there is another ground for not disturbing this nonsuit. If the 77th section of the new Poor Law Act embraces this case, I do not agree that it does not amount to a repeal of the former enactment."

In *Re Baker* (1857) 2 H. & N. 219, 157 E. R. 92, Bramwell, B. said: "When a statute directs something to be done in a certain event, and another law is made which appoints something else to be done, not contradictory, but more comprehensive and including the former, I cannot help thinking that the first Act is gone."

Here, again, there is support for the view that a penalty may be imposed under a later enactment for an act done during the existence of an earlier enactment repealed by the later.

In *R. v. John Davis* (1783), 1 Leach, 271, 168 E. R. 238, a statute was held to be virtually repealed by a latter one reducing the gravity of the offence, and its punishment, and although the report does not make this clear, it appears that the prisoner must have been held liable only to the lesser penalty provided in the second statute. That which applies to mitigation of punishment would logically apply to aggravation of sentence, but the law is not always so interpreted. It must always be borne in mind that where there is a doubt about the true construction of a statute of a penal nature, the doubt should be resolved in favour of the defendant.

In *R. v. Chandra Dharma* [1905] 2 K. B. 335, Lord Alverstone, C. J., observed: "The rule is clearly established that, apart from any special circumstances appearing on the face of the statute in question, statutes which make alterations in procedure are retrospective. It has been held that a statute shortening the time within which proceedings can be taken is retrospective, and it seems to me that it is impossible to give any good reason why a statute extending the time within which

proceedings may be taken should not also be held to be retrospective. If the case could have been brought within the principle that unless the language is clear a statute ought not to be construed so as to create new disabilities or obligations, or impose new duties in respect of transactions which were complete at the time when the Act came into force, Mr. Compton-Smith would have been entitled to succeed; but when no new disability or obligation has been created by the statute, but it only alters the time within which proceedings may be taken, it may be held to apply to offences completed before the statute was passed. That is the case here." The implication is that in the absence of clear and express language to the contrary, a statute imposing new disabilities or burdens should not be held retrospective in its operation.

The case of *In Re School Board Election for the Parish of Pulborough* (1891) 1 Q. B. D. 725, dealt with certain disqualifications attached to bankruptcy under the Act of 1883. It was there held that the disqualifications were not retrospective, and did not apply to a person made a bankrupt before the passing of the Act. Davey, L. J., in the course of his judgment said: "The question therefore seems to me to turn on the proper construction to be put on the words 'Where a man is adjudged bankrupt' at the commencement of s. 32 of the Bankruptcy Act, 1883. Now, reading those words alone, and apart from considerations arising out of the subject-matter of the section in which they occur, I should certainly understand them (according to the ordinary use of the English language) to mean, if any man shall or may hereafter be adjudged bankrupt; and unless there be some controlling context in the Act or in the section, I hold that to be the meaning of the words. It has been suggested that the words may be read as meaning 'where a man is an adjudicated bankrupt'. The answer seems to me to be that those are not the words before us, and that the words we have to construe are grammatically different. It is a well-known principle in the construction of statutes, that where the words admit of two constructions you are not to construe them so as to produce a retrospective effect, or impose disabilities not existing at the passing of the Act."

R. v. Vine (1875), 13 Cox, C. C. 43, dealt with another kind of disqualification, namely, that of a person convicted of

felony, from holding a licence to sell spirits. Here, it was held that the disqualification had a retrospective effect so as to make a licence held by a person disqualified null and void. Cockburn, C. J., said; "If it could be seen that the intention of the legislature was to aggravate the punishment of persons convicted of felony, I should feel strongly the force of Mr. Poland's argument; but the purpose of this enactment is not to punish the felon, but to protect the public from having houses of public entertainment kept by a class of persons likely to prove injurious to society." From this it would appear that the learned judge would not have held upon the words of that particular statute that if it had provided increased punishment for an offence, it would have been retrospective in operation.

From these authorities, none of which as we have said decides the particular point we are discussing, it appears that where there is any doubt upon the true construction of a statute, order, or regulation, the construction should be in favour

of the defendant, and should not be such as to render him liable to increased punishment. There may, however, be cases in which the amendment of the law is such as to do away with the old provision, and replace it by a new provision from the date upon which the new provision comes into operation. Generally, where an enactment is amended, the enactment is to be read from the date upon which the amendment comes into force in its new form, and with full effect from that date. This may even involve the proposition that a person is liable to increased imprisonment or fine under the new law even though his offence was committed at a time when the maximum punishment was under the old law less severe. Only the High Court can settle the matter conclusively, and until such a decision is pronounced, it is likely that the courts will tend to resolve any doubts by refusing to impose the higher scale of punishment provided by new enactments.—J. P.

Extracts from Contemporaries.

An Offence Against a Child.

We heartily agree with the mayor of Luton, who told a mother, found guilty of shoplifting in the presence of her ten year old son, that she had committed a crime not only against the shopkeeper, but also against the boy. She was treated mercifully and bound over, though, as the magistrates said, she deserved to go to prison. Fortunately for her, people are not always dealt with by the sole test of what they deserve, and a prison sentence on the mother might have been a disaster for her family.

There is to-day a widespread and wholesome interest in juvenile delinquency, its causes and its treatment. All careful investigators find that home life is, as might be ex-

pected, one of the most important influences upon a child's character and conduct, perhaps the most important of all. It has been pointed out recently that many people, when questioned on the subject, are quite unable to say when they first learned that they must be honest, but they have a general impression that they knew about it as soon as they knew anything. This points strongly to a probability that it was at home that the first lessons were given in honesty. Even where parents are not scrupulously honest themselves, they are usually horrified at the thought that their children should know anything against them, and the spectacle of the parent allowing her small child to see his mother in the act of stealing is as sad as it is rare.—J. P.

REVIEW.

The Law of Arbitration In India.

By S. D. SINGH, M. A. LL., B. PRIOE Rs. 5.

This is an exhaustive and critical commentary on the Arbitration Act 1940. The arrangement of the book is excellent. The principles have been lucidly expressed in the light of the latest and up-to-date Indian and English case-law, and the changes in the law have been clearly pointed out. All the

intricate points arising under the provisions of the Act have been fully discussed. The appendices contain all the connected statutes repealed or co-existing as well as the English Arbitration Acts and extracts from the Civil Justice Committee Report. The book will be found very useful to the Bench as well as to the Bar.

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[Editors do not hold themselves responsible for the views expressed by the contributors.]

RES IPSA LOQUITUR AND ONUS OF PROOF

The judgment of Mr. Justice Atkinson in *Imperial Smelting Corporation Limited v. Joseph Constantine Steamship Line Limited* (162 L. T. Rep. 267; (1940) 1 K. B. 812) affords one further example of the application of what is known as the doctrine or principle of *res ipsa loquitur*, and the burden of proof which is thereby cast upon the party called upon to rebut the allegation of negligence thus raised against him. This was a special case stated by an arbitrator to determine the question of liability in a claim for damages which was brought by a firm of charterers against a firm of shipowners for failure to deliver a cargo under the terms of a charter-party.

The charter-party provided for the loading by the ship in question of a cargo at a certain port, but before the time for loading had arrived the ship was damaged by an explosion the cause of which was unexplained. It was agreed between the parties that the delay caused by the damage was of such a character as to frustrate the commercial aspect of the adventure, but as regards the liability of the shipowners the main question in dispute was whether the onus lay upon them, if they sought to rely upon frustration, to prove that this was not caused by their own default, or whether it lay upon the charterers to prove default on the part of the shipowners.

Upon this main question of law judgment was given in favour of the shipowners, and, although this decision was subsequently reversed by the Court of Appeal (163 L. T. Rep. 168; (1940) 2 K. B. 430) on the ground that a party who is *prima facie* liable cannot escape liability under a plea of frustration unless he proves affirmatively that the cause of frustration was not brought into operation by his default, the observations of Mr. Justice Atkinson upon the application of the doctrine under discussion remain unaffected by the later decision. In his judgment, in dealing with the question as to whether or

not the charterers in order to discharge the burden which, in his view, lay upon them, had in fact established negligence on the part of the shipowners, he came to the conclusion that the mere happening of the explosion was such as to raise a presumption of negligence, and he went on to consider therefore what degree of proof was thereby called for by way of rebuttal on the part of the shipowners.

Following certain earlier authorities which have dealt with the position which arises when a *prima facie* case of negligence is raised, he held that the onus which was thus cast upon the shipowners was one merely to give an explanation of the explosion, and that, if such explanation was equally consistent with the absence of negligence as with negligence, they had discharged this onus, with the result that the burden once more lay upon the charterers to prove negligence in fact, which, in his view, upon the facts before him they had failed to do.

This question of the degree of proof which is thus called for by way of rebuttal is one of considerable importance in that the facts which may give rise to the application of the doctrine are frequently to be found in the ordinary relationship of mankind which leads to a charge of negligence upon which a claim for damages is based, and it may well happen in such a case that no evidence of negligence is available apart from the presumption which arises from the happening of the occurrence itself. It is important, therefore, to know in what position a plaintiff may find himself in an action when he relies solely upon this presumption, and in what manner it may be rebutted by the defendant so as to lay the plaintiff under the necessity of producing affirmative evidence of negligence in support of his case. This leads to a question which is the subject of this article, and it is this: "In a case in which the facts are such as to raise a presumption of negligence, do they call for an explanation only on the

part of the opposite party, or do they go further and call for proof of the absence of negligence on his part in order to amount to a rebuttal of the charge of negligence?"

As regards the onus of proof which is thus laid upon a party to rebut this presumption of negligence, the judgment which crystallises the law on this point and which has been referred to and followed in a number of subsequent cases is that of Lord Dunedin in the House of Lords in *Ballard v. North British Railway Company* ((1923) S. C. (H. L.) 43). This case concerned an accident which occurred to a train and several wagons on a railway line, and in an action against the Railway Company for negligence the defence was set up (*inter alia*) that the accident was caused by the breaking of a defective link in one of the couplings of one of the wagons. The Lord Ordinary decided against the Railway Company, holding that they had failed to discharge the onus which lay upon them under the principle of *res ipsa loquitur* of showing that the accident had occurred owing to a cause or causes over which they had no control, and for which they were not responsible, and he held that the driver of the train had been negligent, and that the defect in the link might have been, and should have been, discovered on a reasonable inspection. This decision was reversed by the First Division, which came to the conclusion that the driver had not been negligent, and that the defect in the link was latent and could not have been discovered, but on appeal the judgment of the Lord Ordinary was restored. In the House of Lords all the Law Lords were in agreement with his decision that the defect was latent and undiscoverable by an ordinary inspection, but upon the question as to whether or not there was negligence on the part of a driver there was a difference of opinion, a majority holding that there was such negligence.

In giving his dissenting judgment on this point, Lord Dunedin makes these important observations as to the burden of proof where such a principle is invoked, saying, at p. 54: "Taking the cases in which the mere fact of the accident is relevant to infer negligence, it is sometimes said, and the Lord Ordinary has said it, that there is then raised a presumption of negligence which the defender has got to rebut. I think that this is too absolute a method of expressing the legal result in all cases."

It was this same feeling that, I think, led Lord Adam to say in *Milne v. Townsend* (1) 882) 19 R. 830): "The respondent can

only speak so as to throw the inference of fault upon the defender in some cases where the exact cause of the accident is unexplained." If indeed 'relevant to infer' and 'necessarily infers' were the same thing, then I think it would be right to say that, when an accident arises in cases where the doctrine is applicable, then a presumption of fault would arise which must be overcome by contrary evidence, and that is the way that the Lord Ordinary has looked at the matter. But 'relevant to infer' and 'necessarily infers' are not synonymous, and the difference becomes of moment in a case like the present. I think this is a case where the circumstances warrant the view that the fact of the accident is relevant to infer negligence. But what is the next step? I think that, if the defenders can show a way in which the accident may have occurred without negligence, the cogency of the accident by itself disappears, and the pursuer is left as he began, namely, that he has to show negligence. I need scarcely add that the suggestion of how the accident may have occurred must be a reasonable suggestion.

"For example, in *Scott v. The London & St. Katharine Docks Co.*" (13 L. T. Rep. 148; (1865) 3 H. & C. 596) "a case where a bag of flour fell on a man who was passing along a quay in front of a warehouse, it would not have been sufficient to say that the flour bag might have fallen from a passing balloon. I think this view of mine is borne out by the expressions used in the case of *Scott*. Erle, C. J., who gave the judgment of the court (and it is to be noticed that though he and Mellor, J., did not agree with the majority on the facts, the whole matter depending on the interpretation of the judge's notes, the judgment was unanimous on the law) expressed himself thus: 'There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.' I take notice of the word 'explanation'; it is not in absence of 'proof.'"

This insistence of Lord Dunedin upon the onus being discharged merely by the giving of an explanation as opposed to the necessity of proving the absence of negligence has been stressed in a number of more recent cases. Thus, in the case under discussion Mr. Justice Atkinson puts the matter in this

way, saying, at p. 272 and p. 828 respectively: ".....(3) Where the onus is on the owners under the first principle"—that is to say, where the accident proved is of such a nature as to raise a presumption of negligence—"that onus is discharged by proving facts from which the inference that the accident was not caused by negligence is as equally strong, that is, equally consistent with the facts, as the inference that it was caused by negligence," and he held that such an explanation was forthcoming on the facts then before him.

Again, the same principle was applied, and an explanation was accepted in *The Kite* (149 L. T. Rep. 498; (1933) P. 154) which was the case of a collision between a barge which was being towed by a tug and the buttress of an arch of a bridge across a river. There Mr. Justice Langton, in stating his view of the onus which lay upon the owners of the tug to rebut the presumption of negligence, says, at p. 503 and at p. 170 respectively, after quoting the words of Lord Dunedin (*sup.*): "Now, if that be a correct statement of the law—and I humbly think it is—what the defendants have to do here is not to prove that their negligence did not

cause this accident. What they have to do is to give a reasonable explanation, which, if it be accepted is an explanation showing that it happened without their negligence. They need not even go so far as that, because, if they give a reasonable explanation which is equally consistent with the accident happening without their negligence as with their negligence, they have again shifted the burden of proof back to the plaintiffs to show—as they always have to show from the beginning—that it was the negligence of the defendants that caused the accident."

And this last judgment was followed in *The Mulbera* (156 L. T. Rep. 348; (1937) P. 82) which was a claim arising out of the sinking of a barge in a dock. For further cases see *Langham v. Governors of Wellingborough School and Fryer* ((1932) 147 L. T. Rep. 91); *The Stranna* (157 L. T. Rep. 462; (1937) P. 130); *Brook's Wharf and Bull Wharf, Limited v. Goodman Brothers* (156 L. T. Rep. 4; (1936) 1 K. B. 534); *Claydon v. Sir Lindsay Parkinson, Limited* ((1939) 2 K. B. 385); see also the Scottish cases of *Henderson v. Mair* ((1928) S. C. 1); *McGowan v. Barr and Company Limited* ((1929) S. C. 461).—L. T.

Extracts from Contemporaries.

In re Witnesses

Countless are the stories that have been handed down from generation to generation regarding witnesses, their idiosyncracies in their mode of giving evidence, their endeavours to elude the little traps laid for them by the skilful cross-examiner, who has so often the witness at a disadvantage. Occasionally, it is true, the witness scores in the skirmish that takes place, but more often, unless he chances to be very astute, he is at a disadvantage. Some cynical person of a past generation, it will be remembered, classified witnesses into three categories, witnesses simpliciter, blank witnesses, and experts. But this is, perhaps, too strong a way of putting it. In an old volume which the present writer has long had in his bookcase, there is a chapter devoted to witnesses which treats first of all of the expert witnesses who were called in the early days when railway enterprises were very much in the forefront, and the professional witness was frequently to be seen and heard in the committee rooms of Westminster. It is said of one engineer, described as a "dexterous knave," that he spent his days in swearing in one committee

room that black was white, and in another that green was red, it being generally known that he spoke for the sake of his ten guineas a day, and that his most veracious statements usually contained a vein of alloy. Having by his ingenious misrepresentations gravely injured a case in which Mr. Davenport Hill was professionally engaged as counsel, and Mr. Tite, the eminent architect, was a projector, this witness was suddenly struck with apoplexy and died. "Well, Hill, have you heard the news?" inquired Mr. Tite of the barrister whom he encountered in Middle Temple Lane on the morning after the engineer's death, "have you heard that so and so died yesterday?" "I can't say," was the reply, "that I shall shed many tears for his loss. He was an arrant scoundrel." "Come, come," replied the other, "you have always been too hard on that man. I do verily believe that in the whole course of his life that man never told a lie—out of the witness box." Curiously enough it is added that the deceased who lied in public was said to be punctiliously honestly honourable in private life. It seems an odd conclusion, but such is the story.

Jeffreys and the Witness.

It is traditionally reported that in the reign of Charles II. in badgering a witness, no barrister could surpass George Jeffreys, of sanguinary fame. Nevertheless, on more than one occasion he met his match in the witness-box. "You fellow in the leathern doublet," he is reported to have said to a countryman whom he was about to cross-examine, "pray what are you paid for swearing?" "God bless you, sir," was the reply, "and make you an honest man," answered the witness, looking counsel full in the face and speaking with a voice of hearty good-humour, "if you had no more for lying than I have for swearing, you would wear a leathern doublet as well as I."

Erskine's Methods

It is said that Erskine's treatment of witnesses was sometimes unfair, but his jocoseness was generally distinct from mere flippancy and his unfairness was redeemed by such delicacy of wit that his most cutting observations seldom annoyed the witness. A story has come down which tells us that a religious enthusiast, on entering the witness box, objected to take the oath in the customary manner, but stated that though he would not kiss the book he was quite ready to hold up his hand and swear. On being asked by Erskine to give his reason for this departure from the usual mode of testifying in the courts, he answered that "it is written in the Book of Revelation that the angel standing on the sea held by his hand." "But that," interjected Erskine, "cannot apply to your case, for in the first place you are no angel, secondly, you cannot tell how the angel would have sworn if he had stood on dry land as you do." The witness declined to budge from the position he had taken up and was permitted to give his testimony in his own way, and so impressed apparently was the jury by his evidence that they found a verdict adverse to Erskine's client. Erskine

might have remembered, but for the moment he chose to forget, that in Scotland, his native country, the method of taking the oath is for the witness to hold up his right hand and repeat the words after the judge. Erskine was usually very happy in his sayings; one that has often been recalled, but which will bear repetition, is the opinion which he gave on a case laid before him by his friend, the Duke of Queensberry, popularly known as "Old Q" as to whether he could sue a certain tradesman for breach of contract about the painting of his house. The evidence available being in the view of Erskine totally insufficient to support the case, he wrote, "I am of opinion that this action will not lie, unless the witnesses lie too!" Not a few jokes that come down to us have a fairly long pedigree, and so it is in this case, for, as someone pointed out, the story is apparently a revival of the pun attributed to Lord Chancellor Hatton in Bacon's *Apophthegmes*.

Clergymen as Witnesses.

The late Mr. Balfour Browne, K. C., who specialised at the Parliamentary Bar, in his work, *Forty Years at the Bar*, expressed the view that clergymen do not, as a rule, make good witnesses. Having been used to an autocratic pulpit, he said, they did not take kindly to the chair where the bladders of their pomposity—his own word—might be pricked by a sharp question. But despite this general view he had known both clergymen of the Church of England and of Rome to give excellent straightforward evidence. Quakers, as Lamb recalled in one of his essays, have always been remarkable for their self-watchfulness, a quality which never gave way to the winds of persecution or to the violence of judge or accuser under trials and racking examinations. "You will never be the wiser, if I sit here answering your questions till midnight," said one of the Friends. "Thereafter, as the answer may be," retorted his examiner:—*L. T.*

REVIEW.

The Quinquennial Digest (1936-1940) in two volumes, BY R. N. IYER, B. A., B. L., ADVOCATE, MADRAS, PUBLISHED BY THE MADRAS LAW JOURNAL OFFICE, MYLAPORE, MADRAS, PRICE RS. 18.

This is a Digest of all the Criminal, Civil and Revenue cases reported from 1936 to 1940. As is usual with Mr. R. N. Iyer's well-known and popular digests, the arrange-

ment of the book is scientific and the points are grouped under appropriate headings and sub-headings. Equivalent references to most of the journals are given. Head notes and catch words are comprehensive. The book will be found most useful to the Legal profession. The get-up and the printing are good.

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[Editors do not hold themselves responsible for the views expressed by the contributors.]

SOLDIERS' OBEDIENCE TO ORDERS.

The summing-up of Stable, J., in *R. v. Taylor*, at the Manchester Autumn Assizes (*ante*, p. 227), deserves consideration; the opportunity is convenient to discuss the legal position when a soldier, by way of defence to a criminal charge, pleads obedience to the orders of a superior.

Taylor, a lance-corporal on leave, was on his way, last August, to report to the near-by barracks, as was his duty upon the sounding of an air-raid alert, when he met an air-raid warden endeavouring, with difficulty, to make motorist dim their lights. He assisted the warden, joined by a sergeant of another regiment. One motorist would not respond; the warden saying that the motorist required shooting, the sergeant ordered the lance-corporal to fire. He did so, aiming, he said, for the type. The shot, passing through the back seat, lodged in the box of the driver's respirator. Taylor was charged with shooting with intent to do grievous bodily harm.

Stable, J., addressing the jury, said that England is not under martial law, but under the ordinary criminal law; all citizens—in uniform or not—have the same rights. If the use of a weapon is not justified by circumstances, it cannot be justified by the orders of a superior. Taylor wrongly thought that he was obliged to obey the sergeant's order. Did he intend to cause grievous bodily harm, or merely to give the motorist a sharp warning; if the latter, he was not guilty. And so the jury found.

The most lucid exposition of the legal position of a soldier in the criminal courts is found in Dicey's ninth chapter: A. V. Dicey, *Introduction to the study of the Law of Constitution* (1939), 9th edn., ed. E. C. S. Wade, Chap. ix, *The Army*.

"The fixed doctrine of English law is that a soldier, though a member of a standing army, is in England subject to all the duties and liabilities of an ordinary citizen... A soldier is subject

to the same criminal liability as a civilian..." (at pp. 300, 301).

What, then, is the position when a soldier is ordered by his superior to do an act which is unlawful?

"When a soldier is put on his trial on a charge of crime, obedience to superior orders is not of itself a defence" (at p. 302).

The note cites Stephen, *History of the Criminal Law* (1883), vol. i, pp. 204-206, and a curious case is mentioned, *R. v. Thomas* (1816, 4 M. & S. 441), found in Russell, *Crime* (1936), 9th edn., vol. i, p. 510. The note refers to *Keighley v. Bell* (1866), 4 F. & F. 763, 790 and the opinion of Willes, J., that "obedience to an order of a superior officer which is *not necessarily or manifestly illegal* may be a good defence to a criminal charge against a person subject to military law" (at p. 303, note 4; writers italics).

The opinion of Willes, J., was expressed in argument. His exact words are:

"I believe that the better opinion is, that an officer or soldier, acting under the orders of his superior—not being necessarily or manifestly illegal—would be justified by his orders."

The point did not arise for decision in that case.

A soldier must obey the lawful orders of his superior; but such obedience does not, of itself, excuse a breach of the ordinary law. This conflict of duties may occasionally lead to difficulties, but the three examples given by Dicey, and cited below, may provide a criterion.

An officer orders his soldiers to fire upon rioters, force being necessary to quell the disturbance. The soldiers must obey, not only because their officer has given the order, but because, in the circumstances, the order is justified by the law of the land. This is what happened in the Featherstone Riots, 1893, when a body of rioters armed with sticks and cudgels, entered the yard of

Ackton Colliery and demanded the withdrawal of a small number of soldiers placed there to defend it from the attack of a mob. The mob increased and broke the windows of the building where the troops were stationed. The soldiers retreating were surrounded by a mob of 2,000. The crowd was called upon to disperse; the proclamation in the Riot Act was read. Within an hour, and upon the crowd's refusal to disperse, the captain gave orders to fire and a few bystanders were killed. The report of the Committee of Inquiry (including Bowen, L. J.) contains an authoritative statement of the law upon the duty of soldiers. (*Dicey, op. cit., Appendix, Section V, Duty of Soldiers called upon to disperse an Unlawful Assembly*, pp. 620-624.) The rioters intended to set fire to the colliery and assault those upon the premises: serious outrage was threatened to persons and property, and all peaceable subjects were bound to assist in prevention—even, in a case like this, by deadly weapons.

"Officers and soldiers are under no special privileges and subject to no special responsibilities as regards this principle of the law. A soldier for the purpose of establishing civil order is only a citizen armed in a particular manner. He cannot because he is a soldier excuse himself if without necessity he takes human life" (cited at p. 621).

It depends upon "the necessities of the case" whether military assistance be summoned; such a course ought to be "the last expedient of the civil authorities." But once the call has gone, and the necessity has arisen, to refuse such assistance is a misdemeanour. The military must exercise care and skill, and must act so as to prevent serious crime. No set of rules exists to govern their conduct. The presence of a magistrate, important though it be, is not fundamental. Whether the moment has come to fire depends on "the necessities of the case"; is it necessary to fire in order to prevent serious crime, and is the firing conducted without negligence? An order from the magistrate is required by military regulations:

"But the order of the magistrate has at law no legal effect. Its presence does not justify the firing if the magistrate is wrong. Its absence does not excuse the officer for declining to fire when the necessity exists" (at p. 622).

The Featherstone troops had no alternative but to fire; the firing was conducted with reasonable skill and care. These two conditions thus made out, the soldiers incur-

red no legal responsibility; a guilty ring-leader shot dead, died by justifiable homicide; an innocent person killed without negligence, died by accidental death (at p. 623).

Dicey's second example is an extreme case upon the other side of the line. An officer, in a time of political excitement, orders his soldiers to arrest and shoot without trial a popular leader who is suspected of treasonable designs, but against whom no crime is proved. The soldiers must disobey this command; if they obey, they and the officer are guilty of murder.

The difficulty is in the third example. An officer, thinking firearms to be necessary, orders his men to fire on a crowd. The force intended is excessive; threats would, in the circumstances, have sufficed. The order, therefore, being unlawful, the officer will be criminally responsible for the death of any person killed. What should the soldier do? Reverting to the case that Stable, J., tried, would the lance-corporal have been justified in shooting in order, by causing grievous bodily harm, to stop the car?

The answer that Stephen, J., gave extra-judicially (*History of the Criminal Law*, vol. i, pp. 205, 206)—cited by Dicey (*op. cit.*, pp. 304-306)—follows the opinion of Willes, J., in *Keighley v. Bell* (1866, 4 F. & F. 763, 790):

"Probably . . . the order of a military superior would justify his inferiors in executing any order for giving which they might fairly suppose their superior officer to have good reasons . . . The doctrine that a soldier is bound under all circumstances whatever to obey his superior officer would be fatal to military discipline itself, for it would justify the private in shooting the colonel by the orders of the captain, or in deserting to the enemy on the field of battle on the order of his immediate superior. I think it is no less monstrous to suppose that superior orders would justify a soldier in the massacre of unoffending civilians in times of peace, or in the exercise of inhuman cruelties, such as the slaughter of women and children, during a rebellion."

The test, then, as propounded by Stephen, J., is not—as Stable, J., appeared to suggest—was the order lawful, but was the soldier reasonably entitled to suppose that the order was lawful?

"The only line that presents itself to my mind," continued Stephen, J., "is that a soldier should be protected by

orders for which he might reasonably believes his officer to have good grounds."

A soldier who pleads, by way of defence to a criminal charge, the orders of a superior officer may, short of acquittal, have protection, in effect, in certain other ways, where a conviction or punishment would be unjust.

First, a *nolle prosequi* may be entered, by leave of the Attorney General: "leave is never given except upon good cause shown, and is never refused when the interests of justice require it": Archbold, *Pleading, Evidence and Practice in Criminal Cases* (1938), 30th edn., p. 110. Secondly, a nominal sentence may be imposed. Thirdly, the Crown may grant a pardon.

The above opinion of Stephen, J., is accepted by the learned editors (of whom Avery, J., was the chief) of the article on *Criminal Law and Procedure* in *Halsbury's Laws of England*, 2nd edn., vol. ix, p. 24; note (a). And see p. 340, note (h), where the law is thus stated in the text:

"A soldier or airman in a subordinate position is not, it would seem, criminally responsible for the consequences of obeying the orders of his superior officer whose orders he is bound to obey, provided those orders are not, having regard to the occasion upon which they are given and executed, manifestly illegal."

In *R. v. Trainer* (1864, 4 F. & F. 105) the engine driver and the fireman of a railway train were charged, at the Surrey Assizes, with manslaughter. The Report says:

"The learned Judge [sc. Willes, J.] said he should hold that in a criminal

case an inferior officer must be held justified in obeying the directions of a superior, not obviously improper or contrary to law—that is, if an inferior officer acted honestly upon what he might not unreasonably deem to be the effect of the orders of his superior, he would not be guilty of culpable negligence, those orders not appearing to him at the time to be improper or contrary to law" (at pp. 111, 112).

An interesting account of the rights and duties of military forces in relation to the dispersion of unlawful assemblies will be found in the summing-up of Holroyd, J., in *Bedford v. Birley and Others* (1822, 1 St. Tr. (N. S.) 1071, 1210-1234), and the judgments upon a motion for a new trial, which was refused, by Abbott, L. J., Bayley, Holroyd and Best, JJ. (at pp. 1235-1262).

In *R. v. Hutchinson* (1864, 9 Cox Crim. Cas. 555, Major-General Hutchinson was to be charged at the Devon Assizes with manslaughter. He was commandant of the forces at Plymouth. A target was placed in the Sound, under the direction of the Horse Guards, and the artillerymen were accustomed to practice by firing at it with ball. One night, during practice, a ball missed the target, struck the waves, ricocheted and hit a boatman who was taking a boat across the Sound. The bill of indictment against the Major-General was thrown out by the Grand Jury and the prosecution offered no evidence. The Report contains an admirable exposition, addressed to the Grand Jury, by Byles, J. (at pp. 556-8)—L. J.

JUSTICE

What is justice? Is it more than an ideal? Can it truthfully be said that its presence may consist of mere applications of the abstract to the concrete?

We are fond of saying that "justice is done" or that "justice is not done." But is not our viewpoint based mostly upon an assumption in each case, as to what the facts are? If in any case we are wrong as to the facts, does not our conclusion as to the presence or absence of justice tumble into the abyss with the initial fallacy?

Most people are born with an inherent sense of justice but are unable to sense clearly what it means. For that reason they confuse the concrete with the ideal. They love to think that they themselves are just. They are inclined to be critical of attempted applications of justice by others. The error of viewpoint, if any, is largely one of egotism and egocentrism. Yet is it really error? Is

it not nature's purpose to mount our reasoning processes upon a foundation of self-importance so that because, and only because, of the very arrogance of that urge we may engage in assertion of our opinions against those of others, and in the resultant dispute raise a cloud of smoke through which the light of truth may presently shine?

Justice is no more than an ideal. Human kind loves fair play. That, we say, is justice. Yet what is fair play? Does not that present itself according to variations of human concept? Take, for instance, the philosophy of retributive or compensatory justice. At one time this was quite solidly entrenched. "An eye for an eye and a tooth for a tooth" expressed it in a nut shell. Yet came the time when a great Teacher of Men sought to disabuse our minds of it. He said, "If a man smite thee on one cheek, turn thou the other." That tenet has a large following in the world

today, and in practical applications it governs many of our thoughts and actions.

It would be folly to attempt to reconcile the many variant conceptions of justice as an ideal. All have their uses, even the one expressed by Nietzsche that might is or makes right. Each may be utilized in proper time and place to accomplish pragmatic ends when assertion of an ideal as such may fail as a rallying cry.

Let us take any practical application of justice and strip the factual conclusions to the bone; can we ever be sure that justice is really done? It was related of King Solomon that two women disputed as to which was the mother of a certain child. The King lifted his sword. He said, "I shall cut the child in two, so that you may share equally." One woman replied, "Let it be so done, for it is just." The other wept and besought that the child's life be spared even though it be given to the other. Right here were two widely varying philosophies one being based upon the justice of equal division of the flesh, because of inability of either to prove maternity, the other being based upon the conception of justice as wholly for the benefit of the child. King Solomon awarded the child to the woman who wept, because by her affection she showed the likelihood of maternity. Yet could he be really sure of it? On the hard paths of human experience do we not sometime find unnatural parents and adoring foster-parents? May not there be sound reason for the hypothesis that in the case before King Solomon the woman who possessed no affection could be moved to assert her claim only by actual knowledge that such was the fact, and that the woman who wept had such depth of alien affection as to be motivated thereby to a false assertion of maternity? Such cases are not in-

frequently found following adoptions. King Solomon's philosophy was apparently that motherhood did not really matter, but that the interests of the child were predominant, and could best be entrusted the woman who bore the child most affection.

When we go to the courts for justice we often get something quite different, something which may be characterized as an application of a fairly sound conception of the ideal to a more or less false assumption as to the facts. Right here we have the greatest stumbling block to the administration of justice, and there appears to be no way to avoid it.

Try as we may, we will never be able to get away from the taking of testimony as a means of arriving at truth. But how do we know which witnesses tell the truth, guided by accurate observation and recollection and unbiased idealism, and which, though seemingly truthful, are but plausibly endeavoring to mislead others, to the end that the side which for some reason or other they happen to favour may win? And how many who bear witness with intended fairness are unable to testify accurately because of psychological impediment?

There should be no sense of futility because of these realizations. Nor should we substitute cynicism for the respect to which the service of any ideal is entitled. We must bear always in mind that we fight with such weapons as are available, and that when we lose a fight the fault is not always ours but is often that of the weapons. Yet we must continue to fight, fight, come what may, content in a realization that it is a struggle to uphold the keystone in the arch of civilization by the practical application to the affairs of life of justice as an ideal.—*Case, and Comment.*

Wit & Humour.

The Wrong Man. A salesman, seeking to register at a small-town hotel, was told there were no rooms left. "But can't you manage to put me up somewhere?" he pleaded. "I'm leaving first thing in the morning."

The night clerk scratched his head. "Well, there's an extra cot in Colonel Twitchell's room," he relented. "He's an old customer, and probably wouldn't mind if you tiptoed out and didn't disturb him."

"That's fine," the traveler said. "Just call me at seven."

The following morning, bright and early, he crept out of the room and hurried down to pay his bill. To his surprise, the elevator man nodded to him politely. "Good morn-

ing, Colonel Twitchell." At the desk, the clerk smiled: "Good morning, Colonel Twitchell." Bewildered, he hurried across the lobby, past a scrub-woman, who looked up and wished him "Good morning, Colonel Twitchell." Taking a grip on his sanity, he hailed a cab. "To the station!" The driver nodded: "O. K. Colonel Twitchell."

At the station the ticket agent said, "Leaving for the city, Colonel Twitchell?" With a groan he staggered back from the window and, for the first time, he saw his reflection in the mirror of a slot machine.

"My God," he gasped, "they woke up the wrong man!"—*Case and Comment.*

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[Editors do not hold themselves responsible for the views expressed by the contributors.]

NEED FOR AMENDING S. 100, CIVIL P. C., S. 90, EVI. ACT AND S. 388, CRIMINAL P. C.*

By Mohammad Ahmad Kazmi, M. L. A. (Central.)

In the last sessions of the Central Assembly I introduced amongst others, three Bills of general public importance: viz. a Bill to amend s. 100 of the Civil P. C., a Bill to amend s. 90 of the Indian Evi. Act and a Bill to amend s. 388 of the Criminal P. C. They have passed through the second stage and according to the decision of the Assembly they are to be circulated for eliciting opinion thereon by July 15, 1941. I may here mention the objects of the three Bills.

The Civil P. C. Amendment Bill provides that to sub-s. (1) of s. 100 of the Civil P. C., the following shall be added at the end, namely:—

(d) The original decree of the trial Court having in appeal been varied, cancelled or reversed:

Provided that a High Court, while hearing a second appeal on any of the grounds (a) (b) or (c) above may in its discretion determine the correctness or otherwise of the decision on points of facts also, if it thinks that the decision of the Court below is erroneous and unjust."

As would appear from the above, the object of the Bill is to provide a second appeal on facts, where the trial Court and the lower Appellate Court have differed in their findings. Under the law as it stands to-day, the first Court of Appeal has got a right to decide a matter after a perusal of the whole evidence on record, but the High Court is precluded from looking into evidence and is bound by the finding of fact arrived at by the lower Appellate Court.

In 1929 A. I. R. p. 152 on p. 155, their Lordships of the Privy Council confirmed the decision of Lord Macnaghten to the effect that "there is no jurisdiction to entertain a second appeal on the ground of an erroneous findings of fact however gross or inexcusable the error may seem to be". There

appears to be no justification for such a hard rule, which takes away the right of the highest Courts of Justice in India to rectify mistakes and meet out justice even where the Judges feel convinced that injustice has been done. If the High Court in cases in which the first appeal lies to it, reverses a finding arrived at by the trial Court, the party aggrieved is entitled to appeal to the Privy Council and the Privy Council on appeal is entitled to look to the merits of the case, but it is just otherwise with the High Court. This rule is causing great hardship to the litigant public and is a very improper restriction on the powers of the High Court. By this amendment I propose that in case of non-concurrent findings by the first two Courts, the appeal may be heard on merits—facts as well as law, and in case of concurrent findings of facts, though the party aggrieved shall have no right of appeal on facts, yet the High Court will have the power to interfere with it at its discretion.

In the statement of objects and reasons I have dealt with this question in greater detail and I see no justification for this hard rule.

The Evi. Act Amendment Bill seeks to add the following proviso to the s. 90:

"Provided that the word 'document' shall include a copy of the document obtained from the Registration Department or some other Govt. Office, if such copy is admissible in evidence under s. 65."

Section 90 of the Indian Evi. Act provides that the original documents, more than 30 years old coming out of proper custody are to be admitted in evidence without being formally proved by the attesting witnesses or other persons making statement to the

*The learned Author of the article introduced during the winter Session three Bills in the Central Legislative Assembly, relating to their amendments. These Bills have passed through the second stage and are being circulated for eliciting public opinion thereon by July 15, 1941. The importance of the subject to the lawyers need not be stressed.—[Ed].

effect that the document was executed before them. This presumption is provided for the reason that after the lapse of 30 years or more it is rather difficult to get the executants of the documents or the attesting witnesses thereto who may depose about the due execution of the document. Formerly this presumption used to be applied to the copies of such old documents also and there were rulings of the High Court to that effect. In 1935, the Privy Council (in 1935 A. L. J. p. 847) held on a strict interpretation of s. 90 of the Evi. Act that the presumption cannot be made to copies. No doubt the interpretation is correct, but it has caused great hardships to the litigants as it is mostly difficult to obtain such old persons to appear as witnesses. It is to meet this difficulty that the Amending Bill has been moved.

The Criminal P. C. Amendment Bill seeks to remove an unjustifiable practice. It seeks to insert the words "Imprisonment and fine or" after the words "has been sentenced to" in s. 388 of the Criminal P. C. Under s. 388 as it stands if a person is sentenced to fine only, he can get time for the payment of fine, but in cases where in addition to fine, he is also given a term of imprisonment, then no time can be given to him for the payment of fine. For example if a person is sentenced to a fine of Rs. 500 only, he can be given time by the Court to pay the fine, but if he is, in addition sentenced to imprisonment till the rising of the Court, then he cannot be given time for the payment of fine. Thus if he cannot arrange for the fine at once he

must be sent to jail. The hardship is too apparent to require a comment and it is to remove this that Bill has been introduced.

I have given a summary of the objects and reasons of the three Bills to show their importance to the public. The views of the public and of the lawyers and Judges have to be ascertained before the Bills can be further proceeded with in the Assembly. The method of circulation generally adopted by the Govt. of India is that they send the Bills to the Provincial Govts. who in their turn send them to the District Magistrates, who in their discretion send them to individuals or Associations for opinion. As the time upto July 15, for this purpose is rather short, so I suggest that those interested in the Bills should send copies of their opinions in writing regarding their approval or disapproval of the Bills or making suggestions regarding any alterations in addition to or omission from these Bills to the District Magistrates, Provincial Govts. or the Hon'ble the Home Member Govt. of India and if possible a copy to me and a copy to the press. The opinions regarding the three Bills must be written out separately. If the copies of the Bills are required they may be asked for from the office of the District Magistrates and if they be not available there they may be obtained from me. Looking to the importance of the Bills I hope that the public in general and the lawyers and Bar Associations in particular would give them a careful consideration and give expression to their views at an early date.

DEATH OF A MAGISTRATE.

At the North London Police Court on 23rd January the stipendiary magistrate, Mr. Frank Powell, referred to the effect which the recent death of Mr. Basil Watson, K. C., who had previously sat as magistrate at that court, had upon certain pending proceedings.

He said that there were several cases in the list in which those who were charged pleaded "Guilty" or were convicted by the late Mr. Basil Watson, and the question arose whether he (Mr. Powell) had any jurisdiction to perform any act in regard to those cases. It might be that the death of a metropolitan magistrate rendered previous proceedings null and that the convictions already recorded were technically the act of the court as distinct from the act of the particular magistrate trying the cases, or it might be that no

other magistrate had jurisdiction later to try such a case (*The Times*, 24th January).

The matter was argued in a specific case which came on the following day at the same court before Mr. Brodrick (*The Times*, 25th January). It was submitted on behalf of the metropolitan police that there were two separate processes of law, one of conviction and one of sentence, and when a man was convicted, the same court, although differently constituted, could pass sentence. The magistrate held that he had no jurisdiction and the defendant was discharged.

• So far as preliminary acts in summary proceedings are concerned, such as receiving an information or complaint or issuing a summons or warrant, such acts may be performed by one justice even where the information or complaint must be heard by two

or more justices, and that justice need not be one of the magistrates who actually hears the case (s. 29, Summary Jurisdiction Act, 1848). Where, however, any statute requires that an information or complaint must be heard and determined by two or more justices, or that a conviction or order should be made by two or more justices, such justices must be present and acting together during the whole of the hearing and determination of the case (*ibid.*).

Moreover, it is expressly provided by s. 37 of the Summary Jurisdiction Act, 1879, that a warrant or summons issued by a justice of the peace under the Summary Jurisdiction Act, 1848, or any other Act, or otherwise, shall not be avoided by reason of the justice who signed the same dying or ceasing to hold office.

There are two important decisions to which reference should be made on the question of proceedings which are interrupted by a magistrate's death or illness. In *In re Guerin* (1888), 58 L. J. M. C. 42, evidence was heard for six days on an application for a writ of *habeas corpus* to bring Guerin out of custody. It was alleged that he had committed larceny in France, and his extradition had been demanded. A question arose as to his nationality and the case was remanded for evidence as to this to be called. This evidence was later heard by another magistrate, who issued a warrant for Guerin's extradition.

Wills, J., said that the proceeding was contrary to justice, as it could only be satisfactorily conducted by one who had heard the case throughout. He quoted from *R. v. Bertrand*, L. R. 1 P. C. 520, where Coleridge, C. J., said that the most careful note could not convey the evidence fully in some of its most important elements—the look or the manner of the witness, his hesitation, his doubts, his confidence or precipitancy, his calmness or consideration, his manner on a statement of any particular moment. It was the dead body of the evidence without its spirit. The application for the writ was granted.

These observations of Coleridge, C. J., were again referred to by Phillimore, J., in *Ex parte Bottomley* [1909] 2 K. B. 15. In that case several persons were charged with conspiracy to defraud. After the evidence of a large number of witnesses had been heard, the magistrate fell ill and could not continue the hearing. A re-hearing was commenced before another magistrate and counsel proposed to recall some of the witnesses, re-swear them, read to them the depositions

which had been taken, ask them to correct their statements where they appeared to be inaccurate, and ask any further necessary questions. He proposed then to tender them for cross-examination, with liberty to re-examine. The remainder of the witnesses would then be called in the ordinary way.

Phillimore, J., said that there was no authority that this was a wrong course. The main objection was that the procedure involved putting long leading questions to the witnesses. According to "Stephens' Digest of the Law of Evidence," 6th ed., art. 128, p. 146, leading questions could be put in examination-in-chief and in re-examination only with the leave of the court, but could be put in cross-examination without such leave. Other authorities showed that there was no objection to a long leading question. His lordship held that it was a matter for the discretion of the court in a preliminary hearing, and was to be exercised in the best interests of justice. He distinguished *In re Guerin*, *supra*, and *R. v. Bertrand*, *supra*, the latter on the ground that a jury at a murder trial had disagreed and notes of evidence taken at the first trial were read over to the jury at the second trial. Both that and *In re Guerin* were somewhat different from the present case.

Ex parte Bottomley is a difficult case to reconcile with previous authorities; and it certainly appears to be stretching a point to call the reading of a long deposition and then asking whether it is correct a long leading question. Be that as it may, s. 29 of the Summary Jurisdiction Act, 1848, requires all the justices required to hear and determine a case to be present and acting together during the whole of the hearing and the determination of the case—and the determination, it is submitted, includes sentence. This rule, it is submitted, applies to metropolitan police magistrates and stipendiary magistrates with equal force, having regard to s. 33 of the Summary Jurisdiction Act, 1848, which empowers a single metropolitan police magistrate or stipendiary magistrate to do alone whatever the Act authorises one or more magistrates to do. (See also the Metropolitan Police Courts Act, 1839, s. 14, and the Stipendiary Magistrates Act, 1858, ss. 1 and 2.)

One further point in relation to this difficult question deserves particular consideration. Mr. Brodrick said, at North London, on 24th January, that this matter had been a thorn in the side of magistrates ever since the cases of *Sheridan and Grant* (1936), 2 All E. R. 883, 1156; 80 Sol. J. 535. These

decisions were directed to the somewhat difficult question whether a person found guilty by petty sessions of the offence of obtaining credit by false pretences or fraud from A contrary to s. 13 of the Debtors Act, 1869, could be committed to quarter sessions and a charge added of obtaining credit from B, when the justices had heard his criminal record. Humphreys, J., said that the offence of which he had been found guilty was precisely the same and based on the same facts as that charge in the added count, and therefore the plea of *autrefois convict* was good "Conviction," according to such authorities as *R. v. Blaby* [1894] 2 Q. B. 170, and *R. v. Miles*, 24 Q. B. D. 423, meant plea of guilty or a finding of a verdict of guilty, and did not include sentence. These cases decide that a person has been

convicted if he has been found guilty or has pleaded guilty. The difficulty, therefore, in which a magistrate finds himself when he succeeds to a case in which a magistrate has heard the evidence and found a verdict of guilty or taken a plea of guilty and died before awarding sentence, is as follows: He cannot follow the course pursued in *R. v. Bottomley*, *supra*, without being confronted with the plea of *autrefois convict*. On the other hand, he cannot proceed to award sentence without, it is submitted, offending against ss. 29 and 33 of the Summary Jurisdiction Act, 1848. The result is, as Mr. Brodrick found, that certain undeserving convicted persons must escape sentence. There is clearly a matter for the attention of the Legislature as soon as parliamentary time is available.—S. J.

Extracts from Contemporaries.

Escape and prison Breaking

A person who merely refrains from informing against one whom he believes to be an escaped prisoner may not offend against the law, but if he gives actual assistance by harbouring him or giving him food or clothing, the position is different.

Escape from prison without force is a common law misdemeanour and any person who assists would be also guilty of such misdemeanour. If the escape be held to continue so long as the prisoner remains at large; a person who helps him so to remain is aiding and abetting him and therefore is liable as a principal offender. But if, as we think, the offence of escape is not a continuing offence, but is completed once he has shaken off custody, a person who subsequently helps him may perhaps not be guilty of an offence. A person who actually helps a prisoner to escape or sends articles into a prison to facilitate escape from prison is by statute guilty of felony; but this would not appear to apply to the cases we are contemplating.

To break out of prison by force is either a felony or a misdemeanour according as the charge for which the prisoner is in custody is felony or misdemeanour. In case of the felony, but not the misdemeanour, a person who, knowing the felony to have been committed (*i. e.*, the escape) receives or aids the felon so as to hinder the course of justice is guilty as an accessory after the fact.—J. P.

Probation After Convictions.

The old idea that probation was for first offenders only is dying out, though it per-

sisted far too long, and even magistrates have been heard to say that they thought an offender could not be put on probation if he had been previously convicted. It is true that the Act of 1887 was called the Probation of First Offenders' Act, but 1887 is a long time ago and there is really no excuse for speaking of that, repeated, Act to-day. The Probation of Offenders' Act of 1907 cleared up the position satisfactorily.

A Halifax woman found guilty of stealing was recently put on probation, although there were four previous convictions including one for forgery. But those convictions were from 1914 to 1930 and the magistrates felt justified in what they did, because she had been honest for ten years.

If we may say so, we agree, and we think this is a discriminating use of the probation system. Often it is quite impossible to deal leniently with a person who has a record, if only because he shows no sign of wishing to amend. But there are occasional cases where even an old convict may be worth the risk of a trial on probation, and the late Sir Robert Wallace once told a meeting that at the London Sessions he often dealt in that way with ex-convicts. Critics accused him of overdoing probation. Be that as it may, he did as much for the probation system as any judge of his time and the good he did lives after him. There should be no hard and fast rules limiting probation to persons with no convictions or only one conviction. The root of the matter is to look at each case in the light of all the circumstances, and to realise that no two cases, and no two people, are exactly alike.—J. P.

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SEDITION

Some little time ago the Court of Criminal Appeal quashed a conviction for sedition which had been passed on Circuit. The case was shortly reported in a lay contemporary, and we hope for something fuller if the law reports reach it. In the lay press we read that the learned judge had not adequately charged the jury on the meaning or legal definition of the word "sedition". We can well understand his difficulty. Even if he had had his law library with him, he would have found it difficult to construct a definition which would have been consistent with all the charges and judgments—and they are many—on the true significance of this debatable term. Looking at the infallible Oxford English Dictionary, we find it derived from *se* and *ire*. The prefix "se" has a sense of apartness or severance. It is the familiar prefix which we find in such words as "segregate," "separate," and so forth. We all know *ire*. The letter "d" is apparently slipped in for purposes of easy pronunciation. The composite word has nothing whatever to do, as the amateur might very well believe, with sitting down. However, apart from the dictionary, we find when we look at the Law Reports that there is an unfortunate difference among judges as to the legal meaning of this offence, which begins with going apart. Indeed, it has travelled a long and devious journey from its source. Let us look at some of the cases.

In a speech replete with learning Mr. Littleton (afterwards Sir Edward), arguing in *Stroud's* case ((1629) 3 St. Tr. at p. 254), said that the seditious "take a diversion and draw other". He thus followed the original meaning of going apart. There is a fine allocation on sedition in this case which limited space compels us to pass by with a mere reference. It will repay careful study. In *R. v. Lovett* (3 St. Tr. N. S. 1178) the indictment was for issuing and publishing a seditious libel. The libel was a handbill published in Birmingham after police from

London had come down to repress rioting and had, under order of the local magistrates, used some force to disperse a meeting in a place known as the Bull Ring. The handbill contained a record of resolutions of a local body called the "General Convention." It asserted that a "wanton, flagrant and unjust outrage had been made upon the people of Birmingham by a bloodthirsty and unconstitutional force from London, and that the people of Birmingham were the best judges of their own right to meet in the Bull Ring." In directing the jury in *R. v. Collins* (*ibid.*, 1150), where the defendant was charged with printing and publishing the seditious libel, Mr. Justice Littledale told the jury that they must decide whether the resolutions were a calm discussion of the conduct of the police as a public question, or were intended to persuade the people to make use of physical force and to incite them to tumult and disorder. He allowed full scope to the right of free discussion and to the right to criticise the police and the Government. He asked the jury to answer for themselves the question whether the words used exceeded the reasonable bounds of comment on the conduct of the London Police. The jury found that they did, and gave a verdict of guilty.

In *R. v. Lovett* (*sup.*) the evidence given in *Collins's* case was read over again with the prisoner's consent. The indictment in this case is not fully set out in the report, but that of *Collins* says that the defendant published a seditious libel in that the publisher intended to excite the Queen's subjects to resist the law, to resist the police while they were on duty, to bring the police force into hatred and contempt, to procure unlawful meeting, to cause the Queen's subjects to believe that the laws were unduly administered, to raise discontent in the public mind and to raise and cause disobedience to the law. Lovett's indictment was, for writing and publishing and causing and procuring to be written and published this seditious

libel. Mr. Justice Littledale, in charging the jury, said that if they were satisfied that the defendant published the paper and had the intent as charged, it was in his opinion a seditious libel. A note adds that he said that was his opinion "in point of law." It does not seem, however, that the learned judge ever intended to say that the question of sedition or no sedition was due to be decided as a point of law. Those who charge with sedition or seditious libel must, we think, always submit their case to the jury. All that can be said by a judge is that, if the jury think that the result of a speech or pamphlet is to do one or other of the things which are indicated by the indictment in *R. v. Collins*, a verdict of guilty of sedition is proper. In neither case is motive discussed. The indictment in *R. v. Collins* does indeed contain the word "intendedly." If this is a sound indictment the prosecution must, to make good a charge of sedition, give evidence to show not only that the words of the accused were followed, or reasonably likely to be followed, by one of the evil results named in the indictment, but that the accused person intended that this result should follow.

The matter came up again in the Chartist period case of *R. v. Russell* (6 St. Tr. N. S. 723). After a certain trial in Ireland which had resulted in deportation of one, Mitchell the defendant was charged with having said in public :

"The Government have succeeded in convicting honest John Mitchell. How...? By packed juries and partisan judges. I tell Lord John Russell that I have no sympathy with his damnable Government. John Mitchell had asked whether the Queen had not forgotten her duty to the country. I ask the same question and adopt his views. If the Queen forgets to recognise the people then the people must forget to recognise the Queen... The Government is not worthy the support of any honest man..... There is one safe way of getting rid of bad rulers who forget their duty to their country. I openly avow that I mean private assassination."

Chief Justice Wilde charged the jury at great length. He seemed to rely on them to find as a fact whether a speech is seditious, or not. Perhaps we should say that they are to find from their knowledge what the effect of this or that speech would have upon people in a "state of society" with which the jury are familiar. This would enable them to appreciate most fully both the result to

hearers of the words used and the motive of the speaker. The learned Chief Justice declared that the people have the full right to overthrow unpopular governments by constitutional means. But :

"If the tenor of the discourse is to overthrow the Government by violence, by resistance to the law, then, whether that Government be good or bad, approved or disapproved, that is not justifiable..... You will therefore consider what was the sort of overthrow to which the people were invited, whether it was an overthrow by resistance to the law and by tumult and violence, or by regular and constitutional means."

In later years we have some valuable records of judicial definition in the careful pages of Cox's Criminal Cases. The report of *R. v. Sullivan and Pigott* (11 Cox 44) is the report of a charge by Mr. Justice Fitzgerald given to the grand jury in Dublin in 1868. We have no record of the trial by jury, but the charge to the grand jury is well worth study. Sedition is a comprehensive term and embraces all those practices, whether by word, deed or writing, which are "calculated" to disturb the tranquillity of the State and lead ignorant persons to endeavour to subvert the Government and the laws of the Empire. We pause here to regret once more the judicial use (let us not call it *misuse*) of the word "calculated." A foreigner, even an English layman, reading it in the context, would not know that it means "likely," and might very well take it that only those acts and words are seditious which have been prepared by calculating and constructive minds with the view of raising disaffection. A little later the learned judge is inconsistent with this definition—that is, if we read his use of "calculated" to be a use in the common judicial sense. Thus :

"Sedition has been described as disloyalty in action; and the law considers as sedition all those practices which have for their object to excite discontent or disaffection, to create public disturbance or to lead to civil war."

On the whole, however, this learned Irish judge seems to think that intention and motive are the gist of the offence. The crime laid, he says, is the intent, and the grand jury could only find a true bill against the accused if they came conscientiously to the conclusion :

"assuming you find the articles to be seditious, that they were published with the intent laid in the indictment, namely

to stir up and excite disaffection and sedition amongst the Queen's subjects," and so on. The charge, at this point, is confusing. Apparently the grand jury were free to consider for themselves whether the article or speeches were seditious before they came to consider the finding of a true bill. If this is right, words or publications may be seditious, and found seditious, and yet the publishers or speakers should not be indicted unless a malevolent intention to publish them is also proved. We have not the indictment in the report; and it may have been so framed as to place the learned judge in some difficulty and danger of inconsistency. For ourselves, however, we should say that in trials for sedition the proof of wrongful motive is unnecessary. It is for the jury to decide whether the act or words proved in evidence are *likely* to have one or more of the results which are described as the essence of sedition. If they find in the affirmative on this question, a verdict of guilty is proper without any proof of motive at all.

This view is clearly taken by Coleridge, J., in the charge to the jury in *R. v. Aldred* (1912) 22 Cox 1. Whoever, he said, by language incites or encourages others to use physical force or violence in some public matter connected with the state is guilty of publishing a seditious libel.

"The man who is accused may not plead the truth of the statements that he makes as a defence to the charge; nor may he plead the innocence of his motive. That is not a defence to the charge. The test is not either the truth of the language or the innocence of the motive with which he published it. The test is this: was the language used calculated, or was it not, to promote public disorder or physical force ...?"

And so on. If we can overlook the unfortunate use of "calculated" which might deprive the charge of its efficacy and read for it the word "likely," we have a perfect charge.

In *R. v. Burns &c.*, however (16 Cox 355) we find that intention was certainly alleged in the indictment as a vital ingredient in sedition. A well-known, progressive leader (still happily with us) was charged with "seditiously contriving and intending" to disquiet and disturb the peace. At the close of the evidence of facts the learned judge asked the Attorney-General what were the seditious intents alleged against the defendants. The Attorney-General said that the intent was to stir up ill will and disaffection

among the Queen's subjects and the suggestion that grievances might be remedied by unconstitutional methods. The Crown, he said, did not charge the defendants with desiring the destructive riots which in fact took place or with directly exciting the crowd to make these, but said that the defendants "must be aware and were answerable for" the natural result of the language used. In charging the jury the learned judge, quoting Mr. Justice Stephen, laid much emphasis on the essential element of intention. To be seditious, words must have a seditious intention, and he goes on to describe this as an intention to bring about one or other of the results (disorder, contempt of the Government and so forth) which are to be described as the ingredients of the offence. Throughout the charge he perpetually directs the attention of the jury to what, as they thought, was the defendants' intention. Thus at p. 363 he says:

"If you think that these defendants, if you trace from the whole matter laid before you, that they had a seditious intention to incite the people to violence, or create public disturbances and disorder, then undoubtedly you ought to find them guilty."

This seems a clear charge to the effect that intention is an essential ingredient in the offence and must be proved. And yet only a few sentences back the learned judge, quoting the charge in *R. v. Sullivan* (*sup.*) underlines this passage:

"If, on the other hand, on the whole spirit and import of these articles you are obliged to come to the conclusion that they are seditious libels and that their *natural consequences* are to excite contempt of Her Majesty's Government or to bring the administration of the law into contempt then it becomes your duty to find a verdict of conviction."

This remark about natural consequences seems to suggest that the learned judge had something in his mind to the effect that, in making up their mind on a charge, the jury must look at the results of publications or acts, not at their motive. On the whole, however, the charge lays so much emphasis on the necessity of proving motive that we cannot make it consistent with the later charge in *R. v. Aldred* (*sup.*). The law therefore remains uncertain. We can well believe that a judge on Circuit, even if he had before him all the authorities which we have cited, would have found it impossible to frame a definition of sedition which would be con-

sistent with all of them. Perhaps, when and if we get a fuller report of the case recently decided in the Court of Criminal Appeal, we shall have some light on the matter. In any case, there is need of clear

thinking on the subject. As we may unfortunately expect other charges of sedition during the period of our present discontent, no one can doubt the desirability of a clear and unequivocal definition.—L. T.

Extracts from Contemporaries.

Marked money.

An officer's soldier servant billeted on a farmer, convicted of stealing money, was detected by the well-known device of marking coins, one of which was subsequently found in the soldier's possession. A police officer said the prosecutor had lost money before and decided to set a trap.

Setting a trap sounds rather unpleasant, and exception might be taken to it, but it is questionable whether this really was setting a trap. Where money is left in its usual place, not exposed to view and providing no exceptional temptation, the marking of coins is no more objectionable than writing a name on a book or other article. In this country the *agent provocateur* and any provocation to crime, are rightly frowned upon; but there are means of securing evidence, even by providing opportunity for an offence; but are admissible. Thus, where there is good ground for believing that drink is being sold habitually without a licence, a police officer is justified in going to the premises and asking for a drink to see what happens; or an official may quite properly ask for bacon at a shop where he is not registered to see whether the food regulations are being observed. It would be most objectionable if the police officer or the official brought persuasion into play in order to induce an unwilling person to commit an offence he would not commit but for such pressure. It is one thing to ascertain whether offences are being committed, simply by following a customary course of conduct, but quite another thing to offer exceptional temptation. Thus, marked money ought not to be placed where it must offer unusual and unnecessary temptation; but it can be used, as it often is, in a perfectly legitimate way.—J. P.

An Awkward Ambiguity.

Lord Russell of Killowen, the father of the present peer bearing that title, that is, the great Lord Chief Justice, on one occasion, while sitting in the Court of Criminal Appeal, recalled a curious incident which happened to him while on circuit. The question was being discussed as to a jury being told of any

previous convictions recorded against a prisoner, and the Lord Chief, in afterwards referring to the matter, said "an innocent remark of mine once gave this information to the jury. The prisoner was defending himself with much ability but he spoke so low as to be frequently inaudible, and having once said something I did not hear, I said, 'What was your last sentence?' Immediately came the reply, 'Six months, my Lord'! —L. T."

A Corrupt Billeting Officer

The Director of Public Prosecutions was instrumental in securing, towards the end of March, a conviction which may provide a useful example and deterrent. One L. C. Jefferies, a retired police sergeant, had been appointed billeting officer at Aldershot. Here, according to the story accepted by the Magistrates, he offered to get an evacuated woman's allowance antedated, in return for 7s. 6d. The woman gave him this sum, and very properly reported him: luckily she had a witness, so that the almost universal difficulty in corruption cases was not found.

In wartime, such a charge looks rather small beer, but it is obvious that the work of finding billets for evacuated persons holds out opportunities for small-scale bribery and corruption (from persons who want good billets and from householders who want to escape burdens) so that it cannot be regarded only as a matter of 7s. 6d. One odd circumstance leaps to the eye, namely, that billeting officers are not employees of a local authority, and, therefore, the Public Bodies Corrupt Practices Act, 1889, does not apply. A billeting officer is appointed by the mayor or chairman of the local authority, in accordance with a request in a circular letter from the Ministry of Health, and such an officer has a contract of service with the mayor. The Aldershot proceedings were taken under sub-s. (1) of s. 1 of the Prevention of Corruption Act, 1906—we gather, upon the view that there was "an act in relation to his principal's affairs or business" and that, in relation to his principal's affairs or business, Jefferies showed favour to the billeted persons.—J. P.

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[Editors do not hold themselves responsible for the views expressed by the contributors.]

FROST AND ACT OF GOD

Like most maxims, that which runs *Actus Dei nemini facit injuriam* must not be taken literally.

When an "injury" has occurred, it is often an "act of God" which has been directly or indirectly responsible for that injury. A reasonable interpretation of this maxim is, no doubt, "No one is legally responsible for an act of God."

ACT OF GOD

What is an act of God? Certainly death comes within that term when arising from natural causes. But the normal activities of natural forces are not, in law, acts of God. It is not correct, therefore, to define such acts as accidents or events arising from natural causes as distinct from human acts. Against acts of this kind (for the most part), man can make suitable provision. Protection from rain can be afforded to property by the reasonable use of windows. No one who is responsible for the care of furniture in a house can expect to be excused if he permits damage to occur by leaving windows open at all times and under all conditions. The damage which ensues may be the act of God in a literal sense, but it is not an act of God in law. One element is missing, namely, inevitability. The plea of act of God can only be successful if the damage or other event has occurred notwithstanding the exercise of due care.

It has been said that act of God means not merely an accidental occurrence but "something overwhelming": *Oakley v. Portsmouth, etc. Co.* (11 Exch. 623). In the *locus classicus*, *Nugent v. Smith* (1 C. P. D. 441, at p. 444), Lord Justice James styled it an act "which could not have been prevented by any amount of foresight and pains and care, reasonably to be expected." The stress is rather on the words italicised by the present writer than on the earlier part of this passage. It has been indicated above that immunity will depend upon the exercise of "due care." To

put the matter in another way, the law will not excuse a party who is under a duty to take care, if he has failed to exercise "ordinary care, caution or skill": see *The Marpesa* (L. R. 4 C. P. 212, 220); *The Merchant Prince* (1892, P. 179).

Where the care of property is in question the duty is presumably to exercise in relation to that property that degree of care which a prudent man would exercise if the property belonged to him. But a prudent man's conduct must be our guide; for if the property of another is in my care, and I am responsible for its safe keeping, it will not avail me to establish that a similar calamity has befallen my own property: *Doorman v. Jenkins* (1834, 2 Ad. & E. 258).

PRINCIPLES APPLIED TO FROST

How do these principles apply to damage caused by frost or snow? If we could answer the question, "What would a prudent man do to guard against damage by the bursting of pipes, cisterns or water apparatus, or the fall of snow with injurious results to property or to the person?" we should have solved the problem. In the present state of the authorities that question is not easy to answer.

It might be supposed that if the water apparatus installed in premises were satisfactory in normal winters, persons on whom an obligation is laid by law to instal a satisfactory apparatus would be exempt from liability if owing to frost of unusual severity the apparatus became inoperative with the result that the water overflowed and caused damage. So, indeed, it was held in the old case of *Blyth v. Birmingham Waterworks Co.* (11 Exch. 781).

Is it, then, the position that our prudent man must consider only what safeguards are necessary under normal weather conditions, leaving the abnormal to take care of itself? The answer is either "No" or "Yes, but....." Even where the overworked doc-

trine of *Rylands v. Fletcher* (L. R. 3 H. L. 330) applies, freedom from liability can be claimed if the damage was caused by a third party, *Box v. Jubb* (1879, 4 Ex. D. 76), or by act of God, *Nichols v. Marsland* (L. R. 10 Ex. 255) (on appeal, 2 Ex. D. 1), although it would seem that an undiscovered engineering defect would not amount either to an act of God or of a third party for this purpose: *Rylands & Fletcher (supra)*.

The *Rylands & Fletcher* doctrine applies not only to the storing of large quantities of water, but also to any other thing brought by an occupier on to his land for his own special purposes, and the escape of which may cause injury, such as electricity in large quantities: *Eastern, etc., Telegraph Co. v. Capetown Tramways Co.* (1902, A. C. 381).

Rylands v. Fletcher was at one time thought to apply to everything artificial which was brought upon land. This view has been shown to be fallacious in a series of cases of which *Carstairs v. Taylor* (L. R. 6 Ex. 27) is probably the best known: see also *Blake v. Wolf* (1898, 2 Q. B. 426).

COMMON USER

In the *Carstairs* case the rule was established that if A brings water on to his land or into his building for the joint use of himself and B, then B has no cause of action if the water escapes without negligence on A's part. In *Richards v. Lothian* (1913, A. C. 263) this rule was affirmed. And in *Collingwood v. Home and Colonial Stores* (1936, 81 L. J. 130), where fire broke out through a defect in the electric wiring and adjoining premises were damaged by water used in putting out the fire, it was decided that the bringing of electricity on to premises must now be considered to be a normal user of property, and liability therefore depended upon negligence, which was not shown to exist.

However, the user of water, gas or electricity in a normal and usual manner is a different matter from its use in large quantities for the special purpose of a trade or business. The Court of Appeal had to consider this type of case a few years ago.

ABNORMAL USER

The defendants, occupiers of factory premises on the second floor, allowed water to escape into factory premises on the floor below, thus causing damage to the plaintiffs' property. The defendants' business included the washing of cinematograph films for which large quantities of circulating water were necessary, together with a boiler and

carboy for storing water. It was laid down that as the water was on the defendants' premises for their own special purposes and not for the common benefit of the defendants and the plaintiffs, the defendants' user was not a normal user for the purposes for which both the plaintiffs and the defendants were occupying the premises. Accordingly the defendants were liable in damages without proof of negligence: *Western Engraving Co. Ltd. v. Film Laboratories, Ltd.* (1936, 1 All E. R. 106).

In the *Western Engraving* case it appears that the defendants had clear knowledge that the water upon their premises had already on one occasion escaped and entered the plaintiffs' property, but that they took no precautions, and in these circumstances it was considered that there was negligence.

Scott, L. J., drew a distinction between the case of a manufacturing occupier using water for his own special purposes and ordinary user of a house "when water is present for the common domestic use of different tenements."

It will be observed that in this case the finding of negligence was not strictly necessary owing to the doctrine of so-called absolute liability under the *Rylands & Fletcher* doctrine.

FLATS

We turn from trade premises to flats. In the case of *Tilley v. Stevenson* (1939, 4 All E. R. 207, C. A.) the defendant S. was given the key of a flat on December 14 1938, but did not go into occupation until after December 27. From December 24, to December 27, owing to damage caused by frost, water was escaping from a burst pipe in the defendant's flat, and causing damage to the flat below. S. was working in the flat on December 18, but it was also proved that he had good reason for supposing that water was turned off at the main. The county court judge held that the defendant was responsible for having left the flat without taking all proper and necessary precautions to prevent the water pipes bursting, having regard to the low temperatures then prevailing. He also held that S. was liable for the damage because he had taken no steps to ascertain whether or not the water was laid on, but had merely assumed the contrary on inadequate grounds. In the Court of Appeal, Slesser, L. J., said that the owner gave S. a key. The owner had two other keys, to enable gas and water companies, and possibly electricity authorities, to go on to the premises, but he gave one key to a labourer and

the other to a painter as the flat was being prepared for occupation. S. was given a key of the flat on December 14. He went on December 18, to look at the flat and to do some work. He took a kettle of water, as he thought there would be no water. On this point, the landlord confirmed that the water was turned off before S. went to the flat. S. did not go back to the flat until December 27, when he heard water was leaking and somebody else, possibly the painter or decorator or water company, had turned on the stopcock. The suggestion was made that as the B. B. C. had given warning that it was very cold and the pipes might freeze, S. was negligent in not seeing that the stopcock was turned off. Slessor, L. J., observed that the *Rylands & Fletcher* doctrine was not applicable.

The Lord Justice proceeded to consider the position of a tenant who had taken a tenancy of a flat (p. 210), as follows:—

"Therefore, if there is a duty—and it is a very terrifying duty—on a person who wishes to occupy a flat, from the moment he first goes into occupation of a flat, even when he is not actually living there, to remain in the flat in order to see whether or not a workman or anybody else who comes into the flat turns on a stopcock; and if, having done that, he then has to observe the climatic conditions, and if he thinks, or has reason to believe, either from a study of the newspapers, from the wireless, or from some other source of information, that there is likely to be a frost, [if] he must take precautions to see that the pipes do not burst, [and] then, if any or all of these things are not done, apparently he is liable to the tenants living below him in lower flats for the resulting damage due to percolation of water. I cannot believe that there is any such duty imposed upon a tenant. It is elementary law that a man cannot be expected to take precautions against damages which he cannot reasonably be expected to anticipate. I do not think that this man could reasonably have expected that anyone else would turn on this water, and certainly he could not reasonably have expected that, the water having been so turned on, it would freeze, and that, the water having frozen, the pipes would burst. Were this principle to apply, I do not think that any tenant of any flat would be safe from an action at law."

So we know now to what the tenant's liability does not extend. He need not "take precautions against dangers which he cannot reasonably anticipate." The question is what he should reasonably anticipate and guard against. So long as normal methods of plumbing provide no adequate protection against the bursting of pipes in thousands of houses all over the country during periods which are only comparatively cold, it may be assumed with some confidence that if the water system is in a proper state of repair the question whether the temperature was particularly low on certain days is of no importance, subject as follows.

SEVERE WEATHER

Sweet reasonableness or—more shortly—prudence dictates that if an occupier is leaving the premises unoccupied for, say, several days, some additional measures should be taken: if the occupier does not, previously drain the cisterns and water installation within his own premises (and such cisterns and installation serve only those premises) it would seem that here is at least a *prima facie* case of negligence.

In *Western Engraving Co., Ltd. v. Film Laboratories, Ltd.* (1936, 1 All E. R. 106), Scott, L. J., referred to the existence of "specific acts of negligence in having a leaky pipe cock or boiler." These words are a reminder that damage by the bursting of pipes after frosty weather may be caused or increased by a defect in the water installation. During cold weather it behoves us all to look not only to our moat but also to our float—the one in the cistern—and its appurtenances. As has been stated above, a water company is not liable for damage caused by unusually severe frost. But that does not mean that an occupier can escape liability if, owing to a few degrees of frost, very old pipes or cisterns, which should have been replaced long since, burst and cause damage to the property of another.

NUISANCE

Here we have arrived at the point where the line separating the torts of negligence and nuisance is difficult to find.

The keeping of water in cisterns and pipes is certainly not a nuisance if the cisterns and pipes are in good condition. The keeping of a house or other building on land is not a nuisance—provided that it is kept there.

It is undoubtedly the duty of occupiers, though not necessarily of their landlords, to abate any nuisance on the land (including buildings) occupied by them: *Broder v. Saillard* (2 Ch. D. 692) even if it existed when they first occupied the property (*ibid*). Again, an occupier who permits buildings in his occupation to become so ruinous as to collapse and fall on an adjoining property is liable in nuisance to the adjoining owner, unless his landlord has agreed to be responsible for repairs: *Payne v. Rogers* (2 Hy. Bl. 350) as read with *Wringe v. Cohen* (1939, 4 All E. R. 241, C. A.). The *Wringe* case goes so far as to lay down the rule that liability in nuisance exists on the part of the landlord (if he has undertaken the duty of repair) whether or not he knew or ought to have known of the dangerous state of the property; and

this rule must apply with equal force to an occupier whose landlord has not undertaken to keep the property in repair.

There would seem to be no ground, upon principle, for distinguishing between repair

of the structure and repair of other things upon the premises which are likely to cause damage to third parties, or their property, if not kept in repair (subject to the *Rylands & Fletcher* rule).—L. J.

Extracts from Contemporaries.

Injury from Unfenced Machine.

In *Weston v. London County Council* the plaintiff claimed damages in respect of personal injuries sustained when operating a vertical spindle machine designed for cutting moulded edges on pieces of wood. At the time of the accident the plaintiff, who was 31 years of age, was receiving instruction in the work of a wood-cutting machinist at the defendant's Hackney Technical Institute. He founded his case on two grounds: First, the institute was a factory within the meaning of the Factories Act, 1937, and the defendants had failed in their statutory duty to fence the machine; and, secondly, the defendants had been negligent in failing properly to supervise his work. Wrottesley, J., found that the method which the plaintiff had adopted of pulling a piece of wood towards the cutter of the machine, instead of pushing it, was unsatisfactory and dangerous, and also contrary to the instructions which the plaintiff had received.

Technical Institutes and the Factories Act.

His lordship cited the general definition of "factory" contained in the Factories Act, 1937, and intimated that *prima facie* a technical institute was not within it. Nor were such institutes within certain special kinds of premises embraced by the Act. The only special case which in any way approached a technical institute was that which related to "premises in which mechanical power is used in connection with the making... of articles of metal or wood incidentally to any business carried on by way of trade or for purposes of gain. Those words did not cover a technical institute inasmuch as neither trade nor purposes of gain were involved. It was argued, however, that the present case was covered by sect. 151 (9) of the Act which provides that premises in the occupation of a public authority are not to be deemed not to be a factory "by reason only that the work carried on

thereat is not carried on by way of trade or for purposes of gain." The argument was rejected. The learned judge held that the object of the sub-section was to cover all the activities by servants of public or local authorities which would not otherwise be covered by the Act. The provisions were of a purely negative kind. Schools and colleges were not factories, nor were scholars or pupils "employed" by those who owned or taught therein. It was not so much that there was no provision in the Act which was clearly applicable to any place where machines were worked on, but rather that there were many provisions in the Act which were clearly inapplicable to schools and colleges. Parliament might have used language which, in its literal meaning, included technical institutes, but the use of the words "employer", "employed," and "employment" led to a different conclusion.

The Issue of Negligence.

Did the facts disclose any neglect by the defendants to the plaintiff? in his lordship's view they did not. The degree of care which a teacher owed to his pupil must depend on the character of the latter. The plaintiff was 31 years of age and had spent his life in a wood-working machinery shop. In those circumstances it was not negligence on the part of the instructor to leave the plaintiff to adjust the machine while he himself went to look after another pupil—especially as the correct way in which to work the machine had been explained to the plaintiff. With reference to the argument that the instruction should have included teaching the plaintiff how to use the guard to the machine, his lordship indicated that he was not prepared to say that those engaged in teaching the use of an admittedly dangerous machine had to obey the code laid down in the Factories Act concerning guards. So to hold might very seriously hamper such instruction, if not stop it altogether. Judgment was accordingly given for the defendants.—L. T.

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[Editors do not hold themselves responsible for the views expressed by the contributors.]

JUDICIAL MARTYRS

The resignation in a body of the members of the Norwegian Supreme Court, announced in *The Times* of December 24, 1940, marks the latest phase of the heroic stand taken by the Judges of Norway in the cause of freedom and justice.

In common with all other civilised countries, Norway desires justice and respects the law. Her judges have carried out their duties with independence and dignity, and their reputation stands high in the opinion of other countries. The Norwegian Constitution entrusts them with the duty of deciding upon the validity both of statutes and of administrative decrees. But the Germans are in occupation of Norway. This violation of the neutrality of a peaceful nation, though wholly unjustifiable, is nevertheless a fact which cannot be ignored. The Hague Convention of 1907, by which Germany would be bound—if she were to consider herself bound by anything but regard for her own selfish and misguided aims—has provided for such an occupation. The occupying troops must respect the laws in force in the country which they occupy, except of course insofar as they are inconsistent with such occupation.

When the Germans occupied Norway which, it will be remembered, was on the pretext of saving Norway from an invented invasion by Great Britain—a project of which no one has ever heard either before or since—the validity of this principle was expressly admitted by the German Decree of April 24, 1940, which is still in force, and declares that the existing laws of Norway shall remain in operation so far as they are reconcilable with the German occupation.

THE GERMAN AIM

Respect for their own or anyone else's pledges has never been a German vice. As the pretext for the occupation itself was a lie, so also has the German administration given the lie to their formal statement of the

policy to be followed during their occupation. The Reich's Commissioner is not there merely to administer. His real object is to reduce Norway to a subordinate state, dependent in every way upon Germany, and to render all Norwegians subservient for all time to German ideas and to German interests. In pursuance of this objective he has deliberately exceeded the powers of an occupying State as recognised by international law. There is no excuse; as the Germans know from their experience of the British occupation of part of their own country that such an occupation can be carried out with due respect to the local law and to the rights of local inhabitants. Various decrees and orders have been made by the Commissioner, and so far as they are compatible with international law have been respected, albeit reluctantly, by the Supreme Court. This, however, is not enough. Norway has not yet proved as pliable as Germany demands, and further decrees have been made conferring on the puppet who masquerades as Minister of Justice in Norway the power to remove and replace at will all persons who are concerned with the administration of justice, and even setting up under the guise of a "People's Court" a rival organisation staffed by willing traitors who can be relied upon to carry out the orders of their German masters.

GERMAN JUSTICE

We in England have had our own struggles with authority, but such authority has been of like blood and allegiance as ourselves. We have no conception of the difficulties which arise from foreign domination and can form little idea of the present German notion of the judicial office which the Commissioner is endeavouring to impose on the unhappy Norwegians.

Germans by their race, contaminated as it is by servile elements, and by their unhappy history are unduly prone to submit

to the will of whoever happens to be in authority. This proclivity has been made a solemn obligation since the Nazi party on a minority vote came into power as a result of an obscure and discreditable intrigue. Before then their Judges were independent in name, and sometimes in fact, and, though respect for law as such was not regarded as a duty of the government, nevertheless the standard of administration of justice was high. Since then degeneration has gone on apace. No person of legal eminence and moral standing could accept the position which a judge now has to occupy in Germany. The statute law has become a mere matter of administrative decrees, and justice at any moment may find that in Germany it is nothing more than the expression of the mere wishes of the executive. The judge may hear and determine the case, but he must be prepared to operate as the instrument of the executive, merely contriving, while preserving the appearance of a trial, to bring about a decision which has been predetermined by some unknown official of more or less importance, who is actuated by reasons having no relation to the justice of the cause, much in the way that Jezebel practised on the judges of Naboth in order that Ahab might confiscate the vineyard he coveted.

The judge has no independence. He is merely one of the members of a bureaucracy who must obey orders. Such a tendency always exists in every civil service, and it is always necessary to watch and guard against its extension, as Lord Hewart has more than once pointed out. We have successfully resisted that tendency in the past and may have to do so again. But our Constitution has recorded over and over again the principle that the rights of the people exist by law and can only be altered in accordance with law. The administration of justice demands an upright and independent judiciary. Magna Carta and the Bill of Rights—to name only two famous statutes—embody the principles that the right of access to the Courts shall be open to all, and that they shall lay their complaints before Judges who shall do right to all manner of men without fear, favour, affection, or ill-will. The Judge knows that his position is secure so long as his conduct is

pure, and that no inconvenience to the government can or will justify his removal from office.

The advocate knows that the fearless discharge of his duty to his client will in no way endanger his liberty or his career, but on the contrary that it will enhance his reputation. For the lawyer is no mere journeyman doing the routine legal work of the public. He shares with the Judge the duty of maintaining the principles of justice and securing the liberty of the people. Under the present regime in Germany both judge and advocate who so act would find their reward in disciplinary treatment or a concentration camp.

RESPECT FOR LAW

Respect for law is essential to true civilisation. Without it liberty is impossible and life must be miserable, even for the tyrant who shivers in his underground retreat and hides behind his duplicates because in his heart he knows that, as neither he nor his slaves have any respect for law, neither he nor they are safe from one another. When misery overcomes the desire to live, he is doomed. Without respect for law men are but brute beasts: with it and by it we become men living in amity together because each regards the rights of his neighbour. Such a conception is foreign to the German mind, which is so obsessed with the efficacy of power that it ignores the lessons of the past. No Nazi could be the author of those eloquent words of Hooker: "Of law it can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world, all things in heaven and earth do her homage, the very least as feeling her care and the greatest as not exempt from her power."

The Norwegian judges have refused to bow the knee to Baal. They have made their stand and protest for the liberties of the people of Norway, and we salute them as the latest martyrs in the cause of liberty. When the present oppression has passed away in the inevitable defeat of the Nazi domination, they will reap their full reward. But part of it they have already. Now and for all time they have earned the respect and admiration of those who respect justice and love their fellow men.—L. J.

SEPARATION AGREEMENT AND DECREE OF NULLITY

It was decided in *Bragg v. Bragg* (1925) P. 20; 132 L. P. 346, and *Plunkett v. Plunkett*, 1937 3 All. E. R. 736, 101 J. P. 508, that a decree of divorce does not put an end to an existing order of maintenance made by court of summary jurisdiction, though it may be a ground for varying or revoking such an order. The recent case of *Adams v. Adams* (1941) 1 All. E. R. 334, should be noted, because of its effect on a similar but slightly different question, namely, what may be the effect of a decree of nullity of marriage upon such an order. In *Adams v. Adams* a husband and wife had separated under an agreement, and he had contracted to make her a weekly allowance. Subsequently he obtained a decree of nullity on the ground of his wife's incapacity to consummate the marriage, and when she sued him for arrears he contended that arrears accruing due after the date of the decree of nullity could not be recovered. The County Court judge found in favour of the wife, and the husband appealed.

The Court of Appeal confirmed the decision of the County Court judge. It was held that in a case of a decree of nullity on the ground of incapacity the marriage is not void for all purposes, but only voidable and the marriage itself is valid for certain purposes.

Goddard, L. J., distinguished the case of a marriage annulled for incapacity from that of a marriage annulled for such a cause as bigamy. "It may be pointed out, however, that, if a husband enters into a separation deed in ignorance of the fact that his marriage is void—because, for instance, the marriage was bigamous, or the parties were within the prohibited degrees of affinity, and he did not know of the impediment—the deed is void, as was decided in *Law v. Harragin*, following *Galloway v. Galloway*. These cases proceed on the ground of mistake, but there can be no mistake where a decree of nullity is obtained on the ground of incapacity after a separation, of the petitioning spouse *ex hypothesi* can have no greater knowledge of the facts when he or she petitions than when they separated."

A superficial view of such a case might make it appear hard on the husband, it being suggested that the decree was in effect a decision that there never had been a marriage and that consequently any obligation by the man towards the woman must at all events cease from the date when the court declared there had been no marriage. This argument was, however, disposed of by the Court of Appeal, and Scott, L. J., dealt with the question of hardship in the following statement: "I wish to dispose of any notion that a hardship must necessarily result from a decision that the decree of nullity left the appellant bound by the agreement of separation. On the decree absolute, either party could then have applied to the court to vary its terms, treating it as a post-nuptial settlement within the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192, and even now there is no statutory bar to the appellant making an application by the leave of the judge under r. 41 (1), and, in the circumstances of the case, the judge might perhaps exercise his discretion in spite of the delay."

It seems to follow that a decree of nullity does not automatically put an end to a magistrate's order of maintenance. It would however, be a ground upon which an application might be made to the court to vary or revoke the order, and the principles laid down in *Adams v. Adams*, *supra*, would furnish guidance.

Just as the husband could apply to the High Court as was pointed out by Scott, L. J., to deal with the question of the agreement to pay a weekly allowance, so, also it is submitted the husband can apply to the court of summary jurisdiction which made the maintenance order for relief from the obligation. As there are in such a case no children to be considered, the issue between the parties would generally be simple, and the court might be justified in revoking the order for payment of maintenance upon application being made.—J. P.

Extracts from Contemporaries.

Unreliable Test.

Recently at the Durham Assizes there fell from the lips of Charles, J., some wise and witty comments on drunkenness tests: "When I read through the report of the police

surgeon, with his answers and conclusions, I said to myself, 'Charles, you are always drunk yourself—always, because you could never do better than the accused did in tests like those imposed.' " "Always keep

in mind," he warned a jury, "that if you cannot stand on one leg properly, you are drunk." The learned judge added that he was staggered to hear that one reason which convinced the doctor that the accused was drunk was the fact that he wrote his name with such perfection. The fundamental illogicality of most drunkenness tests lies in the fact that to say "All drunk men fail at this test" is not the same thing as saying "All men who fail at this test are drunk." Even if that were not so plain, their practical unreliability has often been demonstrated. Once, in the court of the late Sir Ernest Wild, when he was Recorder of London, a doctor stated that he had applied the Romberg test—standing still without swaying, with the feet together and the eyes shut. When the judge asked him to give a demonstration himself a distinct sway was noticeable. In another case an alleged drunken man having successfully articulated "British Constitution" and "The Leith police dismisseth us," counter-attacked by requiring the doctors to repeat the first two lines of "Jabberwocky," and they failed.

Always Drunk.

Turning again to the words of Charles, J., in these half-bottle days, it is a very *reductio ad absurdum* for a judge to suggest that the logical conclusion of a line of thought is that he is drunk. But it was not always so. More particularly things were different in Scotland and Ireland. Lord Newton, an exceedingly eminent Scots judge, was a heavy drinker. Once a friend, with whom he was discussing the question of purchasing an estate from which he might take his title, said: "Weel, my lord, there's the estate of Drunkie in the mercat; buy it and then ye'll no need to tak' it amiss when folk say ye're drunk aye." Judge Ball, in Ireland, used to keep one of the inkpots on his desk filled with brandy so that he could now and then take a surreptitious sip through a straw kept handy among his pens. There is a story of another Irish judge who drank so freely at a Viceregal ball that he was none too steady on his legs. "Is it true," someone asked Chief Justice Doherty next day, "that he danced at the Castle ball?" "Well," replied the Chief, "I certainly can say I saw him in a reel."—S. J.

What is a Jew ?

Most people have what they call a "pretty fair idea" of what is a Jew. This means, as usual, that the ideas which they hold are vague and unsatisfactory. Last year

Mr. Justice Morton had to consider whether a codicil which cut out of the benefits of a will any child of the testator who should marry a person "not of the Jewish Faith", was void for uncertainty. He decided that it was so. The Court could not dive into a man's mind to ascertain whether in truth he held a certain faith. Recently Mr. Justice Bennett had a similar case (*In re Samuel's Will Trust* (*Times*, April 1)). The testator was anxious that his children should not marry those who were not Jews. He made provision that they should forfeit all benefits under his will if they married anyone "who is not of Jewish parentage and of the Jewish Faith." On the second condition, that of faith, the learned Judge could, of course, do nothing but follow his learned brother, though he said some words which make readers think that these decisions might not survive an appeal. As to "Jewish parentage" it is much too vague. The phrase might refer to race or to religion. The testator did not say whether "parentage" meant of one parent or of both. Testators who wish to make wills of this kind must clearly take better advice in the future. It is interesting to speculate (if speculation were necessary) on the result of this case in German Courts.—L. J.

Seven to One

A London paper records the fact that seven Magistrates attended a petty sessional court where there was only one case to be dealt with, and the defendant did not appear. He was fined for riding a bicycle without lights.

It seems a pity that seven people, possibly busy men and women, should all attend for a single case, when two would suffice, and, according to many people, three is the ideal number. When it turns out that there is only one case to try, and that one apparently trivial, it really does seem that a good deal of time has been wasted. Presumably the justices set aside part of the day for this work and spent a little time travelling to and from the court.

When most people are busy it is good plan to have a rota under which two or three magistrates attend and one or two others are ready in reserve. That is from the point of view of the magistrates themselves. From the point of view of the businesslike handling of cases, a small bench is preferable to a large and it is difficult to find anything in favour of courts sometimes consisting of far more than seven members. We suggest three or at most five.—J. P.

INDIAN CASES

1941

JOURNAL

Vol. 194

[Editors do not hold themselves responsible for the views expressed by the contributors.]

AVOIDANCE OF CONTRACT

"Although it is true that the court ought not to make a contract for the parties which they have not made themselves, yet a mercantile contract, which is usually expressed shortly and leaves much to be understood, ought to be considered fairly and liberally for the purpose of carrying out the object of the parties..."

This excerpt from Lord Justice Mellish's judgment in *The Teutonia* (26 L. T. Rep. 48; L. R. 4 P. C. 173) may well serve as the text for the present article. The question involved, which is one of general importance to practitioners, was raised in the recent case of *Hindley and Company Limited v. General Fibre Company Limited*, (163 L. T. Rep. 424) and its nature may be conveniently indicated by the contentions of the parties.

By a contract dated 27th July, 1939, the appellants sold to the respondents a consignment of jute which was to be shipped from India to Hamburg, Antwerp, Rotterdam or Bremen in September or October, 1939. The buyers had an option to select any one of the four ports named and by a letter dated 11th September, 1939, nominated Bremen as the port of delivery. On 27th September in answer to a letter from the sellers to the effect that Bremen was an illegal destination—the Trading with the Enemy Act, 1939, had come into operation on 3rd September—the buyers withdrew the nomination and substituted Antwerp. The sellers treated the contract as void and the goods were never shipped. The matter came before the Appeal Committee of the Jute Association which awarded damages for breach of contract subject to the following three questions for the opinion of the court: (1) whether, when the buyers nominated Bremen, the sellers were entitled to treat the contract as having been cancelled; (2) whether, after such purported cancellation, the buyers were entitled to decline to accept cancellation and to nominate Antwerp; (3)

whether the sellers were entitled to cancel, and whether the subsequent correspondence amounted to a waiver of their right to do so.

The sellers argued that up to the 11th September the contract was complete in all its terms but one—namely the port of destination—and that, once that port was declared, the contract became complete. The right to declare other ports had gone and, as the contract for discharge at Bremen was illegal and void, the contract came to an end.

The buyers argued that the effect of the war was not to render the contract as a whole illegal inasmuch as it could still be performed in a legal way. The Trading with the Enemy Act, 1939, rendered it illegal to declare Bremen or Hamburg and the duty then resting on the buyers was to declare a legal port. There was no longer any contractual right to declare either of the two above-named places and such declaration imposed no duty contractual, or otherwise, on the sellers. It was a bad declaration—a mere nullity, and the buyers were under a duty to withdraw it and submit a good one.

Mr. Justice Atkinson referred to *The Teutonia* (*sup.*) as affording a good deal of assistance in determining which was the true view. In that case the master of a Prussian vessel had on board a cargo of nitrate of soda under a charter-party and bill of lading bound for Falmouth for orders to proceed to any safe port in Great Britain or on the Continent between Havre and Hamburg, and there deliver the cargo. The ship arrived at Falmouth on 10th July, 1870, and the master received orders to go to Dunkirk and there deliver the cargo. He arrived shortly before the outbreak of the Franco-German war, but the court decided on the issue of fact that, on the information he had, the master had acted reasonably in refusing to deliver at Dunkirk and the case

was treated as one in which it had become unlawful for him to deliver the cargo at the date of his arrival. In fact, he put back to the Downs, to make inquiries, was advised by the owner not to go to Dunkirk, and ultimately put into Dover. The charterer claimed the cargo, and the master declined to hand it over until he had received the freight.

The position was thus dealt with by Lord Justice Mellish. The appellants' argument assumed that the outbreak of war rendered the performance of the charter-party illegal, and that the contract between the parties was dissolved accordingly. It was true that the outbreak of war rendered it illegal for the ship to enter any French port; but the question was whether, under the terms of the charter-party, the contract might not still have been legally performed by the delivering of the cargo at some of the other ports mentioned in the charter-party. The substance of the contract was that the cargo might be delivered at any one of a number of ports, that the consignee was to have the selection of a particular port, but that he was bound to select a safe port—one at which the master could deliver the cargo and earn his freight.

Had the contract been completely performed by the naming of a port at which it turned out in the end to be impossible to deliver? The charterer would have committed a breach of contract by naming a port closed by the order of the Government of the country at the time when he named it (*Ogden v. Graham*, 1 B. & G. 773), and if war had broken out before the consignee gave orders for the master to proceed to Dunkirk, the consignee would have been bound to name some other port than a French port as the port of discharge. In the circumstances, it was intimated, the court ought not to treat the contract as impossible of performance. "It would seem very unjust," the learned Lord Justice said, "to hold, because the consignee has named a port at which, without any fault on the part of the shipowner, it is impossible for the cargo to be delivered, that, therefore, the consignee is entitled to the possession of the cargo at the nearest neighbouring port, which in a charter-party framed like this must necessarily be one of the ports named in the charter-party, without paying for the cargo any freight whatever."

In the result, the court held that the contract had not been dissolved by the impossibility of delivering the cargo at Dunkirk and that the shipowner had not lost his

chartered freight, nor his lien for it, at the time when the cargo was demanded at Dover.

Is the position different if the port named is at the time, and does not subsequently become, as in the case just considered, an illegal destination?

This question was considered in *Waugh v. Morris* (28 L. T. Rep. 265; L. R. 8 Q. B. 202), where the defendant named a place for the delivery of hay which, unknown to him and to the shipowner, contravened an Order in Council made under the Contagious Diseases (Animals) Act, 1869. The point it is desired to emphasise will emerge from the following quotation from the judgment of the Court of Appeal delivered by Mr. Justice Blackburn: "It was said that the intention of both parties was that the hay was to be landed, that therefore they intended to violate the law, and that it may be shown by extraneous evidence that a contract, on the face of it perfectly legal, is void because made with intent to violate the law, and that ignorance of the law makes no difference. But we think, in the first place, that it is a mistake to say that the plaintiff intended that the hay should be landed. He no doubt contemplated and expected that the hay would be landed, for, except under very unusual circumstances, hay is not brought into the Thames for any other object; but all that the shipowner bargained for, and all that he can properly be said to have intended, was that, on the arrival of the ship in London, his freight should be paid, and the hay taken out of his ship."

His Lordship went on to state that, if, unexpectedly, there had arisen a great demand for hay abroad, the consignee might have transhipped and exported it without the shipowner having the slightest ground for complaining that his intention was frustrated. "We agree," the judgment continues, "that a contract, lawful in itself, is illegal if it be entered into with the object that the law should be violated; if, as it is expressed in *Pearce v. Brooks* (L. R. 1 Ex. 213), it is done 'for the very object of satisfying an illegal purpose,' or, as it is expressed in *McKinnell v. Robinson* (3 M. & W. 434), 'for the express purpose of a violation of the law.' But in the present case the shipowner never did even contemplate or believe that the defendant would violate the law. He contemplated that the defendant would land the goods, which he thought was lawful; but if he had thought at all of the possibility of the landing being

character. Who of the child's data an atmosphere of the child wants to and maintain himself by irregular means. The conditions their part. The mine his development. Again the right also important. reported to have hours. Here the recreation. Abnormal physical conditions upon the behaviour of the child. constitution means weak self control. the knowledge of some inherent weakness like lameness or stammering develops an inferiority complex. Oftentimes such children are the objects of at the hands of their mates. The child naturally develops malice against society which finds expression in crime.

Are criminals made or born? Modern investigations show that crime as such is not inherited. There may be predisposing conditions like lack of normal intelligence or low I.Q. Thus Burt would say that 1/5 of the criminals are dull simpletons. Again, some children inherit one or other of the instincts in excess. Thus the child whose acquisitive propensity is very strong steals money to satisfy his natural promptings. Here the delinquent act is not premeditated. The primitive impulse is obeyed without reflection. Thus the child whose intelligence is not normal or whose innate impulses are extraordinarily strong is susceptible to drift into delinquency in the absence of control and supervision.

The environmental conditions are important. The home is the "basic institutional unit in character formation." Homes broken by divorce, death, quarrels, alcoholism and parental immorality tend to vitiate the child's

character. Who of the child's data an atmosphere of the child wants to and maintain himself by irregular means.

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Where the delinquency is due to the abnormal development of certain propensities the cure may consist in diverting these toward more approved forms of behaviour. Thus for instance a child with an excess of the acquisitive urge may be led to take interest in books and be made to turn from the acquisition of wealth to the acquisition of knowledge. And, so in other cases.

Juvenile delinquency usually ends in adult delinquency. But it is easier to cure delinquency in children. The main business of correction is to provide right direction and guidance for the delinquent child.

In order to do this it is essential to ascertain the origin of the anti-social conduct; the circumstances and incentives which contributed to delinquency.—P. R.

Wit & Humour.

What Mischief Afoot.

In response to an ad declaring that a certain lawyer had money to lend, the following letter of inquiry was received.

"Dear Sir,

I saw your Ad in the Tama News Herald. I would need a little money to loan. I wonder what your plans are.

I would like to try it out once, to see if I like it and if you like it the way I would want it.

I always need a little extra money. I sure

would like to try out your plan that is if you are not to strict.

I would try out only \$50 and pay monthly as you wish.

I am a widow and am on the farm with three boys.

Would you be so kind and let me know your plans.

Thank you

(Signed) _____

Case and Comment.